FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict

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INTRODUCTION

The Freedom of Information Act (FOIA)\(^1\) is designed to give the American people maximum access to information in the files of federal agencies. Its underlying premise is that an informed electorate is essential to the continuation of democracy.\(^2\) The FOIA requires that all information held by any federal agency must be disclosed to any person who requests it,\(^3\) unless the information falls within one of the Act's narrowly construed exemptions.\(^4\)

The Privacy Act of 1974,\(^5\) on the other hand, seeks to protect the constitutional right of privacy of the millions of individuals who are the subjects of records maintained by federal agencies.\(^6\) It requires that all federal agencies maintaining such records collect and preserve only information relevant and necessary to accomplish an agency purpose required by statute or executive order.\(^7\) In addition, it grants individuals access to agency records\(^8\) and the right to amend or correct any portion of the record which the subject believes is not accurate, timely, complete, or relevant to the purpose for which the agency maintains the record.\(^9\) The Privacy Act further provides, with certain exceptions,\(^10\) that agencies must not disclose an individual's record to a third person or to another agency without first obtaining the subject's consent.\(^11\) However, the Privacy Act also provides that the individual's consent need not be obtained if disclosure of the record is required under the FOIA.\(^12\)

Obviously, the FOIA's objective of maximum disclosure\(^13\) cannot be achieved without some invasion of privacy. Similarly, absolute protection of the privacy of record subjects cannot be achieved with-

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2. S. REP. No. 813, 89th Cong., 2d Sess. 3 (1966) [hereinafter cited as S. REP. 813].
8. Id. §§ 552a(d)(1), (f)(1).
9. Id. § 552a(d)(2).
10. Id. § 552a(b)(1)-(11).
11. Id. § 552a(b).
12. Id. § 552a(b)(2).
13. S. REP. 813, supra note 2, at 3.
out compromising the right of the public to full disclosure. Some balance between these two laudable but inconsistent goals must be attained. Unfortunately, the provisions of the two statutes are not harmonious, and in certain areas the conflicts between them could result in defeating the legislative purposes behind both the FOIA and the Privacy Act. This article will examine some of the conflicts between the FOIA and the Privacy Act and suggest a possible resolution.

GENERAL PROVISIONS OF THE FOIA

The FOIA requires federal agencies to make available to the public all information held by them unless the information falls within one of nine carefully drawn exemptions. Upon receipt of a request by any person which "reasonably describes" the records sought and conforms to the agency's published rules, an agency must deter-

14. 5 U.S.C. § 552(b)(1)-(9) (Supp. IV 1974). Subsection (b) exempts from mandatory disclosure:

[M]atters that are . . . (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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

(3) specifically exempted from disclosure by statute;

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

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

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

(7) investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

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

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

15. The requests for records with which this article deals are made under subsection (a)(3), which provides:

Except with respect to records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

mine within ten working days whether the requested material falls within one of the nine exemptions.\textsuperscript{16} If, after an administrative appeal, the agency continues to deny disclosure of part or all of the requested material, the requester may sue in federal district court to enjoin the withholding of the material.\textsuperscript{17} The court must determine the matter de novo.\textsuperscript{18} The burden is upon the agency to justify the denial; it must prove that the requested material falls within the claimed exemption.\textsuperscript{19} The court may examine the records \textit{in camera} to determine whether the records or any part of them are to be withheld under any of the exemptions.\textsuperscript{20} If only a part of the material is exempt, "any reasonably segregable portion" must be disclosed after deletion of the portions that are exempt.\textsuperscript{21} The only remedy authorized by the statute for improper withholding of records is an injunction against the withholding.\textsuperscript{22} 

The FOIA does not deal with the question of what information the agencies may maintain on an individual. It is concerned only with the creation of and the limitations upon the right of the public to obtain access to whatever information the agencies maintain. It is the Privacy Act that first attempted to impose limitation upon the types of information federal agencies may maintain and upon the circumstances under which the information may be disclosed.

**THE PROVISIONS OF THE PRIVACY ACT**

The Privacy Act of 1974\textsuperscript{23} is directed at a different set of problems than those with which the FOIA is concerned. Its access provisions are part of an overall scheme to prevent government invasions of personal privacy. An individual wishing to obtain his or her record from a federal agency must be given the record upon request.\textsuperscript{24} Con-
gress, in passing the Privacy Act, found it necessary not only to provide procedures for access to and amendment or correction of records, but also to regulate the collection, maintenance, use, and dissemination of personal information by the agencies.

25. Nothing in the Act dictates the degree of specificity required in a request for a record. It appears that agencies may require the requester to name the system of records in which he or she thinks the record may be found. See Dep't of Justice Regulations, 28 C.F.R. § 16.41 (b) (1975) [hereinafter cited as JUSTICE REGS.]; Office of Management and Budget Regulations, 5 C.F.R. § 1302.1(b) (1976) [hereinafter cited as OMB REGS.]. Justice Regulations are used because that Department is responsible for defending suits against the agencies under the Act. OMB Regulations are cited because that agency is responsible for implementing the Act and encouraging agency compliance. Pub. L. 93-579 § 6, 88 Stat. 1896, at 1909 (1974).

Apparently, a request which satisfies the requirement of the FOIA that it "reasonably describe" the records sought might not be sufficiently specific as a Privacy Act request. For example, the Justice Department requires a requester to describe the nature of the records sought, the approximate dates covered by the record, the system or systems in which it is thought to be included as described in the "Notices of Records Systems" published by the General Services Administration, and the identity of the system manager or component of the Department having custody of the system of records. 28 C.F.R. § 16.41(e) (1975). If the published Notice of Systems of Records for an individual system contains a requirement of greater specificity, that requirement must be followed. Id. The Office of Management and Budget Regulations, on the other hand, are more liberal; a concise description of the system of records will suffice. 5 C.F.R. § 1302.2(b)(1)(i) (1976). This potential problem may be alleviated where the agency provides a procedure whereby a requester can seek help in defining his or her request. See, e.g., JUSTICE REGS., supra, § 16.41(a). A provision like this is particularly helpful for requesters who are unfamiliar with government publications like the Federal Register and may have difficulty wading through the Notices of Systems of Records.

The Privacy Act provides no time limitations within which an agency must respond to a request, although the regulations of some agencies impose time limits. JUSTICE REGS., supra, § 16.45(b) provide time limits of 20 to 40 working days depending upon whether the records requested exceed 100 pages, require consultation with another component or agency, and/or are all maintained at the same location. See also OMB Regs., supra, § 1302.2(b)(2) providing for a response to a request for records within 10 days, unless the Assistant to the Director for Administration determines that the request cannot be answered in that time, requiring notification of the requester with a statement of reasons when there is a delay.

The Act permits the agencies to impose fees for making copies of an individual's record. However, it specifically prohibits fees to cover the cost of searching for the record. 5 U.S.C. § 552a(f)(5) (Supp. IV 1974). In this respect the Privacy Act differs from the FOIA, which allows the agencies to impose reasonable charges both for search and for copying. Id. § 552(a)(4)(A).

The Privacy Act does not provide for administrative review of a denial of access or of a failure to respond to a request, although specific agency regulations may provide for review. E.g., JUSTICE REGS., supra, § 16.47.


To accomplish these objectives, the Act requires all agencies to maintain in their records only such information about an individual as is relevant and necessary to accom-
Before disseminating an individual's record to anyone other than an agency, the agency maintaining the record must make reasonable efforts to assure that the record is accurate, timely, relevant, and complete for the agency's purposes, unless disclosure is required under the FOIA.\(^{27}\)

An essential element of the Act's protection of individual privacy is the requirement, with certain exceptions, that an agency obtain the subject's consent before disclosing a record to any person or agency.\(^{28}\) The consent requirement is intended to afford individuals a measure of control over the dissemination of their records and the uses to which those records are put.\(^{29}\)

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\(^{27}\) Id. § 552a(e)(6). It is unclear why disclosures under the FOIA are exempt from this requirement. Although the Senate Report expresses a concern that the Privacy Act may undermine the right of the public and the press to information concerning the operation of government, S. Rep. 1183, supra note 6, at 71, the disclosure to third parties of inaccurate or irrelevant information about an individual arguably could constitute an invasion of privacy by presenting his or her affairs in a false light. Perhaps a record which the agency knows to be inaccurate or irrelevant might be withheld on the ground that its disclosure would constitute a clearly unwarranted invasion of privacy, at least until the agency could amend the record to conform to the standards of the Privacy Act.


\(^{29}\) S. Rep. 1183, supra note 6, at 68. It is also expected to serve as a check upon the illegal or inadvertent linkage or centralization of federal information systems with those of other federal agencies, state and local governments, and the private sector. The premise underlying
The more important exceptions to the consent requirement include disclosure to officers or employees of the agency who have a need for the record in the performance of their duties, disclosures required under the FOIA, disclosures for a routine use, and disclosures for a civil or criminal law enforcement purpose.

Closely related to the consent requirement is the provision compelling federal agencies to maintain an accounting of the disclosures made of each record pertaining to an individual. Except for disclosures made under subsection (b)(1) or pursuant to the requirements of the FOIA, the agencies must keep an accurate accounting of the date, nature, and purpose of each disclosure of a record and the requirement is that if the subject of a record is allowed to know where and to whom the information concerning him or her is disseminated, it will assist in the prevention of illegal and improper uses of the information by agency personnel who have no business with it. Id.

Additional exceptions to the consent requirement are:

1. To the Bureau of the Census for purposes of planning or implementing a census or survey, or other related activity; (2) to a recipient who has provided adequate advance written assurance that the record will be used solely for statistical research and reporting and that the record is to be transferred in a form that cannot be individually identified; (3) to the National Archives of the United States, or to the Administrator of General Services to determine whether the value of the record warrants its preservation in the Archives; (4) to a person who has shown compelling circumstances affecting the health or safety of an individual if notification is to be sent to the individual’s last known address; (5) to congressional committees; (6) to the Comptroller General in the course of the performance of the duties of the General Accounting Office; and (7) pursuant to the order of a court of competent jurisdiction.

The law enforcement activity must be authorized by law, and the head of the requesting agency or instrumentality must make a written request to the agency maintaining the record which specifies the particular portion of the record desired and the law enforcement activity for which it is sought. 5 U.S.C. § 552a(b)(7) (Supp. IV 1974).

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the name and address of the recipient.\textsuperscript{39} If an agency has not exempted the system of records from access, the accounting, except for records of disclosures for a law enforcement purpose, must be made available to the subject on request.\textsuperscript{40}

Once an individual has received a copy of the record, he or she may request that the agency amend or correct any portion which allegedly is not accurate, timely, relevant, or complete.\textsuperscript{41} Denial of amendment entitles the subject to administrative review\textsuperscript{42} and eventual suit in federal district court.\textsuperscript{43} Upon review, if the reviewing officer upholds the refusal to amend, the individual must be allowed to file a concise statement of the reasons for his or her disagreement with the agency's refusal, which must be included in any subsequent disclosure of the record.\textsuperscript{44} The right to challenge the contents of one's record is, perhaps, the major advantage of pursuing the right of access under the Privacy Act rather than under the FOIA.

Federal district courts are granted jurisdiction to entertain civil actions under the Privacy Act\textsuperscript{45} in five situations. They are (1) denial of amendment requests by reviewing officers,\textsuperscript{46} (2) denial of administrative review of refusals to amend,\textsuperscript{47} (3) denial of access

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\textsuperscript{43} The purpose of this requirement is to enable a person examining the accounting to determine which employees, on any given day, had access to an individual's record, so that the nature and pattern of an agency's transfers of personal information might be audited. S. REP. 1183, supra note 6, at 52.

\textsuperscript{44} Id. § 552a(c)(1)(B) (Supp. IV 1974).

\textsuperscript{45} Id. § 552a(c)(3).

\textsuperscript{46} Id. § 552a(d)(2).

\textsuperscript{47} Id. § 552a(d)(3). If the individual requests review of the refusal to amend, the review must be completed within 30 working days, although the head of the agency may extend this period "for good cause shown." Id. § 552a(d)(3). The Act does not specify to whom the "good cause" must be shown or what constitutes "good cause." There is no statutory limit upon the extension of time.

\textsuperscript{48} Id. § 552a(g)(1)(A).

\textsuperscript{49} Id. § 552a(d)(3), (d)(4). A concise statement of the agency's reasons for refusal may also be included. Id. § 552a(d)(4).

\textsuperscript{50} The Act does not specifically require an agency to investigate alleged inaccuracies. However, Congress appears to expect that the agency will make reasonable efforts to verify both the requester's allegation and its own information by contacting any agency from which it received the disputed material, questioning its own investigators, reviewing both its own records and any material supplied by the individual, and reviewing its computer programming. S. REP. 1183, supra note 6, at 75.

\textsuperscript{51} As under the FOIA, the action may be brought where the plaintiff resides or has his or her principal place of business, where the records are situated, or in the District of Columbia. Actions brought under the Privacy Act must be brought within 2 years from the time the cause of action arises. However, if the agency has willfully made a material misrepresentation of any information required to be disclosed under the Act, and the information is material to the establishment of the agency's liability to the individual, the action may be brought within 2 years of the time that the individual discovered the misrepresentation. 5 U.S.C. § 552a(g)(5) (Supp. IV 1974).

\textsuperscript{52} 5 U.S.C. § 552a(g)(1)(A) (Supp. IV 1974).

\textsuperscript{53} Id.
requests,\textsuperscript{48} (4) maintenance of inaccurate, untimely, irrelevant, or incomplete records which leads to a determination adverse to a subject,\textsuperscript{49} and (5) other failure to comply with the Act resulting in an adverse effect upon an individual.\textsuperscript{50} In suits brought either to amend a plaintiff’s record or to enjoin an agency’s refusal to grant a plaintiff access to his or her record, the court is to determine the matter de novo;\textsuperscript{46} it may conduct an \textit{in camera} inspection to determine whether the record has been improperly withheld under subsection (k).\textsuperscript{52} Where the plaintiff seeks amendment or correction of a record, the court may order the agency to amend the record either as the individual requested or as the court sees fit.\textsuperscript{53}

In actions to obtain access to a record, the burden is upon the agency to sustain its action. However, in suits to compel the amendment of a record, there is no similar provision. Presumably, the burden of proof falls upon the plaintiff in such cases.

The Privacy Act provides for criminal penalties in three situations: (1) where an officer or employee of an agency willfully makes an improper disclosure of individually identifiable information to someone not entitled to receive it;\textsuperscript{55} (2) where an officer or employee of an agency willfully maintains a system of records without meeting the statutory notice requirements;\textsuperscript{56} and (3) where any person knowingly and willfully requests or obtains any individual’s record under false pretenses.\textsuperscript{57} In each instance, the party is guilty of a misdemeanor and is subject to a fine of not more than $5,000.\textsuperscript{58}

**Potential Conflict Between the Privacy Act and the FOIA**

\textit{The Conflicting Access Provisions}

Both the FOIA and the Privacy Act create rights of access to records held by federal agencies.\textsuperscript{59} Both contain provisions exempt-

\begin{itemize}
  \item \textsuperscript{48} \textit{Id.} § 552a(g)(1)(B).
  \item \textsuperscript{49} \textit{Id.} § 552a(g)(1)(C). In a suit against an agency for its failure to maintain an individual’s record in accordance with the statutory standards, resulting in a determination adverse to him or her, if the court determines that the agency acted in an intentional or willful manner, the United States is liable to the plaintiff for the greater of either the actual damage sustained or $1,000, plus costs and reasonable attorney’s fees. \textit{Id.} § 552a(g)(4)(A),(B).
  \item \textsuperscript{50} \textit{Id.} § 552a(g)(1)(D).
  \item \textsuperscript{51} \textit{Id.} § 552a(g)(2)(A), (g)(3)(A).
  \item \textsuperscript{52} See text accompanying notes 78 through 82 infra.
  \item \textsuperscript{53} 5 U.S.C. § 552a(g)(2)(A) (Supp. IV 1974).
  \item \textsuperscript{54} \textit{Id.} § 552a(g)(3)(A).
  \item \textsuperscript{55} \textit{Id.} § 552a(i)(1).
  \item \textsuperscript{56} \textit{Id.} § 552a(i)(2).
  \item \textsuperscript{57} \textit{Id.} § 552a(i)(3).
  \item \textsuperscript{58} See text accompanying notes 78 through 82 infra.
  \item \textsuperscript{59} \textit{Id.} § 552(a)(3); \textit{id.} § 552a(d).
\end{itemize}
ing certain types of records from disclosure. Although the nature and scope of the exemptions of the FOIA differ from those of the Privacy Act, generally an individual can obtain his or her records under either Act. If the system in which a desired record is contained has not been exempted from the access provisions of the Privacy Act, the individual will be able to obtain more information under the Privacy Act than under the FOIA, because the exemption of intra- and inter-agency memoranda would not apply.

The Justice Department originally contended that the Privacy Act was the sole means available to individuals to obtain access to their records. If a system of records had been exempted under the Privacy Act, an individual who requested his or her record from that system would obtain nothing under either statute. This interpretation has been modified somewhat. Justice Department Regulation 16.57, dealing with the relationship between the Privacy Act and the FOIA, provides that any request by a record subject for his or her file will be processed under the Department's Privacy Act regulations. Releases of records under that regulation beyond those required by the Privacy Act are at the sole discretion of the Deputy Attorney General and his or her delegates. The regulation then confers this authority upon the managers of the record systems. It further provides that to the extent that a requested record has been exempted under the Privacy Act, the individual will receive the records to which he or she is entitled under the Privacy Act and which the system manager is willing to disclose as a matter of discretion. In addition, disclosure will be made of all records within the scope of the request to which the individual "would have been entitled" under the FOIA "but for the enactment of the Privacy Act" and the agency's exemption of the system under the Act.

Section 16.57 is ambiguous. Subsection (b) states that a requester "shall receive" all of the records to which he or she is entitled under the FOIA. However, if the release of any records beyond the require-
ments of the Privacy Act is a matter of the system manager’s discretion, then the manager presumably has discretion to withhold any material not required to be released under the Privacy Act, whether or not the requester is entitled to the information under the FOIA.

The Justice Department’s regulations further undermine the purposes of both the Privacy Act and the FOIA. Where an individual requests his or her record which has been exempted under subsection (j), (k)(3), or (k)(4), or which has been compiled in anticipation of a civil proceeding, the Department “will neither confirm nor deny the existence of the record.” The individual will be told only that there is no record available to him or her under the Privacy Act. Such reticence on the part of the Department is not only unwarranted, but also appears to contravene the mandate of the Privacy Act that there be no secret maintenance of records.

If an individual has requested information which has been exempted from disclosure under subsection (j) and the system has also been exempted from the grant of jurisdiction, there may be some question whether he or she can contest the withholding in court. Where agency policy is to treat a subject’s request for his or her records as a Privacy Act request unless it specifies that it is made only under the FOIA, the agency may contend that the court has no jurisdiction to hear the case. If the request is indeed made only under the Privacy Act, the court probably has no jurisdiction. However, if the request was made under both acts or only under the FOIA, it should be the jurisdictional provisions of the FOIA, not the agency’s policy, that control.

Where the agency employs Privacy Act procedures for all requests

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68. The exemption for records maintained by the CIA or criminal law enforcement agencies. See text accompanying notes 86–93 infra.
69. The exemption for records relating to the provision of protective services to the President or to others. See text accompanying note 97 infra.
70. The exemption for records required by statute to be used solely as statistical records. See text accompanying note 98 infra.
72. Id.
74. Id. § 552a(g)(1)(B).
75. See, e.g., Justice Regs., supra note 25, at § 16.57(b), which states that all requests by individuals for records pertaining to themselves will be processed only under its Privacy Act procedures. OMB Regs., supra note 25, at § 1302.2(b)(1)(i) provides that if a request could be processed under either act and specifies either both acts or neither act, the Privacy Act procedures will be employed; however, the individual will be so informed and will be further informed of the existence of the FOIA and of the difference in procedures and costs between the two Acts. Many, if not most, requests for information by individuals do not specify the Act under which they are made. Lawton Letter, supra note 62.
by individuals for their own records and then sends a requester the
cryptic response that there is no record available to him or her under
the Privacy Act, the individual on whom there actually is no record
may find that he or she has gone to court for nothing. If the individ-
ual made the request under both acts, there is a possibility that the
FOIA's exemption 377 could lead a court to hold that the agency is
exempt from suit, even though the FOIA does not permit agencies
to exempt themselves from suit. Clearly, the individual whose
objective is to obtain maximum disclosure should state that the
request is made primarily under the FOIA, and that he or she re-
quests, in addition, any other records that may be available under
the Privacy Act. It may even be desirable, when dealing with an
agency whose regulations are similar to those of the Justice Depart-
ment, to make a separate request under each Act, to insure maxi-

Even where the agency has not exempted the record system from
the grant of jurisdiction, additional problems may arise as to the
permissibility of in camera inspection. Although the Privacy Act
provides that the court may examine records in camera which have
been exempted under subsection (k),78 there is no similar provision
for the inspection of records exempted under subsection (j)—rec-
ords maintained by the CIA or by an agency whose primary function
is the enforcement of the criminal laws. The FOIA, on the other
hand, allows the court to conduct an in camera inspection of records
for which an agency has claimed any exemption.79 In addition,
under the FOIA, the burden of proof is on the agency to justify its
refusal to disclose.80 The Privacy Act also places the burden on the
agency to sustain its action.81 However, the burden of proof clause
immediately follows the provision for in camera inspection of re-
cords exempted under subsection (k). Because agencies exempting
records under subsection (j) may also exempt themselves from
suit,82 there is a question as to which party bears the burden of proof
where the records were exempted under subsection (j) and the re-
quest was processed under the Privacy Act. The spirit and purpose
of both statutes would dictate that the agency should bear the bur-
den of proof in this situation as well. This course is also more reason-

77. 5 U.S.C. § 552(b)(3)(1970) (the exemption for records which are specifically exempted
from disclosure by statute).
79. Id. § 552(a)(4)(B).
80. Id.
81. Id. § 552a(g)(3)(A).
82. Id. § 552a(j).
able because the agency, which controls the records, can justify the exemption more easily than the requester can show that the claim of exemption is unjustified.

The Differing Nature and Scope of the Exemptions

The exemptions of the Privacy Act differ from those of the FOIA in three major respects. First, an agency cannot claim an exemption under the Privacy Act at the time it receives a request for records unless it has first promulgated rules exempting all such records from access. Second, whether an exemption can be claimed under the Privacy Act depends, in part, upon the nature and function of the agency maintaining the record. Third, the agency head may promulgate rules exempting entire systems of records from the operation of the Privacy Act, while the exemptions of the FOIA are applied on a case-by-case basis.

Subsection (j)(1) permits the Central Intelligence Agency to promulgate rules to exempt any of its record systems from the access provisions of the Privacy Act. Subsection (j)(2) allows the same exemption for record systems maintained by an agency or component whose principal function is the enforcement of the criminal

83. Id. §§ 552a(j), (k).
84. Section 552a(j)(1) allows the Central Intelligence Agency to promulgate a blanket exemption for all its records, and section 552a(k)(3) allows an exemption for records "maintained in connection with the provision of protective services to the President or to others." Id. §§ 552a(j)(1), (k)(3).
85. Id. §§ 552a(jk). At the time the rules are adopted, the agency must include in its statement the reasons for exempting a system of records from any provision of the Act. Id.
86. This subsection allows the agency to exempt record systems from any provision of the Act except: subsection (b), the conditions upon disclosure; subsections (c)(1) and (2), requiring the maintenance of an accounting; subsections (e)(4)(A)-(F), requiring publication in the Federal Register of the existence and character of any record system maintained (see note 25 supra); subsection (e)(6), requiring agencies to assure that a record is accurate, timely, relevant, and complete before disseminating it, unless the disclosure is made under the FOIA; subsection (e)(7), prohibiting the maintenance of records on how individuals exercise their first amendment rights unless expressly authorized by statute or unless pertinent to and within the scope of an authorized law enforcement activity. However, agencies that may exempt records under (j) are the ones most likely to be allowed to maintain these records; subsections (e)(9) and (10), requiring the establishment of rules of conduct and administrative and technical safeguards to protect the confidentiality of the records and the security and integrity of the system; subsection (e)(11), requiring publication in the Federal Register and the provision of an opportunity for public comment upon any proposed new use or intended use of information in the system; and subsection (i), the criminal penalties.

The justification for allowing the CIA to exempt its systems of records was that Congress did not wish to jeopardize the collection of intelligence information pertaining to national defense or foreign policy or to allow persons without a security clearance to inspect classified information. S. Rep. 1183, supra note 6, at 74. Congress was concerned with the "sensitivity" of the "delicate information regarding national security" contained in the files of the CIA. H.R. Rep. No. 1416, 93d Cong., 2d Sess. 18 (1974) [hereinafter cited as H. Rep. 1416].
laws. The exemption applies if the record system consists of: (1) information compiled in order to identify criminal offenders and alleged offenders, comprised only of identifying data and criminal history;\(^8\) (2) information compiled for a criminal investigation that is associated with an identifiable individual;\(^8\) or (3) reports identifiable to an individual that are compiled at any stage of the enforcement process.\(^8\)

Although these agencies are prohibited from maintaining secret information systems,\(^8\) they are permitted to exempt their record systems not only from the access and challenge provisions of the Act, but also from the grant of jurisdiction to the federal courts.\(^9\) Thus, if an agency chooses to exempt a system of records from that provision, there is no way that a requester can challenge the propriety of the exemption. The suggestion that an agency might exempt itself from suit is not mere speculation. The Justice Department has, in fact, exempted record systems from that provision, giving as its reasons only "because these systems are compiled for law enforcement purposes and have been exempted from the access provisions."\(^9\) Thus, a criminal justice agency may maintain inaccurate or irrelevant information in an individual's file indefinitely, because there is no means for the individual to challenge the contents of his or her record. Although the Senate Committee that considered the bill was aware that the amendments to the FOIA would allow individuals to obtain limited access to their records compiled for law enforcement purposes,\(^9\) the potential impact of subsection (j)(2) upon the right of access of individuals under the FOIA was apparently not fully appreciated.

Subsection (k) of the Privacy Act allows an agency to promulgate rules to exempt record systems from the operation of the access and challenge provisions.\(^9\) A system of records may be exempted under

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\(^8\) Id.
\(^8\) Id. § 552a(j)(2)(C).
\(^8\) Id. § 552a(e)(4).
\(^9\) Id. § 552a(j).

92. JUSTICE REGS., supra note 25, at § 16.98(c),(d)(11). Fifteen record systems were exempted from subsection (g) under this regulation, including the Drug Enforcement Administration's Semi-Automatic Narcotic Trafficker Profiles and Specialized Automated Intelligence Files.

93. S. REP. 1183, supra note 6, at 75. The Report states that the provision was intended to reconcile the exemption with the amendments to subsection (b)(7) of the FOIA.

94. 5 U.S.C. § 552a(k) (Supp. IV 1974). Eligible agencies may also exempt their record systems from subsections (c)(3) (requiring agencies to grant a subject access to the accounting of the disclosures of his or her records); (e)(1) (the requirement of relevance and necessity); (e)(4)(G),(H), and (I), requiring publication in the Federal Register of notice of the proce-
this subsection if it is: (1) exempt from disclosure under the FOIA's exemption for classified information;\textsuperscript{85} (2) investigatory material compiled for a law enforcement purpose, except that if the maintenance of the information has resulted in a denial of any right, benefit, or privilege for which an individual was otherwise eligible under federal law, it must be made available unless disclosure would reveal the identity of a confidential source;\textsuperscript{86} (3) maintained in connection with the provision of protective services to the President or to others;\textsuperscript{97} (4) required by statute to be used solely as statistical records;\textsuperscript{98} (5) investigatory material compiled solely for the purpose

\textsuperscript{85} 5 U.S.C. § 552a(k)(1) (Supp. IV 1974). Section 552(b)(1) exempts information properly classified pursuant to criteria established by executive order. 5 U.S.C. § 552(b)(1) (Supp. IV 1974). The justification for exempting classified information from the access and challenge provisions of the Act is that disclosure might damage the nation's foreign policy and defense, because the material would no longer be subject to security controls. H. Rep. 1416, supra note 86, at 19. Congress believed that the nation's foreign policy and defense would also be compromised if the agencies maintaining such records were required to make public the categories of their sources of information. S. Rep. 1183, supra note 6, at 74.

\textsuperscript{86} 5 U.S.C. § 552a(k)(2) (Supp. IV 1974). If the information was given before the effective date of the Privacy Act, it may be withheld to the extent that it would reveal the identity of a source who gave it under an implied promise of confidentiality. If it was furnished after the Act's effective date, it must be disclosed unless the source received an express promise of confidentiality. As to the investigatory law enforcement exemption, it was feared that disclosure of such records to the investigation subjects would impair the inquiry by alerting them that their activities were being monitored, enabling them to prevent detection or avoid prosecution. H. Rep. 1416, supra note 86, at 19.

Although information must be disclosed to the individual if its maintenance has led to the denial of any right, benefit, or privilege under federal law, 5 U.S.C. § 552a(k)(2) (Supp. IV 1974), if no such denial has resulted, the information remains exempt if the agency so chooses. No reason has been advanced for denying the subject access to such investigatory records after the investigation has been completed and it is clear that no further action will be taken. It would seem that the purposes of the Act would be better served if the exemption were permitted to be claimed only where an agency could show that a specific governmental interest would be damaged or impaired by disclosure of a record to its subject. In all other cases, an individual should be allowed to obtain access to his or her records and to challenge their contents.

\textsuperscript{97} 5 U.S.C. § 552a(k)(3) (Supp. IV 1974). The exemption for records relating to protective services was included because allowing access to these files would "vitiate a critical part of Secret Service work which was specifically recommended by the Warren Commission." H. Rep. 1416, supra note 86, at 19. Probably, the same reasoning justifies exempting the record system from the requirement of subsection (e)(4)(I) that the notice published in the Federal Register include a statement of the categories of sources of records in the system, although the House and Senate Reports do not specifically discuss this provision.

\textsuperscript{98} 5 U.S.C. § 552a(k)(4) (Supp. IV 1974). The exemption for statistical records was justified on the ground that the records do not have a direct effect on any particular individual and their disclosure would interfere with a legitimate agency activity which had been approved by Congress. H. Rep. 1416, supra note 86, at 19. This reasoning overlooks the possibil-
of determining suitability, qualifications, or eligibility for federal
civilian employment, military service, access to classified informa-
tion, or federal contracts;99 (6) testing and examination material
used solely to determine qualifications for appointment or promo-
tion in the civil service, if its disclosure would compromise the ob-
jectivity or fairness of the examination process;100 or (7) evaluation
material used to determine potential for promotion in the armed
services.101

No justification was advanced in either the Senate or the House
Reports for allowing agencies to exempt their record systems from
the requirement that information be maintained only when it is
"relevant and necessary to a purpose of the agency required to be
accomplished by statute or by executive order."102 However, once an
agency has exempted a record system from the operation of sub-
section (e)(1)—the requirement of relevance and necessity—there
is nothing to prevent it from maintaining information on an indivi-
dual which is wholly unrelated to its purposes or even forbidden
by other provisions of the Privacy Act.103 Since under subsection
(j) the agency may also exempt the record system from the grant
of jurisdiction to the federal courts to hear cases alleging violations
of the Act,104 challenge is impossible. This apparent contradiction
is especially important in light of the congressional purpose not
only to provide access to and challenge of records, but also to im-
pose restraints upon the information power of the government in
order to protect the constitutional rights of privacy and due pro-
cess.105 The Senate Committee on Government Operations consid-

is identical to that in subsection (k)(2). See note 96 supra.
101. Id. § 552a(k)(7). The provision protecting confidential sources is identical to those
in subsections (k)(2) and (k)(5). See note 96 supra.
102. Id. § 552a(e)(1).
103. See, e.g., id. § 552a(e)(7), which restricts the authority of the agencies to maintain
records of an individual's exercise of his or her first amendment rights. See note 26 supra.
ered the statutory standards of necessity and relevance a minimum safeguard essential to the effectiveness of the Act.

The Committee is convinced that effective legislation must provide standards for and limitations on the information power of government. Providing a right of access and challenge to records, while important, is not sufficient legislative solution to threats to privacy. . . . [It is not enough to tell agencies to gather and keep only data which is reliable by their rights for whatever they determine is their intended use, and then to pit the individual against government, armed only with a power to inspect his file and a right to challenge it in court. . . . To leave the situation there is to shirk the duty of Congress to protect freedom from the incursions by the arbitrary exercise of the power of government and to provide for the fair and responsible use of that power.]

Thus, permission to exempt record systems from the statutory requirements of necessity and relevance appears to undermine the avowed purposes of the Privacy Act.

It might be expected that this problem would be alleviated somewhat by the requirement that agencies make reasonable efforts to assure that a record is accurate, timely, relevant, and complete before disclosing it to third parties. However, disclosures required by the FOIA are excepted from this requirement. Thus, inaccurate, misleading, or damaging information on a subject may be released to a third party requester. Even if the subject later gains access to his or her record and obtains amendment of the misleading portions, the FOIA recipient will not receive the amendment because no accounting of FOIA disclosures is required.

Because FOIA disclosures are excepted from these requirements, a record subject about whom inaccurate or damaging information had been circulated has no recourse. If the record is contained in a

106. Id. The Report defined "privacy" as a shorthand term for the restraint on the power of government to investigate individuals, to collect information about their personal lives or activities in society or in ways which are banned by the Constitution, or for reasons which have little or nothing to do with the purpose of government or of the agency involved as their powers are defined by the Constitution and specific statutes.

S. REP. 1183, supra note 6, at 17 (emphasis added).

107. The Senate Report states that the Act in part is designed to prevent the kind of illegal, unwise, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some overzealous investigators . . .

S. REP. 1183, supra note 6, at 2.


109. Id.

110. Id. § 552a(c)(1),(c)(4).
system which has been exempted from access under the Privacy Act, the subject may never know that the government maintained such damaging information, that it was disclosed, or that it may have been used against him or her by the FOIA recipient. In such a case, the remedies provided in the Privacy Act for the adverse effect of an agency’s failure to comply with the Act would be useless. Even if the subject could prove that the agency maintained information on him or her that did not meet the statutory standards, it would be impossible to prove that its dissemination caused the harm alleged without knowing who had received the information.

**FOIA Exemption 3 and the Privacy Act Exemptions**

Subsection (q) of the Privacy Act expressly prohibits agencies from relying on the exemptions of the FOIA to withhold information otherwise available to the requester under the Privacy Act. However, neither Act contains any provision dealing with the situation where an individual requests his or her records under the FOIA when the agency has exempted them from disclosure under the Privacy Act. In addition to claiming that portions of the requested record are exempt under the FOIA, the agency may contend that under the Privacy Act its exemption of the system containing the record renders the entire record “specifically exempted from disclosure by statute” and therefore unavailable under the FOIA’s exemption 3. An agency might use this argument to withhold a record from its subject even though none of the other FOIA exemptions applied.

*FAA Administrator v. Robertson*

This argument might appear to be “bootstrapping,” but it is lent credence by the Supreme Court’s decision in *FAA Administrator v. Robertson.* 113 *Robertson* involved a request by persons representing a public interest group, the Center for the Study of Responsive Law, who requested Systems Worthiness Analysis Program (SWAP) reports from the Federal Aviation Administration. SWAP reports consisted of the FAA’s analysis of the performance and operations of commercial airlines and were based largely upon information supplied to FAA investigators by airline operators. Section 1104 of the Federal Aviation Act of 1958 provided, in part, that if “any person” made objection to the public disclosure of

111. Id. § 552a(g)(1)(D).
information obtained by the agency, the agency should order the information withheld when, in its judgment, a disclosure of such information would adversely affect the interests of such person and was not required in the public interest. The FAA refused to produce the reports, and the requesters sought administrative review. While the appeal was pending, the Air Transport Association filed an objection pursuant to section 1104 on behalf of its airline members. The FAA then denied the request, stating that the reports were exempt under the FOIA's exemption 3.

Both the district court and the court of appeals ruled that the reports were not specifically exempted from disclosure by statute. The court of appeals held (1) that the language of the exemption required that the statute upon which the agency relied specify or categorize the documents for which the exemption was claimed, and (2) that section 1104 was not within the FOIA exemption because it "delegated 'broad discretionary power' under a 'public interest standard.'" It reasoned that one of the main purposes of the FOIA was to eliminate vague phrases such as "in the public interest" or "for good cause shown" as a basis for withholding information. Therefore, section 1104 could not be considered a specific exemption by statute within the meaning of exemption 3.

The Supreme Court reversed. In an opinion by Chief Justice Burger, the Court found that the FOIA's exemptions indicate a congressional judgment as to the types of information that the agencies must be permitted to keep confidential if they so choose. It noted that "the language of Exemption 3 contains no 'built-in' standard," but is ambiguous, necessitating resort to the legislative history. The Court found the legislative history of exemption 3 indicated clearly that Congress was aware of the many previously enacted statutes authorizing withholding information to protect the public interest. Congress did not appear to have distinguished among them upon the basis of whether standards for non-disclosure were provided or upon the degree of discretion left to agency officials.

116. Id.
117. Id. at 1034.
118. Id. at 1035.
120. Id. at 262.
121. Id.
122. Id. at 263.
123. Id.
124. Id. at 263-64.
The Court reasoned that to rule that material withheld under section 1104 or a similar statute was not exempt under subsection (b)(3) would be to construe the FOIA as repealing by implication all existing statutes restricting access to public records. The Robertson Court held the term "specific," as used in the exemption, could not be read to mean that the exemption applied only to documents which were specified either by name or by category, for such an interpretation would require Congress to undertake an impossible task. Further, it would imply that Congress had re-evaluated every previously enacted statute which delegated authority to withhold information, an implication which was contradicted by the legislative history.

The opinion stressed the doctrine that "repeals by implication are disfavored," and that when courts are faced with statutes capable of co-existence, it is their duty—absent a clearly expressed congressional intent to the contrary—to regard both as effective. Therefore, the Court reasoned, it would be unreasonable to believe that Congress had repealed by implication so many statutes, each of which had been carefully considered to meet a specific need. Clearly, Congress had intended to let these laws stand.

The Court further noted that the congressional intent to open up most public records under the FOIA was not irreconcilable with an intent to preserve a large measure of discretion respecting the confidentiality of the SWAP reports, so as to insure continued access to necessary and sensitive information. Because Congress could not reasonably anticipate every situation in which withholding was warranted, statutes vesting regulatory agencies with broad discretion were inevitable.

If a case arises where an agency bases its denial of a FOIA request upon its Privacy Act regulation exempting the system containing the record, Robertson would provide authority for the argument that the record is specifically exempted from disclosure by statute. Although Robertson applied to discretionary withholding statutes

125. Id. at 265.
126. Id.
127. Id.
128. Id. The Court cited H. REP. 1497, which stated that earlier statutes restricting access to information would not be modified by the FOIA.
131. 422 U.S. at 266.
132. Id.
133. Id. at 266-67.
enacted prior to the FOIA, the Supreme Court’s reasoning that such statutes are inevitable because Congress cannot anticipate every situation in which withholding is necessary, would be equally applicable to later statutes like the Privacy Act. Should courts follow this line of reasoning, the congressional intent in enacting and amending the FOIA would be undermined. This is especially ironic because the amendments to exemptions 1 and 7, passed only a few weeks before passage of the Privacy Act, were intended to broaden access to some of the same records which may be exempted from access under subsections (j) and (k) of the Privacy Act. Even more ironic is the possibility that a third party requester would be able to obtain information from a file while the subject of the file would not. The reason for this anomaly is that the Privacy Act and its exemptions apply only to requests by individuals for access to their own records.

The Problem of Determining the Congressional Intent

There is no reported case dealing with the application of exemption 3 of the FOIA to the Privacy Act exemptions. When such cases begin to come before the courts, it will be necessary to determine congressional intent to resolve the question whether records exempted under the Privacy Act are, by the agency’s action, exempt from any disclosure. Determining the congressional intent will be an extremely difficult task, since the House and Senate Reports on the two acts express not only different, but opposite, intentions. For example, the House Report on the Privacy Act states that the Act will have an effect on exemption 6 of the FOIA. The House bill, which was not the bill enacted, would have made most individually identifiable information exempt from disclosure to the public. However, the Senate Report on S. 3418, the present Privacy Act, expresses the intent to preserve the right of access to information under the FOIA. It is in order to protect the right of public disclosure under the FOIA that the Privacy Act’s restrictions on disclosure do not apply to disclosures required under the FOIA.

Both the Senate and the House Reports clearly state that it would be undesirable to allow individuals access to their own intelligence

134. Id. at 263, 266.
135. E.g., investigatory records compiled for law enforcement purposes and classified information.
137. Id.
or law enforcement investigatory records. However, both Houses expressed a contrary intent by passing the amendments to exemptions 1 and 7, which expanded access to classified information and investigatory records compiled for law enforcement purposes. The Conference Report on the FOIA amendments states that the classified documents exemption was narrowed to require documents to be properly classified to qualify for the exemption and that in camera inspection was viewed as an important part of the court's de novo determination of whether the material was actually exempt. The Conference Committee clearly intended maximum responsible disclosure; this conclusion is further supported by the requirement that any reasonably segregable portion of a record be disclosed after deleting the portions that are exempt. In its discussion of the amendments to exemption 7, the Conference Report states that those amendments were intended to clarify congressional disapproval of certain court decisions which expanded the scope of agency authority to withhold investigatory records compiled for law enforcement purposes. It emphasized that such terms as "national security," "criminal law enforcement authority," and "intelligence" were to be narrowly construed and set limits on how each term should be defined. Although the Senate committee responsible for the Privacy Act was aware of the passage of the amendments to these exemptions, it appears that the potential impact of the Privacy Act exemptions upon these newly-expanded rights of access under the FOIA was not fully appreciated or considered. Unless it be contended that the intention of Congress in passing the Privacy Act was to take away with one hand what it had just given with the other, it may be that congressional intent is neither clear nor discernible.

**A Possible Solution: The Doctrine Disfavoring Repeals By Implication**

Interestingly, one rule of law the Supreme Court used in *Robertson* to reach the conclusion that section 1104 made SWAP

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143. Id. at 12.
144. Id.
145. Id. at 13.
148. Id.
149. S. Rep. 1183, supra note 6, at 75.
reports specifically exempt from disclosure by statute would lead to the opposite conclusion if used by a court in a case involving the discretionary exemptions of the Privacy Act. It is a canon of statutory construction that repeals by implication are disfavored—that is, a later statute will not be interpreted to repeal by implication an earlier one unless there is a clearly expressed legislative intent to that effect. Unless there is an affirmative showing of an intent to repeal, the only justification for a repeal by implication is that the two statutes are irreconcilable.

[But] when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

This canon of construction is based upon a presumption that Congress had given serious consideration to the earlier statute so that before deciding that it has been repealed or amended, "it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end."

It cannot seriously be contended that Congress made a considered determination to repeal the amendments to the FOIA exemptions only a few weeks after they were enacted. Certainly there is no language in subsection (j) or (k) of the Privacy Act indicating that Congress expressly intended to deny access to those records under the FOIA. The Senate Report expressed the intention that the eligible agencies use the opportunity to exempt records sparingly and disclose records whenever a specific governmental interest would not be harmed. It should be remembered that Congress overrode a presidential veto to enact the FOIA amendments. It is not likely that the result of such an effort would be deliberately cast aside the very next month. Assuming that Congress gave serious consideration to both acts, it can only follow that the broadening of access

151. 417 U.S. at 550.
152. Id. at 551.
153. 419 U.S. at 134.
157. The Privacy Act was passed on December 18, 1974 by the Senate and on the following day by the House. Pub. L. 93-579, 88 Stat. 1896, 1910 (codified at 5 U.S.C. § 552a (Supp. IV 1974)).
under the FOIA was intended to be effective in spite of the discretion to exempt records under the Privacy Act.

The two acts are not irreconcilable. The access provisions of the Privacy Act are for the most part intended to allow the individual to obtain the entire record. To allow agencies to exempt certain record systems from this unrestricted access is not inconsistent with continuing to permit the more limited access available under the FOIA.\textsupercite{158}

\textbf{CONCLUSION}

The purpose of the FOIA is to provide for public scrutiny of the operations of the federal government by providing access to the records it maintains. The exemptions of that Act are designed to protect certain governmental interests in the confidentiality of specific categories of information. The Privacy Act was not intended to conflict with the FOIA or to undermine its purposes. Rather, the purpose of the Privacy Act is to protect individuals from invasions of their constitutional right of privacy caused by abuses of the government's power to collect, maintain, and disseminate information. Although the Privacy Act requires certain safeguards before disclosure of a subject's record to third parties, requests for information under the FOIA are excepted from these restrictions.

The right of access to records provided by the Privacy Act serves a different purpose from that of the FOIA. It is intended to allow individuals to determine whether the information maintained on them is accurate, timely, relevant, and complete. It is supplemented with a right to seek amendment or correction of any portion of the record that does not meet these statutory standards.

The exemptions of the Privacy Act permit agencies to exempt entire systems of records from access. All of these records were previously available, at least to a limited extent, under the FOIA. Only a few weeks before it passed the Privacy Act, Congress had broadened access to some of the same records which may be exempted not only from access, but also from suit under the Privacy Act. Because agencies are not forbidden to use their regulations exempting record systems from access under the Privacy Act as a basis for the denial of FOIA requests, there is a danger that they may use the Privacy Act to undermine the right of public disclosure under the FOIA.

The rights created by both acts are extremely important for the

\textsupercite{158} Any applicable exemption of the FOIA would limit access under that Act. Particularly important with respect to materials which would be exempted under subsection (j), (k)(1), or (k)(2) would be exemptions 1, 5 (intra- and inter-agency memoranda), and 7.
preservation of democratic government and our civil rights and liberties. Neither act should be implemented in a way that would undermine the goals of the other. Rather, the rights of access created by each act should be treated by the courts and the agencies as separate and independent.

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