

Privacy Act Training 2016

Open Government Workshops



Presenter:

Michael J. Toland, Ph.D.
**Deputy Chief FOIA Officer and Departmental
Privacy Act Officer,**
Deputy Director for FOIA/PA Operations
Office of Privacy & Open Government
United States Department of Commerce

(202) 482-3842
mtoland@doc.gov

Presented: August 24, 2016



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Overview of the PA:

- The PA, 5 U.S.C. §552a. has been in effect since September 27, 1975.
- The purpose of the PA is to regulate the collection, maintenance, use, and dissemination of personal information held by the Executive Branch of Government.
- The PA protects personal information maintained in a PA system of records that is retrieved by a name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.
- The PA is a statute that regulates the Federal Government's collection, maintenance, use and dissemination of *personal information* about U.S. citizens (and aliens lawfully admitted for permanent residence).



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

The PA, in part:

- Expands 1st party access to information- individuals have an increased right of access to agency records maintained on themselves unless an *exemption* applies.
 - With the exception of exemption (d)(5), which allows agencies to withhold information prepared in reasonable anticipation of a civil action or proceeding, exemptions must be listed in an applicable SORN.
- Restricts 3rd party access to records- meaning that the PA prohibits disclosure of PA information to 3rd parties unless one of twelve *exceptions* apply.
 - Some common PA exceptions include: “need to know” within agency; disclosure required by the Freedom of Information Act; routine uses (which must be listed in an applicable SORN); disclosure pursuant to a court order.
- Provides for the amendment of inaccurate information.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

The PA has four basic policy objectives:

- restrict disclosure of records containing personally identifiable information that is maintained by agencies;
- grant individuals increased rights of access to agency records maintained on them;
- grant individuals the right to seek amendment of records maintained on them upon showing that the records are not accurate, relevant, timely, or complete; and
- establish a Code of Fair Information Practices, which requires agencies to comply with statutory norms for the collection, maintenance, and dissemination of records.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

The PA maintains federal agencies and their components:

- inform people at the time of collection, why the information is collected and how it is used;
- publish a Systems of Record Notice (SORN) in the Federal Register whenever a record system is created, altered, amended or deleted;
- ensure that information collected is accurate, timely, complete or relevant before it is disclosed to others;
- allow individuals access to information about themselves;
- maintain an accounting of certain disclosures made, absent consent, ensuring that recipients can be identified and to enable the subject of the file to know when and for what purpose the record was shared;
- allow an individual the opportunity to correct factual inaccuracies in their records;



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

The PA maintains federal agencies and their components (cont.):

- inform people at the time of collection, why the information is collected and how it is used;
- Establish rules of conduct for those who work with records protected by the PA;
- Establish appropriate administrative and technical controls on PA information; and
- Provide a Privacy Act Statement when collecting information.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Scope of the PA:

- Limit collection of personal information to what is “necessary.”
- Prohibit secret Government record systems.
- Prohibit secret use of Government records.
- Provide the right to see and correct one’s own records.
- Provide safeguards to protect information security and accuracy.
- Provide civil and criminal consequences for violations.
- Provide a right to find what disclosures were made and for what purpose.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

The PA covers:

- U.S citizens; and
- resident aliens (those lawfully admitted to the U.S. for permanent residence).

The PA does not cover:

- nonresident aliens;
- corporations, associations, partnerships, trustees, receivers, personal representatives, and public or private organizations; or
- deceased persons*.

*While the Privacy Act does not cover information regarding deceased persons, the information may be withheld under the Freedom of Information Act if its release would violate the privacy rights of surviving family members.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Everyone at the Department of Commerce is subject to PA provisions (The Department's workforce (including contractors) is subject to the Privacy Act and must comply with all of its provisions.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Examples of personnel involved in Privacy related matters:

- anyone who manages information, records, and systems;
- anyone who is responsible for privacy compliance;
- anyone who is responsible for IT security;
- anyone who manages contracts and contractors; and
- anyone who supervises personnel and projects, or handles personal information that is maintained in a PA system of records.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Penalties for violating the PA:

- Employees are criminally liable if:
 - ✓ they knowingly disclose PA information which is prohibited from disclosure.
 - ✓ they knowingly and willfully maintain a system of records without notice in the Federal Register; or.
 - ✓ they knowingly and willfully request or obtain records concerning an individual under false pretenses.
- The penalty is a misdemeanor and fines, not to exceed \$5,000.



Basic Policy Objectives

The Privacy Act (PA)(5 U.S.C. § 552a)

Examples of PA violations:

- Sharing a payment invoice containing an individual's financial information with a person not authorized to see it.
- Knowingly releasing an individual's background investigation records improperly to any person or agency not entitled to receive them.
- Obtaining or disclosing confidential financial disclosure data under false pretenses or facilitating others acting under false pretenses.
- Discussing in a public area, information such as an individual's application for employment or performance rating.
- Maintaining a group of records about an individual that are designed to be retrieved by a personal identifier, prior to the publication in the Federal Register of a Privacy Act Systems of Record Notice (SORN) to cover the records system.



What does the Privacy Act Pertain to?

Records in a System of Records

The PA protects information on individuals that is in a “system of records.”

- This is any group of records from which information is *retrieved* by the name of the individual or by some other identifying particular assigned to the individual.



*Coverage of the PA is dependent not on the content of the records, but on the method of retrieval. Always remember that **retrieval** is key!*



System of Records

If an agency maintains PA records, it must do so under a proper System of Records Notice (SORN), published in the Federal Register.

A SORN identifies:

- covered individuals and information;
- the purpose and authority for the agency collection of information;
- routine uses of the information;
- any exemptions that apply to information maintained under the SORN;
- and other information about how the information will be maintained and stored.

There are a number of Government-wide and Department-wide SORNs, as well as bureau/agency specific SORNs.



Collecting Privacy Act Information

A goal of the PA is to directly solicit information from the individual. Direct solicitation ensures accuracy.

When directly soliciting personal information from an individual, you must provide a Privacy Act Statement (PAS) – directly on the collection instrument.

A PAS provides individuals with:

- The agency's authority to collect information;
- Purpose for collecting the information;
- Routine uses of the information; and
- Whether provision to agency is mandatory or voluntary.



Collecting Privacy Act Information

Example of a PAS:

- ✓ **Authority:** identifies the specific Federal statute or Executive Order that authorizes the collection of information.
- ✓ **Purpose:** identifies the principal purpose or purposes for which the information will be used.
- ✓ **Routine Uses:** identifies the routines uses, which may be made of the information, as published in the SORN that applies to the intended record collection.
- ✓ **Disclosure:** identifies whether the information provided voluntary or mandatory, and the effects on the individual if he or she chooses not to provide all or any part of the requested information.

Privacy Act Statement

Authority: The collection of this information is authorized under 5 U.S.C. § 301, Departmental regulations; Executive Order 12656, Assignment of emergency preparedness responsibilities; Homeland Security, Federal Continuity Directive 1, requiring Federal agencies to account for its personnel during emergencies; and Departmental Administrative Order 210-1, Emergency Readiness for Departmental Continuity.

Purpose: The Department of Commerce (Department) is collecting this information to ensure managers, supervisors, and other appropriate staff and individuals have the most current personal contact information for contacting you in the event of a man-made disaster, a natural disaster, or planned exercise.

Routine Uses: The Department will use this information to send notifications, alerts, and/or activations and to relay critical updates and guidance to Department personnel in response to an emergency scenario or exercise. Disclosure of this information is permitted under the Privacy Act of 1974 (5 U.S.C. Section 552a) to be shared among Department staff for work-related purposes. Disclosure of this information is also subject to all of the published routine uses as identified in the Privacy Act System of Records Notice COMMERCE/DEPT-18, Employees Personnel Files Not Covered by Notices of Other Agencies.

Disclosure: Furnishing this information is voluntary; however, failure to provide accurate information may delay or prevent the individual from receiving notifications in the event of an emergency.



Scenario #1

Exercise

You have been asked to develop a form that will be used to collect resumes and contact information from individuals that may be interested in applying for a position opening up in your office. Your supervisor asked that you establish an electronic system so that the resumes may be uploaded, stored, accessed and searched based only on certain skill sets, prior experience, and educational background.

Would you be required to identify a SORN under which you may collect this information?

Would a PAS be required to collect this information?



First Party Access under the Privacy Act

A Privacy Act Request

An individual may submit a written request for his or her PA records by mail or in person.

- For requests by mail, Department regulations require a notarized certification of the request or a statement of identity signed under penalty of perjury.
15 C.F.R. § 4.24
- For in person requests, individuals must still provide the request in writing, along with satisfactory proof of identity (preferably an official document bearing the individuals picture). If the requester has no satisfactory proof of identity he or she must provide a signed statement asserting their identity and stating that they understand that knowingly and willfully requesting or obtaining PA information under false pretenses subjects them to a misdemeanor or fine.



First Party Access under the Privacy Act

A Privacy Act Request

Examples of proof of identity pursuant to 15 C.F.R. § 4.24:

- **Notarized statement:** City of ____ County of _____. (Name of individual), who affixed (his) (her) signature below in my presence, came before me, a (title), in and for the aforesaid County and State, this __ day of __, 20__, and established (his) (her) identity to my satisfaction. My commission expires _____.

Signature: _____;

- **Statement of identity made under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization:**

“I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years or both, and that requesting any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than \$5,000.”

Original Signature of Requester _____



First Party Access under the Privacy Act

Processing a PA Request

An individual has a legal right of access to his or her own PA records unless one of 10 PA exemptions applies.

PA Exemptions:

The Self Executing Exemption

- (d)(5)- This exemption allows an agency to withhold information compiled in the reasonable anticipation of a civil action or proceeding, including administrative hearings. This exemption protects civil litigation files from access by the individual, but does not incorporate a deliberative process or attorney-client privilege.



First Party Access under the Privacy Act

PA Exemptions cont'd:

Exemptions applicable to the Department which require promulgated regulations

- (j)(2)- applies to information maintained by a principal function criminal law enforcement agency *and* compiled for a criminal law enforcement purpose.
- (k)(1)- applies to classified information.
- (k)(2)- applies investigatory material compiled for law enforcement purposes, other than material within the scope of (j)(2).



First Party Access under the Privacy Act

PA Exemptions cont'd:

- (k)(4)- applies to information that is required by statute to be maintained and used solely as a statistical record (includes some Census records).
- (k)(5)- applies to some specific Federal personnel information if it would reveal a source who was provided with an *express* promise of confidentiality in the context of a background investigation.
- (k)(6)- applies to testing or examination materials used to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process.



First Party Access under the Privacy Act

Interplay between the PA and FOIA in handling PA requests

All requests made by individuals for information about themselves should be reviewed under both the PA and the Freedom of Information Act (FOIA) because a requester is entitled to the combined total of what is releasable under the PA and the FOIA.

Things to remember:

- Individuals are only entitled to more than others if the records sought are actually PA records, maintained properly under a SORN;
- PA and FOIA exemptions are not the same; and
- PA information may only be withheld from an individual requesting his or her information when both a PA and FOIA exemption applies.



Scenario #2

Exercise

As the supervisor of your office, you have been keeping records of, and have reported to the Office of the Inspector General (OIG), that one of your employees has been improperly using government property for personal gain, and stealing office equipment. Shortly after reporting this information to the OIG, the employee takes a leave of absence for medical reasons. While the employee is out, the OIG provides you with a copy of its report of investigation (ROI) and a summary of its findings suggesting that the ROI and its supporting evidence will be turned over to the Department of Justice to pursue potential criminal actions. The OIG has asked that you use this information in order to take disciplinary actions against the employee, but to consult with it prior to releasing the ROI. At the same time, the employee sends you the following email:

Hi Jane-

Would you please send me any and all records that you may have that discuss me or that are in any files the Department may have on me?

How should this request be treated?

How should you handle the ROI and the OIG's summary?



No Disclosure Without Consent

The PA prohibits disclosure of PA information to 3rd parties unless:

- (1) The subject of the PA records has provided written consent authorizing access/release to a 3rd party; or
- (2) One of 12 exceptions applies.



No Disclosure Without Consent

Example of third-party authorization:

“If you are authorizing information related to yourself to be released to another person, please fill in the information below:

Name of authorized recipient – Please print or type –

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Commerce to release the above-described information relating to me.

Original Signature of Requester

Date



No Disclosure Without Consent

12 Exceptions:

- (b)(1) Intra-agency disclosures

Disclosure of PA information/records may be made to officers and employees of the agency which maintains the record who have a “need to know” the information in the performance of their duties.

- (b)(2) Disclosure required by FOIA

Remember that you should have an actual FOIA request in hand for this exemption to apply.

- (b)(3) Routine Use

Must be consistent with the purpose of the original collection and it must be published in the applicable SORN to apply.



No Disclosure Without Consent

12 Exceptions cont'd:

- (b)(4) Bureau of Census

Records may be released to Census for the purpose of planning or carrying out a census or survey or related activity.

- (b)(5) Statistical Research and Reporting

Release may be made to recipients who have provided the agency with advance adequate written assurances that the record will be used solely as a statistical research or reporting record, and the record will be transferred in a form that is not individually identifiable.



No Disclosure Without Consent

12 Exceptions cont'd:

- (b)(6) Release to the National Archives and Records Administration (NARA)

Records having sufficient historical value to warrant continued preservation or for evaluation by the Archivist to determine whether the record has such value may be released to NARA.

- (b)(7) Law Enforcement

Records may be released to another agency or instrumentality of *any* governmental jurisdiction within or under the control of the U.S. for a civil or criminal law enforcement activity if the activity is authorized by law.

- ❖ Release under this exception must be made when a request is made on official letterhead, from a specifically high level individual, and when the request identifies specific records.



No Disclosure Without Consent

12 Exceptions cont'd:

- (b)(8) Health & Safety

Disclosure may be made upon a showing of compelling circumstances affecting the health or safety of an individual.

- (b)(9) Congress

Release may be made to either House, or to any committee, subcommittee thereof, joint committee or joint subcommittee to the extent the matter is within its jurisdiction. This exception does NOT apply to a request from individual Members of Congress.

- (b)(10) U.S. Government Accountability Office (GAO)

Information may be released to the Comptroller General in the performance of duties of the GAO.



No Disclosure Without Consent

12 Exceptions cont'd:

- (b)(11) Court Order

Release of PA information may be made to a *court of competent jurisdiction* upon an order specifically approved by a judge (this does not include routine clerk subpoenas).

- ❖ There is some conflict in the law on what a court of competent jurisdiction actually is. If you are presented with a court order, contact our office!

- (b)(12) Consumer Reporting

Information may be released to a consumer reporting agency in accordance with the Debt Collection Act.



Scenario #3



Exercise

Dear Office of Human Resource Management:

Under the provision of the Privacy Act, I am seeking a copy of my son's records under your control. My son, Samuel A. Graham, interned in your office last spring as part of his high school civics class. I have legal custody of my son and am willing to pay up to \$25.00 for these records.

Sincerely,

Rebecca Graham

Your office has received the request letter above. Should the request be processed under the Privacy Act?



Scenario #4

Exercise

Larry Lawless, Chief of the New Jersey State Police Department calls your office stating that he is conducting an investigation into an alleged crime ring involving one of your colleagues. To assist in the investigation, Chief Lawless asks that your office provide all records relating to the subject of the investigation, including all copies of their personnel records, any disciplinary actions, and any other records that may be maintained on the subject.

May you provide Chief Lawless with the requested information?



Scenario #5

Exercise

You've been handling an employment action that has resulted in a coworker being moved to another office within the Department. While at lunch with a friend from the office to which your coworker was moved, your friend asks for the low down on what really caused the move.

Can you share the information with your friend?

If not, can you think of circumstances when it would be appropriate to share the information with your friend?



No Disclosure Without Consent

Accounting for Disclosures

Each agency must maintain an accounting of all disclosures made from a SORN, except for when disclosures are made under exception (b)(1)- “need to know” and exception (b)(2)- pursuant to FOIA.

- An Accounting must include: the name and address of the person to whom disclosure is made; the nature and purpose of each disclosure; and the date disclosure was made.
- A record’s accounting must be kept for five years after disclosure is made, or for the life of the record.
- A record’s accounting must be made available to the subject of the record except for those accountings made under exception (b)(7)- law enforcement.
- Anyone to whom records have been disclosed must be informed of any corrections or notations of dispute subsequently made to the disclosed records.



Request for Amendment

An individual may submit a request for correction or amendment of his or her Privacy Act records.

Correction/Amendment Requests should include:

- Specific identification of the record to be corrected/amended
- Specific details of what information should be added, deleted, or modified
- A statement explaining the basis for the requested correction or amendment (including whether the information in the record is unnecessary, inaccurate, irrelevant, untimely, or incomplete), with all available substantiating documentation



Request for Amendment

Agency Response:

- If a correction or amendment is made, the individual should be notified in writing, and a copy of the amended record should be provided to them.
- If a correction or amendment is not made, the individual should be informed of the reasons for the denial, the date of the denial, and the Privacy Officer's name and title.
 - Denials may be appealed to the General Counsel's office.
 - If a record is not amended, the individual may file a statement of his or her disagreement with the agency's position and that statement must be kept with the record and disclosed every time the record is disclosed.



Legal Causes of Action Under the Privacy Act

Four Civil Actions:

(1) Amendment Lawsuits

If an agency denies a request for amendment, an individual may sue the agency. 5 U.S.C. § 552a(g)(1)(A).

(2) Access Lawsuits

An individual may sue an agency in order to obtain information withheld from the individual. 5 U.S.C. § 552a(g)(1)(B).

(3) Accuracy Lawsuits

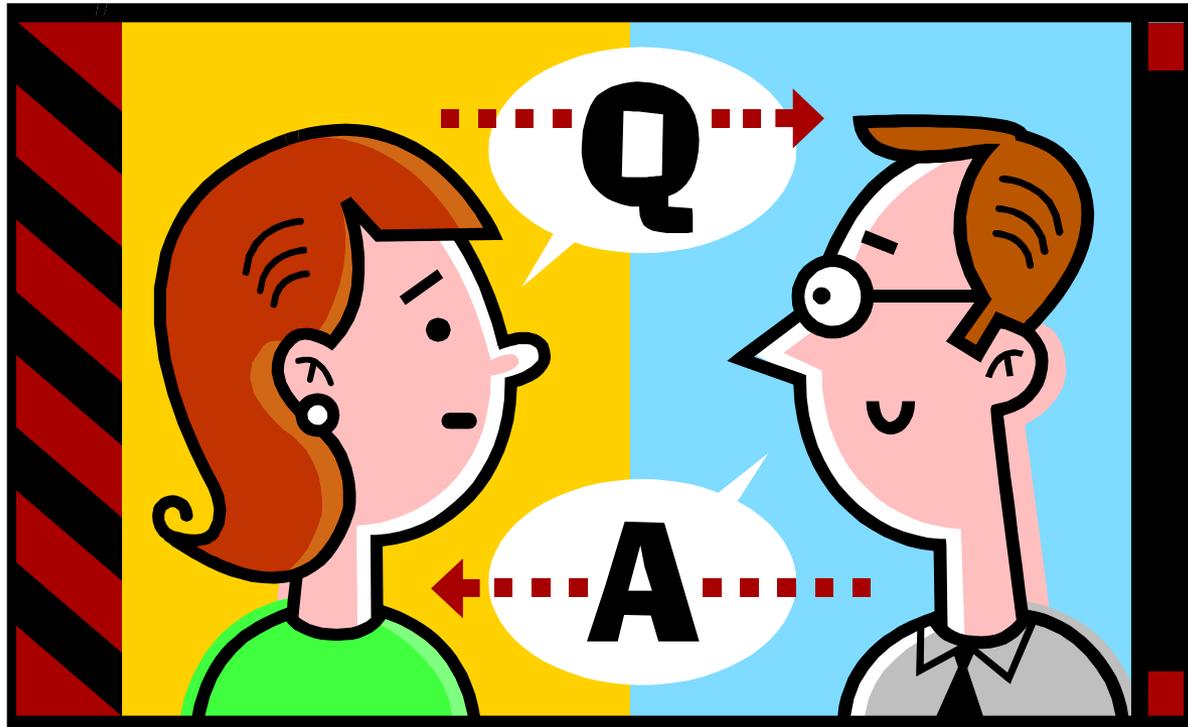
An individual may sue an agency for maintaining inaccurate records on the individual. 5 U.S.C. § 552a(g)(1)(C).

(4) Other Damages Lawsuits

An individual may sue an agency for damages resulting from a violation of the PA. 5 U.S.C. § 552a(g)(1)(D).



Question and Answer Time





Office of Privacy &
Open Government

Privacy Act Program

Contact

For questions or additional information about the Privacy Act,
contact:

Michael J. Toland, Ph.D.

Deputy Chief FOIA Officer and Departmental Privacy Act Officer,
Deputy Director for FOIA/Privacy Act Operations
Office of Privacy and Open Government

mtoland@doc.gov

202-482-3842