OFFICE OF MANAGEMENT AND BUDGET

PRIVACY ACT IMPLEMENTATION

Guidelines and Responsibilities
NOTICES

(1) Identify each system of records which the agency maintains and review the content of the system to assure that the information is necessary for one or more agency functions, the maintenance of which is necessary and relevant to a function which the agency is authorized to perform by law or executive order (5 U.S.C. 552a(c)(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)(7)) 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 penalties or a failure to supply that data (5 U.S.C. 552a(e)(3)).
(4) Revise any personal data collection forms or processes which they may prescribe for use by other agencies (e.g., standard forms) to conform to the requirements of 5 U.S.C. 552a(e)(3).
(5) 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.
(6) Establish reasonable administrative, technical, and physical safeguards to assure that records are disclosed only to those who are authorized to have access 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) and (e)(10).
(7) Maintain an accounting of all disclosures of information about 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 statement available in 5 U.S.C. 552a(c)(1), (2), and (3).
(8) When using a record or disclosing it to someone other than an agency, assure that it is as 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).
(9) Permit individuals to have access to records pertaining to themselves and have an opportunity to request that such records be amended. See 5 U.S.C. 552a(d)(1), (2), and (3).
(10) Publish rules describing agency procedures developed pursuant to the Act and describing any systems which are amended pursuant to the Act. See 5 U.S.C. 552a(d)(8) and (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(n).
(12) Refrain from renting or selling lists of names and addresses unless specifically authorized by law. See 5 U.S.C. 552a(m).
(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 guidelines 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)(8).
(16) Establish a program for periodically reviewing agency record-keeping policies and practices to assure compliance with the Act.
(c) The Secretary of Commerce shall, consistent with guidelines issued by OMB, issue standards and guidelines on computer and data security.
(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 (7).
(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).
with guidance on format, content, and timing to be issued under separate transm.

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 60 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.

7. Effective Date. The provisions of this Circular are effective on September 27, 1975 except that:

a. 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

b. 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. 555) 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 9092, NECB, Washington, D.C. 20503, telephone 202 355-4614.

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.


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NOTICES

SUBSECTION (A) DEFINITIONS

Subsection (a) "For purposes of this section—"

Agency. Subsection (a) (1) "The term 'agency' means agency as defined in section 552(e) of this title;"

The definition of "agency" is the same as that used in the Administrative Procedures Act as modified by the Freedom of Information Act amendments (Pub. L. 93-502): "agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." (5 U.S.C. 551(1)). 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) as added by Pub. L. 93-502)

Two aspects of this definition require further explanation:

The scope of the term; i.e., what entities are covered, now has the definition of agency been broadened to encompass additional organizations as a result of the FOIA amendments?

Whether or not entities within an agency are to be considered agencies. This is particularly significant in applying subsection (b) (1), in determining what constitutes an interagency transfer.

The first question—the scope of the definition—is covered in the House report on the FOIA amendments quoted below, as modified by the conference report which has become law:

For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under the FOIA amendments (title 5, U.S.C. but which perform governmental functions and control information of interest to the public. The bill expands the definition of "agency" for purposes of section 552, and 552a title 5, United States Code, its effect is to assure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

The term "agency" has been employed invidiously, so that a Department or other higher-level agency—its subunits individually independent component functions 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 overunit level while letting the appropriate subunits handle requests for their own records." (Attorney General's Memorandum on the 1976 Amendments to the Freedom of Information Act, 1975, p. 5).

In our view, this practice of giving variable content to the meaning of the term 'agency' for various purposes can be 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 obtaining 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. 8 U.S.C. 552(a)(1)(b).) 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 practice under the Privacy Act and the practice 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 may be considered a single 'agency' under the Privacy Act, simply to facilitate the exchange of records (Letter from Assistant

H.R. 16373 on the House floor in a statement by Congressman Moorhead—"* * * '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 acted to date.

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 have a need for them in the performance of their duties. For example, within the Justice Department—which is an agency under the Freedom of Information Act amendments, as the Assistant Division of the Department, the U.S. Attorney's offices, the parole Board, and the Federal Bureau of Investigation would be on a need-for-the-record basis.
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 Act raises another issue as to whether an entity or individual serving more than one agency may be considered an "employee" of each agency he serves, for certain purposes. While this is not specifically addressed in the Act, it is reasonable 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 for purposes 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 or "employee" of each agency he serves, for personnel purposes or dealing with nonresident aliens, only.

This distinction was to be made between a distinction can be made between an agency and their own agency for purposes as economic regulations. This distinction appears with reference to a record, one maintained Is, defined as "... information about an individual 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 as an individual under this Act and the rights of proprietorships, businesses, and corporations which are not intended to be covered by this Act. This distinction was to ensure that the bill left the Federal Government's information activities for such purposes as economic regulations. This definition was also included to exempt from the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, Central Intelligence Agency and other agencies for the purposes of investigating or collecting information about nonresident aliens and people in other countries. (Senate Report 93-1183, p. 79)."

The language cited above suggests that a distinction can be made between individuals natural persons 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." 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 nonresident aliens, only that portion which relates to citizens or resident aliens is subject to the Act but agencies are encouraged to treat such systems as separate, in their entirety, 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 allow the decedent's 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 to be maintained by Federal agencies is used, and the implicit personal judgement involved in this thrust—indicates that the Act did not contemplate permitting relatives or parties 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 in various judicial forums as a part of, or ancillary to, other proceedings.

"Maintain."

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

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

First, it is used to connot the various record keeping functions to which the requirements of the Act apply; i.e., maintaining, collecting, processing, and disseminating. Thus, wherever the word "maintain" appears with reference to a record, one should understand it to mean collect, use, or disseminate information for a record-keeping function. Second, it is used to connot control over and hence responsibility and accountability for systems of records. This is extremely important given the civil and criminal sanctions in subsections (g) and (l) for failure to comply with certain provisions. The applicability of certain provisions, including the exemptions from subsections (g) and (l), can be determined by an agency's ability to demonstrate that it has effective control over a system of records. See, for example, subsection (g), (c) (1), (a) (9), (g), and (i) wherein the term "maintain" clearly means having effective control over a system of records. To have effective control of a system of records does not, in itself, give the unknown physical control of the system. When records are disclosed to Agency B from a system of records maintained by Agency A, they are then considered to be maintained by Agency B (as well as Agency A) and are subject to all of the provisions of the Act in the same manner as though Agency B had originally compiled them. The individual is controlled from its system of records to a second agency and that record is placed in a separate system of records maintained by the second agency which becomes part of the system of records maintained by the second agency and all of the published material as to the second agency's system of records would relate only to the record moved into its system.

The requirements of subsection (m) must also be carefully considered in determining which systems are to be considered as "maintained," i.e., controlled by an agency within the terms of the Act. Subsection (m) stipulates that systems of records operated under contract or, in some instances, State or local governments operating under Federal mandates on or by behalf of the agency "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 or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other specific identifying information relating to the individual, such as a finger or voice print or a photograph."

The term "record," as defined for purposes of the Act, may include a biographical 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 Act, is essential in 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, both within the scope of the definition; and
Includes individual identifiers in any form including, but not limited to, finger prints, voice prints and photographs.

The phrase "identifying particular" suggests any element of data (name, number) or other descriptor (finger print, voice print, photographs) which can be used to identify an individual. Identifiers may, for example, be unique (i.e., many individuals share the same name) but when they are not unique (e.g., name) they are individually assigned—as 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. H12246, December 18, 1974). This definition "includes the record of present registration, or membership in an organization, activity, or admission to an institution." (Senate Report 93-1183, p. 79). (While this language was written with reference to the definition of the "person" information 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 not only to the entire record in the conventional sense (such as a record in a computer system), but also to the item or grouping of items from a record provided that such grouping includes an individual identifier.

System of Records. Subsection (a) (5)

The term "system of records" means a group of 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.

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 agency (i.e., there is indexing or retrieval 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 any agency ..." was intended to accomplish 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 "... under the control of any agency ..." was not intended to eliminate from the coverage of the Act any of those systems (which would large1y negate the definition of "maintain") 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, not the individual, 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 in the subsections (b), (c), (d), (e) and (f) ("agency records" in subsection (b), and "any system of records within the agency" in subsection (f)).

The intent was, despite the different wording for each subsection, not to have each of the subsections apply to a different roster of systems of records, but to have every system which can be considered a system in which systems of records an agency was responsible.

The second purpose of the phrase was to distinguish "agency records" from records created or maintained by the physical possession of agency employees and used by them in performing official functions, were not considered "agency records." (e.g. phone lists) are not considered to be agency records within the meaning of the Privacy Act. An agency is responsible for the system, not the individual, under the control of that agency. This distinction is embodied, in part, in the phrase "under the control of an agency" in section 5 (S.U.C. 552(a) (4)).

An agency shall not classify records which are controlled and maintained by it, as non-agency records, in order to avoid publication of data which exist, prevent access by the individuals to whom they pertain, or otherwise evade the requirements of the Act.

The "are retrieved by" criterion implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; not merely that a capability or potential for retrieval exist. For example, an agency record-keeping system on forms it regulates may contain "records" (i.e., personal information) about officers of the firm incident to evaluating the firm. This personal information is, however, clearly "records" under the control of an agency, they would not be considered part of a system as defined by the Act unless they (1) are maintained as such by reference to a personal identifier (name, etc.). That is, if these hypothetical "records" are never retrieved except by reference to company identifier or some other nonpersonal indexing scheme (e.g., type of firm) they are not a part of a system of records. Agencies will necessarily have to make determinations on a system-by-system basis.

Considerable latitude is left to the agency in defining the scope or grouping of records which constitute a system. Certainly, all the "records" for a particular program can be considered a single system or the agency may consider it appropriate to segment a system by function or geographic unit and treat characteristics of the implications of these decisions and some limitations on them are discussed in connection with subsection (e) (4), publication of the annual notice. Briefly, the two considerations which the agency should take into account in its decisions are:

1. A tendency to comply with the requirements of the Act and facilitate the exercise of the rights of individuals; and
2. The cost and convenience to the agency, but only to the extent consistent with the first consideration.

Statistical Record. Subsection (a) (6)

"The term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes, either in whole or in part in making any determination about an identifiable individual, except as provided by section 6 of title 13." (House Report 93-1416, p. 15.)

A "statistical record," for purposes of the Act, is a record in a system of records which is 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 "statistical records" under the Act if they are not used 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 Bureau of the Census 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

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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 "route use" to discover the relevant portion of the Federal Business Administration Investigatory Act, the FBI, or the IRS. Mr. Chadwick stated that obviously is not prohibited to prohibit such necessary exchanges of information, providing its rule-making procedures are followed. It is prohibited to prohibit criminal, ad hoc, disclosures for private or otherwise irregular purposes. To this end it would be sufficient if an agency publishes a "routine use" of its information gathered in any program that it has 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 Moosher in similar statements said that "If the routine procedure 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 unnecessary 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 inter-agency 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 data. (Constitutional 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. Dislosures 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. Dislosures 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 the "routine uses" of information in each system of records which it maintains by publishing a declarative statement in the Federal Register, thereby permitting public review and comment (subsection (e) (11)).
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 transferred to State agencies or to permit information on such a record to be checked against other Federal agency's records.

In either case, however, such must be presented to state that the language of the request is made a prerequisite to obtaining a consent when it is not.

The consent provision of this subsection was not intended to pertain to a person or open-ended consent clause; i.e., one which would permit the agency to disclose a record without limit. At a minimum, the consent clause should state the general kind of record which will be the subject to which 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 maintains 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 agency 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 one to which the personal information on an individual is used for a purpose other than originally intended." (House Report 93-1418, p. 12).

This discussion suggests that some constraints on the transfer of records within the agency were intended irrespective of the definition of agency. Minimally, 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.

Movement 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 or payroll transfer. Such a transfer is permitted if such is requested in writing by the individual involved and is executed in accordance with regulations prescribed by the agencies involved. Agency A to support Agency B within a cross-service arrangement are, arguably, being maintained by Agency A as its own system of records. While such transfers would meet the criteria both for intra-agency disclosure and "routine use," they should be treated as intra-agency disclosures for purposes of the accounting requirements.

**Disclosure to the Bureau of the Census.** Subsection (b) (2) "Required under section 522 of this title;" Subsection (b) (2) (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. S31817, December 17, 1974 and p. H12244, December 18, 1974). It absolves the agency 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 has a need to disclose such information under the Freedom of Information Act and permits an agency to withhold a record about an individual if the disclosure of the individual unles that disclosure is permitted 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. 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 disseminating records 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 closed) may only be released under the "routine use" provision (subsection (b)(3)).

**Disclosure for Statistical Research and Reporting.** Subsection (b) (5) "To a recipient who has provided the agency with advance adequate written assurance that the record will be used for 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 individual identifiers but also that the identity of the individual cannot be reasonably deduced by anyone from tabulations or presentations of the information. See also the discussion of "statistical record" [(a)(5), above.

**Disclosure to the Bureau of the Census.** Subsection (b) (6) "For a routine use as described in subsection (b)(2) above, may be disclosed for statistical research or reporting purposes only after the agency which maintains the record has received a written statement which includes:

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).

Fundamentally, agencies disclosing records under this provision are required to assure that information disclosed for use as a statistical research or reporting record cannot reasonably be used in any way to make determinations about individuals. One may infer from the legislative history and other portions of the Act that an objective of this provision is to reduce the possibility of matching and analysis of statistical records with other records to reconstruct individually identifiable records. An accounting of disclosures is not required when agencies publish aggregate data so long as no individual member of the population covered is identified, for example, statistics on employee turnover rates, sick leave usage rates.
Viewed from the perspective of the recipient agencies, material thus transferred would not constitute records for its purposes.

Disclosure to the National Archives. Subsection (b) (6) “To the National Archives of the United States as a record which has substantial 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 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 (3) for a discussion of constraints on the maintenance 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 to be disclosures within 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 Congress in Moorehead 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 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. H10009.)

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 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 or his delegate, or the Attorney General's representative, has 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 uses." Records in law enforcement systems may also be disclosed for law enforcement purposes 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 uses." Records in law enforcement systems may also be disclosed for law enforcement purposes to governmental agencies "within or under the control of the United States." This language does not authorize the disclosure of a record to a member of Congress acting in an individual capacity 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.”

Disclosure under Emergency Circumstances. Subsection (b) (8) “To a person pursuant to a showing of compelling circumstances to protect health or safety of an individual; as in the release of medical records on a patient undergoing emergency treatment. The individual pertaining to whom records are disclosed need not necessarily be the individual whose health or safety is at peril; e.g., release of dental records on several individuals in order to identify an individual who was injured in an accident.”

Disclosure to the Congress. Subsection (b) (9) “To either the House or the Senate, or the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.”

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.

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Subsection (c) Accounting of Certain Disclosures

Subsection (c) “Each agency, with respect to each system of record under its control, shall—

(a) Upon request, promptly provide a written summary of the disclosures made for each law enforcement purpose and each law enforcement activity consistent with the provisions of subsection (b) (7) and (8) of this section, keep an accurate accounting of—

(1) The name and address of each 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)); 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.
NOTICES

Agencies are required to adopt a system of records for all records which contain any information pertaining to an individual who is a citizen or resident of the United States and who has a “need to know” such information for reasons other than national security or foreign intelligence. The system of records must include a record of the individual’s name, address, and other relevant identifying data. The agency must also maintain a record of the nature of any disclosure of the record made pursuant to Freedom of Information Act (see subsection (b) (2)).

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 it a system a document listing 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 daily, the agency may include in its system the daily file of the names of individuals who do not have a “need to know” and not have access. (see subsection (1)).

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

(Note: That the accounting requirement is not one from which an agency may seek an exemption under subsections (1) and (2).)

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

(Note: That the accounting requirement is not one from which an agency may seek an exemption under subsections (1) and (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 unreasonably impede the individual's right to 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, if 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). However, if the individual can provide no other suitable documentation, the agency should request a signed statement from the individual asserting 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 (f)(3).)

For systems to which access is granted by mail (by virtue of their location), verification of identity may consist of the individual's name and date of birth which is associated with the system. Where the sensitivity of the data warrants it, (i.e., unauthorized access could cause harm or embarrassment to the individual), a signed notarized statement may be required or other reasonable means of verifying identity shall be necessary, depending on the degree of sensitivity of the data involved.

Note: That section 7 of the Act forbids an agency to deny an individual any right (including access or a copy of a record) on the basis that the agency promulgates rules which the agency promulgates shall provide means 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 the transmission to the requestor of a record by the computer tape or translation of the record into a form comprehensible to the individual to obtain a copy of any record pertaining to another individual. This provision may not be used to 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 other individuals 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 another individual. If such 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 (f) and (k)).

Subsection (f)(2) provides that agencies may establish a "special procedure, 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:

If, in the judgment of the agency, the transmission of medical information directly to a requesting individual could have an adverse effect on the requesting individual, and the rules which the agency promulgates shall provide means 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 the transmission to the requestor of a record by the requestor.

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 disclosure of records within 10 days of receipt of the request (excluding Saturdays, Sundays, and legal public holidays). Wherever practicable, that acknowledgement 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 amend the record is one where the record is inactive and stored in a records center and, therefore, not as readily accessible. See subsection (d) (2) above. Presumably, in such cases the risk of an adverse determination being made on the basis of a record to which access is sought and which the individual might choose to challenge is 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, or in writing. The mail-in 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. The request must be clearly stated in writing or through the mail. Instructions for the preparation of a request and any forms employed should be as brief and as simple as a request is to be received on other than a prescribed form, the agency should not reject it or request resubmission unless additional information is essential to process the request. In that case, the inquiry to the individual should be limited to obtaining the needed additional information, not re­submission of the entire request. Incomplete or inaccurate requests should not be rejected categorically. The individual should be asked to clarify the request as needed. Requests presented in person should be screened briefly while the individual is still present, wherever possible, to assure that the request is complete so that clarification may be obtained on the spot.

These provisions for amending 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 received 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 his record.

The agency should also require verifi­cation that the individual is the record holder and that the requests are seeking to amend records pertaining to themselves and not, inadvertently or intentionally, the records of other individuals.

Acknowledgement of Requests to Amend Records. Subsection (d) (2) (A) "Not later than 10 days (excluding Sa­turdays, Sundays, and legal public hall­days) after the date of receipt of such request, acknowledge in writing such request; and

A written acknowledgement by the agency of the receipt of a request to amend a record must be provided to the individual within 10 days (excluding Saturdays, Sundays, and legal public holidays) after the request is clearly described in the request (a copy of the request form may be appended to the acknowledgement) and advise the individual when he or she may expect to be advised of action taken on the request. If no separate acknowledgement of receipt is necessary if the request can be reviewed, processed, and the individual advised of the results of the review (whether compiled with or denied) within the 10-day period.

For requests presented in person, written acknowledgment should be provided at the time the request is presented.

Actions Required on Requests to Amend Records. Subsection (d) (2) (B) "Promptly, either

(1) [An action correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or (2) (I) Inform the individual of the refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a reconsideration of the refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

In reviewing an individual's request to amend a record, agencies should, wherever practicable, complete the review and advise the individual of the results within 10 days of the receipt of the request. Prompt action is necessary both to assure that records are as accurate as possible and to reduce the administrative effort which would otherwise be involved in issuing a separate acknowledgment of the request and subsequently informing the individual of the action taken. If the nature of the request or the system of records produces such records within 10 days, the required acknowledgement (subsection (d) (2) (A) above) must be provided within ten days and the review should be completed as soon as reasonably possible, normally within 30 days from the receipt of the request (excluding Saturdays, Sundays, and legal public holidays) unless unusual circumstances preclude completing action within that time. The number of cases on which the agency was unable to act within 30 days will be included in the annual report (subsection (p)). If the expected completion date for the review indicated in the acknowledgement cannot be met, the individual should be advised of the delay and of a revised date when the review may be expected to be completed.

Unusual circumstances can be viewed as situations in which records cannot be reviewed through the agency's normal process. By definition, such cases would, statistically, be the exception. A review which entails obtaining supporting data from retired records or from another agency and which could not, therefore be completed within the required time might qualify.

In reviewing a record in response to a request to amend it, the agency has the burden of going forward to support the agency's conclusion. The agency must assess the accuracy, relevance, timeliness, or completeness of the record in terms of the criteria established in subsection (e) (5), i.e., to assure the adequacy of the individual to whom the record pertains in any determination about that individual which may be made on the basis of that record.

With respect to requests to delete information, agencies must heed the criteria established in subsection (e) (1), namely, that the information must be relevant and necessary to accomplish a statutory purpose of the agency required to be accomplished by law or by executive order of the President." This is not to suggest that agencies may routinely maintain irrelevant or unnecessary information. As a result of a request to delete information, the record may, at the agency's option, be included in the annual reports to Congress. Reviews in connection with the development of a system, the preparation of the public notice and the description of the purposes for which it is maintained and periodic reviews of the records contained in it are necessary that only information which is necessary for the lawful purposes for which the system of records was established is maintained in it. It will be the primary vehicles for assuring that only relevant and necessary information is main­tained.

Agency standards for reviewing records in response to a request to amend them may, at the agency's option, be included as part of the rules promulgated pursuant to subsection (f) (4). Generally, it would seem reasonable to conclude that such standards for review need be no more stringent than is reasonably necessary to meet the general criteria in subsections (e) (1) and (e) (5) for accuracy, relevance, timeliness, and completeness. Judicial review is available for determinations to grant an individual access and to amend or not amend a record pertaining to the individual. While the definite burden of proof for granting access is upon the agency in such judicial review, in the judicial review of the refusal of an agency to amend a record there is no similar burden upon the individual. An analogous standard may be utilized by the agencies in establishing standards for review of individual requests for amendments of records. The burden of going forward could be placed upon the individual. In most instances will know better than the agency the reasons why the record should be amended. It would be appropriate, in the interest of accuracy, to establish regulations setting forth the standards they will use upon review of such request, that the individual be required to supply certain information in support of his request for amendment of the record. The request would then be
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:

Advisethe individual;

Correct the record accordingly; and

Where an accounting of disclosures has been made, an agency shall provide a complete accounting of the record which 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:

1. 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;

2. Advise 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

3. Describe the procedures for requesting such a 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 (c) (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 to limit the time limits by which, except under unusual circumstances, transfers of any amendment to a record are made.

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 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 procedures for official 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 by the agency head 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 for military service by one of the following acting in an official capacity— [it is assumed that, while the language above does not specifically cover it, a military officer otherwise qualified as the reviewing official would be permitted to serve as the reviewing official];

(a) The President;

(b) A court or the United States;

(c) The head of an Executive agency; or

(d) The Secretary of a military department;

2. Engaged in the performance of a Federal function under authority of law or an Executive act; and

3. Subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, as 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. 554, 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 insulate 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:

1. Of its refusal and the reasons therefor;

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

3. Of the procedures for filing a statement of disagreement;

That any such statement will be made available to anyone to whom the record was subsequently disclosed and not later than 30 days after the request for review. That if the agency deems it appropriate, a brief statement by the agency summarizing its reasons for refusing to amend the record;

That prior recipients of the disputed record will be provided a copy of any statement of dispute to the extent that an accounting of disclosures was maintained (see subsection (c) (4)); and

Of his or her right to seek judicial review of the agency's refusal to amend a record provided for in subsection (g) (1) (A), below.

If the reviewing official determines that the record should be amended in accordance with the individual's request, the agency shall proceed as prescribed in subsection (d) (2) (B) (1), above; namely, correct the record, advise the individual, and inform previous recipients.

A notation of a dispute is required to be made only if an individual informs the agency of his or her disagreement with the agency's determination under subsection (d) (3) (appeals procedure) not to amend a record.

A final agency determination on the individual's request for a review of an agency's initial refusal to amend a record must be completed within 30 days unless the agency head determines that a fair and equitable review cannot be completed in that time. If additional time is required, the individual should be informed in writing of the reasons for the delay and of the approximate date on which the review is expected to be completed. Such extensions should not be routine and should not normally exceed an additional thirty days. Agencies will be required to report the number of cases in which review was not completed within 30 days as part of the annual report (subsection (d) (5)).

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

When an individual files a statement disagreeing with the agency's decision not to amend a record, the agency should clearly annotate the record to show that the record is disputed; if 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 record to which they pertain. They should, however, be filed in such a manner as to permit them to be retrieved readily without the disclosed portion of the record 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 making a correction when disclosing disputed information. Such statements will normally be limited to the reasons stated to the individual under subsection (d) (1) and (2) 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 (3) (amending record).

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 any means of access to material being prepared for use in litigation other than that established under other procedures such as the Freedom of Information Act or the rules of civil procedure.

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

Mr. ELLERSON. 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. ELLERSON. 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 that it would presuppose we issued the definition of "record" as the one who prepared the record. I do not think we did.

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

Frankly, I do not think the attorney's files that are collected in anticipation of a lawsuit should be subject to the application of the act in any instance, much less the access provision. It is our intention 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 considered, it stated "was prepared in anticipation of a record to any record and we struck the word, 'record,' and inserted "information." So we did it precisely for we were not elevating an investigation with the word, 'record,' to the status of records. We did want to make it clear that there was not to be such access, because that access would be within the usual rules of civil procedure.

Mr. ELLERSON. 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. H10955.)

While the above passage refers primarily to the defense of suits by the government, it is equally applicable to the assembly of information in anticipation of government-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 collected in reasonable anticipation of a civil action or proceeding and therefore the purpose of the compilation governs 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 applied pursuant to 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:

1. How does the information relate to the purpose for which the system is maintained?
2. What are the adverse consequences, if any, of not collecting that information?
3. Could the need be met through the use of information that is not in individually identifiable form?
4. 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?
5. 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, establishing financial need as part of assessing eligibility for a program for which need is a legitimate

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 not collected about an individual cannot be misused. 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 13 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."

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criterion, parental income may be relevant only for certain applicants.

Subsection (e) below, provides additional criteria governing the maintenance of records on the activities of individuals in exercising their rights under the Privacy Act.

This provision does not authorize agencies to destroy records which they are required to retain under the Federal Records Act.

Agencies shall assess the legality of, need for, and relevance of the information contained or proposed to be contained in each of its systems of records at various times.

In preparing initial public notices (subsection (e) (1)),

In connection with the initial design of a new system of records (subsection (e) (2)).

Whenever any change is proposed in system of records (subsection (e) (3)),

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 unless a comprehensive review of the system of records was conducted within the previous year in connection with the initial design of the system or records was conducted within the previous year in connection with the initiation of the system or in the system or records was conducted within the previous year in connection with the initiation of the system or in the system or records was conducted within the previous year.

This provision does not require that each agency conduct a detailed review of the contents of each record in its possession. Rather, agencies shall consider the relevance of, and necessity for, the general categories of information maintained and, incident to using or destroying any individual records, examine their content to assure compliance with this provision.

It should be noted that subsection (e) (4) 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 professed by a part 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 would contain to govern in such situations.

Information to be Collected Directly from the Individual. Subsection (e) (2) "Collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs."

This provision stems from a concern that individuals may be denied benefits, or that other adverse determinations affecting them may be made by Federal agencies based on the basis of information obtained from third party sources which could be erroneous, outdated, irrelevant, or biased. This provision establishes the requirement that agencies under Federal programs which affect an individual should be made on the basis of information supplied by that individual for the purpose of making those determinations but recognizes the practical limitations of this by qualifying the requirement with the words "to the extent practicable." The notion of protecting the individual against adverse determinations by or to which he is subject to or is supplied to other agencies for other purposes is also embodied in the provisions of subsection (b) which constrains the transfer of records maintained by one agency to another agency, to which individuals the opportunity to challenge the accuracy of agency records pertaining to them; and subsection (e) (4) which prohibits the keeping of secret files.

Except for certain "statistical records" (subsection (a) (6)), which, by definition, are "not used in whole or in part in making a determination about an individual," virtually any other record could be used, in making a "determination about an individual's rights, benefits or privileges" including employment. The practical effect of this provision is to require that information collected for inclusion in any system of records, other than "statistical records," be obtained directly from the individual whenever practicable.

Practical considerations (including costs) may dictate that a third-party source, such as records maintained by another agency, be used as a source of information in some cases. In analyzing each situation where it proposes to collect personal information from a third-party source, agencies should consider:

- The nature of the program: i.e., it may well be that the kind of information needed cannot be obtained from a third party such as investigations of possible criminal misconduct;
- The cost of collecting the information directly from the individual as compared with the cost of collecting it from a third party;
- The risk that the particular elements of information proposed to be collected from third parties, if inaccurate, could result in an adverse determination;
- The need to insure the accuracy of information supplied by an individual by verifying it with a third party or to obtain a certificate of the third party's or her capabilities (e.g., in connection with reviews of applications for grants, contracts or employment); and
- Provisions for verifying, whenever possible, any identification or verification information with the individual before making a determination based on that information.

It should be noted that a determination by Agency (A) that it is in its best interest and consistent with this subsection to obtain information about an individual from Agency (B) instead of directly from the individual does not constitute an act by the former, sufficient for Agency (B) to release that information to Agency (A). Agency (B) is minimally required to meet the requirements of any statutory constraints on the permissible system of making a disclosure to Agency (A) including the conditions of disclosure, in subsection (b).

The standards and procedures set forth in the Federal Reports Act (44 USC 3501) to the extent that they pertain to the Federal Records Act are generally applicable to the Federal Records Act. The necessity for, and relevance of, and necessity for the maintenance of records on the activities of individuals in exercising their rights under the Privacy Act, are required under the provisions of subsection (e) (4).

Subsection (e) (5) "Inform each individual with whom it seeks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual."

This provision is intended to assure that individuals from whom information about themselves is collected are informed of the reasons for requesting the information, how it may be used, and what the consequences are, if any, of not providing the information.

A provision in this subsection is the notion of informed consent since an individual should be provided with sufficient information about the request for information to make an informed decision on whether to disclose the information. This is intended to assure that the act of informing the individual of the purpose(s) for which a record may be used does not, in and of itself, satisfy the requirement to obtain consent for disclosing the record. See subsection (b), conditions of disclosure.

The information called for 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 practical. 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 in this regard.

While this provision does not explicitly require it, agencies should, where feasible, inform third-party sources of the purposes for which information which they might release is to 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), care 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 detract from the 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)).

It is not intended that this subsection be used to create a right to be informed of or to be observed by an individual in the normal course of his own business.
Information or void an action taken on the basis of that information. For example, a failure to comply with this section, in collecting crop yield data from a farmer, was not intended to vitiate a crop program or the benefits based, in part, on such information. However, such an individual may have grounds for civil action under subsection (g) (1) (D) if he can show that he was harmed as a result of that determination.

Subsection (e) (3) (A) "The authority (whether granted by statute, or by executive or Presidential direction) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary.

The agency should cite the specific provision in statute or Executive order which authorizes the agency to collect the requested information (see subsection (e) (1) above), the brief title or subject of that statute or order, and whether or not the collecting agency is required to impose penalties for failing to respond or is authorized to impose penalties. Where the system is maintained pursuant to some combination of statutes or Executive order, and authority, it should be cited. The question of whether compliance is mandatory or voluntary is different from the question of whether there are any consequences of not providing information; i.e., the law may not require individuals to apply for a benefit but clearly, for some voluntary programs, to apply without supplying certain minimal information might preclude an agency from making an informed judgment and thereby prevent an individual from obtaining a benefit. See subsection (e) (3) (D) regarding the requirements to inform individuals of the effects, if any, of not providing information.

In some instances it may be necessary to include required and optional information on the same data collection form. This should be avoided to the extent possible since the likely effect on some responses may be coercive. In other instances it may fear that, even though portions of an information request are voluntary, by failing to respond, they may be perceived to be uncooperative and their opportunity to obtain the benefits may be precluded. (See 44 U.S.C. 3511, the Federal Register Act.)

Subsection (e) (3) (B) "The principal purpose or purposes for which the information is intended to be used;"

The individual should be informed of the principal purpose(s) for which the information will be used; e.g., to evaluate suitability, to issue benefit payments. The principal purpose(s) may include all major purposes for which the record will be used by the agency which maintains it and particularly those likely to entail determinations as to whether an individual's rights, benefits, etc. As in all other portions of the information collection process, purposes should be stated with sufficient specificity to communicate to an individual without being so lengthy as to discourage reading of the notice. Generally, the purposes will be directly related to, and necessary for, the purpose authorized by the statute or executive order cited above.

Subsection (e) (3) (C) "The routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection; and"

"Uses" can be distinguished from "purposes" by describing the objectives for collecting or maintaining information, whereas "uses" are the specific ways or processes in which the information is employed in making decisions. The sample text on some types of voluntary programs, to provide information to persons or agencies to whom the record may be disclosed. For example, the purposes for collecting information may be to evaluate an application for a veterans' benefit and to conduct checks. Uses might include verification of certain information with the Department of Defense and release of check-issue data to the Treasury Department, or disclosure to the Justice Department that the applicant apparently intentionally provided false or misleading information.

The term "routine use" is defined in subsection (a) (7) to mean the disclosure of a record "* * * for a purpose which is compatible with the purpose for which it was collected." A "routine use" is one which is authorized by a statute, or is in the system of records or another use described pursuant to subsection (e) (3) (B), and involves disclosure outside the agency which maintains the record; and is not limited to the public notice about the system of records published in accordance with subsection (e) (4), below, but also established in advance by notice in the Federal Register to provide public comment. See subsection (e) (11), below.

The description of "routine uses" provided to the individual at the time information is collected will frequently be a summary of the material published in the public notice pursuant to subsection (e) (4) (D). As with other portions of the notification to the individual, care should be exercised to tailor the length and tone of the notice to the circumstances; i.e., the public notice published pursuant to subsection (e) (4) can be much shorter if it is the individual who supplied the record rather than the agency to which the record is appended.

Subsection (e) (3) (D) "The effects on the individual of not providing the information;"

The intent of this subsection is to allow an individual from whom personal information is requested to know the effects (beneficial and adverse), if any, of not providing any part or all of the requested information so that he or she can make an informed decision as to whether to provide the information requested on an information collection form or in an interview.

The individual should be informed of the effects, if any, of not responding. This should be stated in a manner which relates to the purposes for which the information is collected; e.g., the information is needed to evaluate disabled veterans for special counseling and training and if it is not provided, no additional training will be considered but disability annuities payments will continue. Particular care must be exercised in the drafting of the wording of the notice to assure that the respondent to the information request is not misled or inadvertantly coerced.

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 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 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, length and detail 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 may 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 same level of detail in their public notices, just as if the agency were treating 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 several systems for the purposes of the Act. If each of several groupings of agency records is used for a

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cation may have a record pertaining to them; e.g., systems segmented by location of birth, or by range of Identifica­
tion number. In any case, “If a system is located in more than one place, each location must be listed.” (House Report 93–1416, 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 indi­
vidual for access to records and gener­ally be informed.
Systems, however, should not be sub­
divided or reorganized so that informa­
tion which would otherwise have been subject to the act is no longer subject to the act. For example, if an agency main­
tains a series of records not arranged by name or personal identifier but uses a separate index file to retrieve records by name or personal identifier 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, 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
disclosure of a record for that “routine use” as specified in subsection (e) (11).
For major changes to existing systems, a report of the changes before that change is effective. If the change to an existing system involves changes to “routine uses”, they are subject to the requirements of subsection (e) (11). The nature of the changes in a system which would require the issuance of a revised public notice before that change is described for each element of the public notice in the preceding paragraphs. Generally, any change in a system which has the effect of expanding the cate­gories of individuals on whom records are maintained, or the potential recipi­ents of the information, will require the publication of a revised public notice before that change is put into effect. In addition, any modification that alters the procedures by which individuals ex­ercize their rights under the Act (e.g., for gaining access) will require the pub­lication of a revised notice before that change becomes effective.
Changes in the type described above will typically also require the preparation of a “Report on New Systems” under subsection (f), below. Any other change will be incorporated into the next annual revision of the notice.
The General Services Administration (Office of the Federal Register) will issue more detailed guidance on the formats to be used by agencies in publishing their public notices. The formats prescribed by GSA are to be used to facilitate the annual compilation of the notices and to assure that they are produced in a consistent manner to make them more useful to the public.
Descr1bing the Name and Location of the System in the Public Notice. Subsection (e) (4) (A) “The name and location of the system”
Agencies will specify each city/town and site at which the system of records is located. Frequently, dispersed public system each location should be listed. A change in the list of locations will not require publication of a revised notice.
While the House report language cited above clearly indicated that the location of each site at which the system is main­tained is to be listed, exceptional situa­tions may dictate not including the list­ing in the body of the notice; e.g., military personnel records which are kept at several hundred installations or certain farmer records which are kept at several thousand county extension agent offices. To include the list of locations in each applicable notice would only serve to inflate the size and thereby reduce the readability of the notice. In these instances, it may be appropriate to publish a single list of field stations, or to refer in the notice for all systems at those sites to a list which is generally available.
Describing Categories of Individuals in the Public Notice. Subsection (e) (4) (B) “The categories of individuals on whom records are maintained in the system;”

The purpose of this requirement is for an individual to determine if inform­ation on him might be in (the) system. The categories of records therefore should be clearly stated in non-technical terms understandable to individ­uals unfamiliar with data collection methods. (House Report 93–1416, p. 7.) 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 who 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 previous items, non-technical terms should be used. 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, including the categories of individuals in the system or the agency’s program.
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 technical aspects 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), (e) (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) (E) “The records management policies and practices of the agency regarding stor­age, retrievability, access controls, re­tention, and disposal of the records”;

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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 premises and on any secondary storage medium.

In describing record "storage," the agency should indicate the medium in which the records are maintained (e.g., file folders, magnetic tape). "Retrievability" refers to the capabilities in the system of records to index and access a record (e.g., by name, combinations of personal characteristics, identification numbers). "Access controls" describes, 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 or other archives, 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 responsible 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 to the new address. The agency need not report this change to the Federal Register, except to the extent that such changes are 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 the address of the location(s) at which the individual may present a request in person. Wherever practicable, this list should be the same as the list of officials responsible for the system 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 determination after the knowledge of 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 will 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 in the Public Notice. Subsection (e) (4) (H) "The agency procedures whereby an individual may be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content."

This portion of the public notice must include the mailing address(es) and, if possible, the telephone number(s) of officials who can answer inquiries 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 a record be included in the public notice. It only requires that individuals be advised of the means by which they can obtain information about those procedures. However, it should be noted that, pursuant to subsection (f), agencies are required to publish rules which stipulate the procedures whereby the individual can exercise each of these rights and that these rules are required to be incorporated into the annual compilation of notices and rules published by the Office of the Federal Register.

A revised public notice shall be issued before effecting any change about which individuals would be required in order to exercise his or her rights under the Act. Changes of this type in the interim between the annual publications of notices and rules 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 (5). 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 shall list the types of sources used: e.g., Previous employers, Financial institutions, Educational institutions attended, or Personal reviewers (subject to use 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 assessing 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 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 a 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, revalidation of pertinent information with the individual to whom it pertains may be appropriate.

Understanding that completeness of any determination could prejudice the decision. Agencies must limit their records to those elements of information which bear on the determination(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 having a right to access the record, the agency shall ensure that the record is accurate, complete, timely, and relevant for decision making.

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 (e.g., pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.

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 (e.g., pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.

Recognizing that an agency properly discloses 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 objective of this provision is to assure that agencies shall not make unreasonable restrictions on the determination of adequacy of information as a basis for decisions. Agencies must make reasonable efforts to assure that any error is corrected as soon as possible after it is discovered.

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 clear that the objective of the law enforcement provision on the general prohibition was "to make certain that political and religious activities are not used as a cover for illegal or improper activities." However, it was also 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, H10882 and November 21, 1974, H10883).

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 disclosed in response to a request for a record under compulsory legal process when such process becomes a matter of public record.

When a record is disclosed under compulsory legal process (e.g., pursuant to subsection (b)(11), and 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 record 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.

Rulings of Conduct for Agency Personnel. Subsection (e)(9) "A member of the agency personnel involved in the design, development, operation, or maintenance of any system of records, or in the processing of any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;" 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 agencies engage all persons 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, paper work management, management of records, and related functions, computer systems development and operations, communications, statistical data collec-
safeguards will, necessarily, have to be
administrative, technical, and physical
safeguards.

The need to assure the integrity of and
security and confidentiality of records and
other related requirements for security and confi­
dence 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 intention
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
whenever practicable. Agencies should
furnish as complete an explanation of
the routine uses and any changes made
for notice as possible. Approval or
comment is required on proposed
new or changed use of the
information in the system, and provide
an opportunity for interested persons to submit
written data, views, or arguments to the
agency.

A notice in the Federal Register for
a new "routine use" is one which
involves disclosure of records for a new
use not made previously, where the
disclosure is for a new purpose compatible with the purpose for
which the record is maintained or to a
new recipient or category of recipients
(even if other uses are concurrently cur­tained); and

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

SECTION (f) AGENCY RULES

Subsection (f) "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 imple­
ment the provisions of the Act in ac­
cord with the requirements of section
553 of title 5 of the United States
Code including publication of the rules in the
Federal Register so that interested
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
scribing 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
hearings are not precluded by this section
and, in particular instances, agencies
must elect to use the formal hearing
procedure.

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 subsec­tion
differ from notices under subsection
(e) in several ways.

Rules promulgated under this subsec­tion
are subject to requirements of section
553 of the Administrative Proce­
dure Act governing the publication of
proposed rules for public comment
before 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 rules need 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 allow­ing
at least 30 days for public comment
prior to publishing them as final rules.

Often systems which will be in use on
September 27, 1975, agencies will have

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to publish rules not later than August 28, 1975.) No further republication of agency rules as they appear in this Federal Register may be included in the annual compilation published by the office of the Federal Register unless a change is proposed.

The language of subsection (f) explicitly requires "general notice" to be published, whereas the language of section 553(b) of title 5 which permits agencies not to publish a general notice if "persons subject thereto are named and either personally served or otherwise have actual notice * * * * shall not apply to rules promulgated under this subsection. Agencies should also be aware of the fact that, although the presumption is of the validity of the published rule, judicial review under the Administrative Procedure Act will be available to assure against arbitrary or capricious actions.

Rules for Determining if an Individual Is the Subject of a Record. Subsection (f) (1) "Establishes procedures whereby an individual can be notified in response to his request for access to any system of records named by the individual contains a record pertaining to him;" The procedures for individuals to determine if a record exists are not entitled to access weighed against the probable harm (including embarrassment) to the individual to whom the record pertains which would result from unauthorized access; and

The standards for verification of identity which a typical Individual about whom record is maintained could be expected to present himself or her choosing and the agency's response time. Agency personnel office during normal working hours. No requirements may be established which would have the effect of impeding an Individual in exercising his or her right to access.

Agencies which maintain systems of records on widely dispersed groups of individuals and which have field offices located to which individuals have been encouraged to access those offices as sites at which an individual can present a request for access even though his or her records may not be maintained at any one of those field offices. The information necessary to identify individuals should be kept to the absolute minimum and neither this provision nor any other provision of the Act should be construed to encourage and storing additional information about an Individual.

The published rules prescribing procedures for verification of identity will include:

A list of the locations and/or mailing addresses of locations to which the request may be presented;

When additional verification is required or permitted, the hours when those locations are open (including the dates of holidays on which they are closed); and

Documents which the agency will require, if any, to establish the identity of an individual (specifying as many alternatives as possible).

Rules for Granting Access to Records. Subsection (f) (3) "Establishes procedures for the disclosure to an individual upon request of records pertaining to him. (The Act provides that records pertaining to him, including special procedure sec, if deemed necessary, for the disclosure to an individual of medical records, psychological records, and other records of a personal nature."

Individuals may be granted access to their records either in person or by having copies mailed to them. The nature of the system and of the individuals on whom records are maintained will determine which method is appropriate. If an agency determines that it can grant access to records only by providing a copy of the record through the mail 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 presently drafted, the Act provides that individuals have an unqualified right of access to records pertaining to them (with certain exceptions specified in sections (i) and (k) below) but that 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 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 that access (see subsection (d) (2) for guidance on making the response time). 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 or her 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 (f) (4) "Establishes procedures for reviewing a request from an Individual concerning the amendment of any record or information pertaining to the individual. The Act provides that the agency may authorize the amendment on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to effect fully his rights under this section."

Agency procedures for permitting an individual to request amendment of a record shall be consistent with subsection
NOTICES

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 wherever possible, and otherwise to enhance the utility of these publications. For example, 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 portions 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 other grounds for action in violation 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 also be noted that an agency/employee responsible for an adverse action against an individual may be personally subject to civil suit, particularly where the agency/employee acted in a manner that was intentional or willful.

Judgments, costs, and attorney’s fees assessed against the United States under this subsection would appear to be payable from the public funds rather than agency funds. 28 U.S.C. 2414 and 31 U.S.C. 724a (Payment of Judgments); 28 U.S.C. 1924 (Costs). While it is not the purpose of these guidelines to discuss the jurisdiction of the district courts or the procedures in such cases, it should be noted that under subsection (g) will be handled by the General Litigation Section of the Civil Division of the Department of Justice. In these cases, upon receipt of a copy of the summons and notice from the Attorney General and notification of its filing by the United States Attorney (see Rule 4, Federal Rules of Civil Procedure), the General Litigation Section will request the agency to furnish a litigation report.

Some agencies are authorized to conduct their own litigation. Where its suitably authorized, it may decide to handle its own cases under this Act. In view of the general litigation responsibility which the Department of Justice has for all other federal agencies in the executive branch, it is important that agencies handling their own litigation under this Act keep the Department of Justice currently informed of their proceedings with respect to the Civil Division copies of significant documents which are filed in such cases.

Each agency should maintain a complete and careful record of the administrative procedures followed in processing this statute. The record should be maintained so that the agency certified as the complete administrative record of the proceedings as a basis for possible use in litigation.

GRANDS FOR ACTION. Subsection (g) (1) “Civil Remedies. Whenever any agency

The subsection authorizing civil actions by individuals is designed to assure that the individual to whom (1) was unsuccessful in an attempt to have an agency amend his or her record; (2) was improperly denied access to his or her record or to information about him or her in a record; (3) was adversely affected by an agency action based upon an improperly constituted record; or (4) was otherwise injured by an agency action in violation of the Act will have a remedy in the Federal District courts.

REFUSAL TO AMEND A RECORD. Subsection (g) (1) (A) “Makes a determination un­

An individual may seek judicial review of an agency’s determination not to amend a record pursuant to a request filed under subsection (d) (2) under either one of two conditions:

The individual has exhausted his or her recourse under the procedures established by the agency pursuant to subsection (d) (3); (applying to the agency’s refusal to amend) and the reviewing official has also refused to amend the record.

The individual contends that the agency has not considered the request to review in a timely manner or otherwise has not acted in a manner consistent with the requirements of subsection (d) (3). Such an action could presumably involve a challenge either to the agency’s procedures published under subsection (f) (4) or to the agency’s head’s decision to extend the period of review for “good cause shown” under subsection (d) (3).

An individual may also bring a civil action based on allegedly inaccurate records. If it can be shown that the information is adverse to the individual resulted from that inaccuracy, see subsection (g) (1) (C). However, no test of injury is required to bring an action under subsection (g) (1) (A).

The basis for judicial review and the available remedies in actions brought under this subsection are found in subsection (g) (2).

DENIAL OF ACCESS TO A RECORD. Subsection (g) (1) (B) “Refuses to comply with an individual request under subsection (d) (1) of this section.”

Under this subsection, individuals may challenge a decision to deny them access to records to which they consider themselves entitled (under subsection (d) 1)). The action giving rise to the suit may be the agency head’s determination (pursuant to subsection (k), specific exceptions) to exempt a system of records from the requirements that individuals be granted access. “Since access to a file

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is the key to insuring 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 current law records covered 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) (4).

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

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, irrelevance or untimeliness 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 agency has been "intentional or willful" (subsection (g) (4)).

No such test is required under the provision of subsection (g) (1) (A), above, under which an individual can seek a review of the accuracy of a record.

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 way 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 Refusal 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.

In conducting its review, "(B) The court is required to determine such matters de novo and the burden of proof is upon the agency to sustain the exemption." (House Report 93-1416, p. 17) In view of the sensitivity of some of the records to which access may be sought, the court, in examining those records may do so in camera. "A person seeking access and who has reason to believe is being maintained on him for the purposes of determining its accuracy and completeness, for example, or to take advantage of the right of the individual, could raise the question of the propriety of the exemption which denies him access to his file. In deciding whether the citizen has a right to see his file or to learn whether the agency has a file on him, the court would of necessity have to decide the legitimacy of the agency's reasons for the denial of access, or refusal of an answer. The Committee intends that any citizen who is denied a right of access may have a cause of action, without the necessity of having to show that a decision has been made on the basis of it, and without having to show some further injury, such as loss of job or other benefit, that might stem from the denial of access." (Senate Report 93-1183, P. 82.)

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

Direct the agency to grant the individual access as provided under subsection (d) (1), above.

Require the agency to pay court costs and attorney fees. "It is intended that such award 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)

Remedies for Adverse Determination and Other Failures to Comply. Subsection (g) (4) "In any suit brought under the
provisions of subsection (g) (1) (C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of:

(A) Actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recover receive less than the sum 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:

(1) 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 to amend a record 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 (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 (B). See House Report 93-1416, pp. 17-18 and the Congressional Record, December 18, 1974, P.H. 122445 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."

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, 1975; e.g., disclosure without the consent of the individual or an adverse action resulting from a disclosure. This language is intended to be consistent with a court's ability to hold liable, under this law, for actions 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 is intended to ensure 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 minor individuals acting in loco parentis to minors, parents, legal guardians, and custodians the same as the individual for purposes of giving consent for disclosure and the exercise of rights under the Act.

It is important that, under agency procedures, the officer or employee who maintains the system is aware that, under agency procedures, the officer or employee who maintains the system may not be the one who is responsible for publishing the notice. The exemption provisions, subsections (j) and (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 important 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 take the responsibilities of each clear. The officer or employee who maintains the system has an obligation to notify the one responsible for publishing the notice. Similarly the officer or employee responsible for publishing the notice, once notified of the existence of a system, must make that fact public.

(1) CRIMINAL PENALTIES

This subsection establishes criminal sanctions for three possible violations.

Unauthorized disclosure.

Failure to publish a public notice or a system of records subject to the Act.

Obtaining access to records under false pretenses.

The first two are directed at actions of officers and employees of Federal agencies and (pursuant to subsection (m)) certain contractor personnel. Agencies should ensure that all personnel are informed of the requirements of the Act and, pursuant to subsection (e) (9), rules of conduct, are given periodic training in this area.

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

As was discussed in connection with subsection (e) (4), above, a basic objective of the Act is to assure that there is no system of records whose very existence is kept secret. An agency is required to publish a public notice about each system of records which it maintains. It is a criminal violation of the Act to willfully, or with reckless disregard, maintain a system of records and not to publish the prescribed public notice. The exemption provisions, subsections (j) and (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 important 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 take the responsibilities of each clear. The officer or employee who maintains the system has an obligation to notify the one responsible for publishing the notice. Similarly the officer or employee responsible for publishing the notice, once notified of the existence of a system, must make that fact public.

Criminal Penalties for Failure To Publish a Public Notice. Subsection (i) (2) "Any officer or employee of any agency who is responsible for publishing the notice required to be given to individuals with respect to a system of records without meeting the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than $5,000."

As was discussed in connection with subsection (e) (4), above, a basic objective of the Act is to assure that there is no system of records whose very existence is kept secret. An agency is required to publish a public notice about each system of records which it maintains. It is a criminal violation of the Act to willfully, or with reckless disregard, maintain a system of records and not to publish the prescribed public notice. The exemption provisions, subsections (j) and (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 important 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 take the responsibilities of each clear. The officer or employee who maintains the system has an obligation to notify the one responsible for publishing the notice. Similarly the officer or employee responsible for publishing the notice, once notified 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 (k)) and specific exemptions (subsection (j)). The principal difference between the two categories is that systems of records exempted under subsection (j) may be exempted only from those provisions of the Act than those exempted under subsection (k). Exemptions under subsection (j) may be exempted from the civil remedies provision and, in particular, the judicial review under sections (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 the agency or committee or subcommittee that maintains the system must make a determination that the system falls within one of the categories of systems which are permitted to be exempted, and publish the determination in rule in accordance with the requirements of section 553(c) of the Administrative Procedure Act. That notice must include a description of any provisions of the Act which the system is being exempted from, the reasons therefor, and a statement required under section 553(d)(4) (A) that the system is being exempted.

The name of the system (This should be the same as that given in the annual public notice under subsection (e)(4); and

The specific provisions of the Act from which the system is to be exempted and the reasons therefor. A separate reason must be stated for each exemption from which the system is to be exempted, where a single explanation will serve to explain the entire exemption.

The agency head's determination is subject to a rule under the Administrative Procedure Act (APA) and is subject to the requirements 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 98-1416, 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 exempt only certain portions of systems, 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 a law enforcement agency 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, and parole authorities, and which consists of (A) identifiable information concerning individual criminal offenders and alleged offenders and consisting of (B) data and notations of arrests, the nature and disposition of crimi-
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 552(b) (1), (2), (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d) (1), (e) (4) (G), (E), and (f) of this section if the system of records is—"

"(1) * * *

*(2) * * *

"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 purposes 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 subject 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 therefore.

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 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 term "including general notice" means that individual notification will not suffice.

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

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, whenever 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 portions of systems where it is not possible to segregate entire systems. For example, records containing classified material to which access may be denied under subsection (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) (3) or (b) should be withheld. However, if the case of records which are permitted to be exempted to the extent that their disclosure would reveal the identity of a confidential source, it would be proper to exercise, to the extent that the content of any records being segregated does not disclose the identity of the source.

Exemption for Investigatory Material Complied for Law Enforcement Purposes

Subsubsection (k) (2) "Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section:

"Protective Prow. That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an implied promise that the identity of the source would be held in confidence, or, prior to the effective date of such an implied promise that the identity of the source would be held in confidence;

"This provision allows agency heads to exempt a system of records compiled in the course of an investigation of an alleged or suspected violation of civil laws, including violations of the Uniform Code of Military Justice and associated regulations, except to the extent that the system is more broadly exempt under the provision covering records maintained by an agency whose principal function pertains to the enforcement of criminal laws (subsection (j) (2). This exemption was drafted because "(1) individual access to certain law enforcement files could impair investigations, particularly those which involve complex and continuing patterns of behavior. It would alert subjects of investigations that their activities are being scrutinized, and thus allow them time to tamper with or prevent detection of illegal action or escape prosecution." (House Report 93-11416, p. 19.)
The phrase "investigatory material compiled for law enforcement purposes" is the same phrase as opened exemption (b)(7)(D) 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 and the now amended Freedom of Information Act exemptions. 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 requires that individuals have a reasonable opportunity to learn of the existence of, and to challenge, investigatory records which are to be used in legal proceedings.

To 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 a confidential source was contained in subsection (a)(6) of the Privacy Act. The effective date of the Act was September 21, 1975, and information currently contains substantially identical language. The phrase "in investigatory material" was recognized as having the same meaning given to that phrase in the Freedom of Information Act exemptions. The Act as now amended (b)(7) of the Freedom of Information Act exempts a record when any reasonable doubt exists as to whether disclosure would reveal the identity of a confidential source.

The compromise provision for the maintenance of information received from confidential sources represents an acceptance by the House of the Inadequacy of the language permitting 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 compromise makes no attempt to define disclosure of even a small part of a particular item would reveal the identity of a confidential source. The disclosure of even a small part of a particular item would reveal the identity of a confidential source.

Furthermore, the acceptance of this section in no way preclude the disclosure of information which would reveal the identity of an individual to whom the record pertains unless a source expressly requests that it not be released as a condition of furnishing the information: and the record, if stripped of the identity of the source, is nonetheless believed to be such 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 to the one obtained with the tacit understanding that the identity of the source would not be revealed. For this reason the Act provides that information in 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 sufficient to permit its disclosure. Obviously, if 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 that could only have been furnished by one individual known to the subject. Only in those cases, may the substance of the record be provided without revealing the identity of a source and then only to the extent necessary to do so. It is recognized, however, that in some instances be very difficult for an agency to know whether the content of a record would, in and of itself, reveal its source. Therefore, it may be appropriate in light of the intent underlying this exemption, to disclose only to the extent that there is reasonable doubt 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 in which its disclosure would reveal the identity of a source would provide information under a pledge of confidentiality is found in Senator Ervin's compromise bill on the floor of the Senate.

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Finally, it is important to note that the House provision would require that all future promises of confidentiality to sources of information could be used in whole or in part but not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 18.

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.

This provision permits an agency head to exempt a system of records which is used 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 * * * only" suggests that systems of records which qualify to be exempted under this provision are those composed exclusively of records that by statute are prohibited for any purpose involving 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 Records Maintained to Provide Protective Services. Subsection (k)(5) "Maintained in connection with an investigation of offenses by a person who is a present or former employee of the President of the United States or other individuals pursuant to section 3806 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. 3801.

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 records. A "statistical record" is defined in subsection (a)(6) as a "record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 18." 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 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 * * * only" suggests that systems of records which qualify to be exempted under this provision are those composed exclusively of records that by statute are prohibited for any purpose involving 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 civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the
source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

'this provision permits an agency to exempt material from the individual access provision of the Act which would 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 the purpose 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 appointment 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 his 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 of 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 subsection 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, and, at the same 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 its 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. This is the customary thing to make these promises of confidentiality, so that most all of the information (in investigatory records) will be maintained in 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.

Exemption for Examination Material. Subsection (k) (6) "Testing or examination material used solely to determine individual qualifications for appointment or promotion in the military or civilian service only if disclosure of the record to the individual would reveal information about the testing process which would potentially give an individual an unfair competitive advantage. For example, the Civil Service Commission and the military departments give written examinations which cannot be revised in their entirety each time they are offered. Access to these questions and answers could give an individual an unfair advantage. This language also covers certain of the materials used in rating individual qualifications. This subsection permits the agency to withhold a record only to the extent that its disclosure would reveal test questions or answers or testing procedures."

It was not the intent of this subsection to permit exemptions of information which are required to be made available to employers 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 of which it is part and, similarly, the exemptions of (k) (7) and (k) (8) indicate the intended narrow coverage of the exception set forth in subsection (k) (5).

Exemption for Material Used To Evaluate Potentials 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 this section, under an implied promise that the identity of the source would be held in confidence."

The discussions of subsection (k) (2) and (5), above, should be reviewed in applying this provision. The same rationale regarding when and how the confidentiality of sources may be protected applies here.

The military departments will publish regulations specifying those categories of positions in the Armed Services for which pledges of confidentiality may be made when obtaining information on an individual's suitability for promotion. These categories will be narrowly drawn.

**Subsection (1) Archival Records**

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

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

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

Records which are sent to the General Services Administration for storage as a result of determination by the agency head that it would "effect substantial economies or increase 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 Act to the same extent that they would be if 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 maintains 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 regulations thereunder, it is intended that the notice provisions of records covered by these guidelines; the General Services Administration shall issue general guidelines to the agencies on preferred methods for handling systems of records stored in Federal records centers. In view of the intent underlying this provision, agencies may consider that the records stored in Federal records centers are transferred intragency and need not publish notice of "routine uses" 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 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. The procedures of this section shall not be subject to the requirements of this section except subsections (e)(4)(A) through (G) of this section."

*(Records Archived On or After September 27, 1975.)* Subsection (1)(3) "Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives. The procedures of this section shall not be subject to the requirements of this section except subsections (e)(4)(A) through (G) of this section."

Records referred to the Archives pursuant to 44 U.S.C. 2103 (for "preservation") on or after September 27, 1975 are considered to be maintained by the Archives for purposes of the Act but are only subject to selected provisions of the Act. "[They] are subject to those provisions of this Act requiring annual public notice of the existence and character of the information systems maintained by the Archives, or the maintenance 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. H 12245.)

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 which transferred them to the Archives, the requirement in maintenance 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." (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 Act which permit changes in documents at the request of the individual whose information is maintained in them. Such changes are specifically excluded in subsection (e)(4). These should include, as a minimum--" The categories of individuals on whom records are maintained

The types of information in those records

Policies governing access and retrieval.

It is intended that the notice provisions of this Act which permit changes in documents at the request of the individual whose information is maintained in them are excluded in subsection (e)(4). These should include, as a minimum--" The categories of individuals on whom records are maintained

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Policies governing access and retrieval.
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 (1) 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 (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 or at the direction of a system of records designed to accomplish an agency function ..." are subject to the requirements of the subsection. While the contract need not have the same name as the operation of such a system, the contract would normally provide that the contractor operate such a system 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 maintenance) of a system, 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 Presidentially directed goal.

If the contract provides for the operation of a 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, but merely additional to what it otherwise uses. The subsection clearly imposes new responsibilities upon an agency but does not confer any new authority to implement it. Although the method by which agencies 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 causing 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 which could be used to cause the otherwise applicable requirements to be applied to a system maintained under contract. This subsection does not merely require that the provisions be consistent with the Privacy Act in its contracts. It requires, in addition, that the agency cause the requirements of the Act to be applied, limited only by the authority to which the contractor is subject to this subsection to apply the requirements of the section in a manner which is enforceable. Otherwise, the agencies may end up performing those functions in other to satisfy the activity of the 'cause' requirement.

The decision as to whether to contract for the operation of the system or to perform the function "in house" was not intended to be altered by this subsection. Furthermore, this subsection was not intended to significantly alter OSA and OMB authority under the Brooks Act or the OMB memorandum ordering the performance of a system by Federal agencies and the OMB's circular in OMB Circular No. A-11, dated May 9, 1973, concerning the method of ADP procurement. The principles concerning reliance upon the private sector in OMB Circular No. A-76, and related provisions were also not intended to be changed.

The provisions would apply to all systems of records where, for example:
The definitions of records and record systems are made by Federal agencies;
The records are maintained for administrative functions of the Federal agency such as personnel or health records maintained by an outside contractor engaged to provide health services to agency personnel.
The provisions would not apply to systems of records:
Records are maintained by the contractor on individuals whom the contractor employs in the process of providing goods and services to Federal agencies;
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a clearly unwarranted invasion of privacy under section 552(b)(8) 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. 37132.)

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 Federal 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 that what is prohibited is "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 authorized specifically by law to sell or rent such lists. It is equally apparent that the language in no way creates the 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 (o) Report on New Systems

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

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 recommend to the Director of the Office of Management and Budget (Attn: Information Systems Division) and to the Privacy Protection Study Commission the scope of the proposals for agencies or other persons which may be exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

This subsection provides that the President submit to the Congress a list of major accomplishments; i.e., improvements in agency information practices and safeguards.

 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. The individual agency reports will include not only the minimum information required for inclusion in the report to Congress but also such information as the President may deem necessary to evaluate the overall effectiveness of the Privacy Act implementation, identify areas in which implementing policies or procedures should be changed, and assess the impact of Federal data management activities.

Agency reports shall include but not be limited to the following:

Summary—A brief management summary of the status of actions taken to comply with the Act, the results of these efforts, any problems encountered and recommendations for any changes in legislation, policies or procedures.

Accomplishments—A list of major accomplishments; i.e., improvements in agency information practices and safeguards.

Plans—A summary of major plans for activities in the upcoming year, e.g., area of emphasis, additional securing of facilities planned.

Exemptions—A list of systems which are exempted during the year from any...
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 refusals 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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