[NOT YET SCHEDULED FOR ORAL ARGUMENT]

APPEAL NOS. 10-5140/10-5143

_____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

CARA LESLIE ALEXANDER, *et al.*,

Plaintiffs-Appellants,

vs.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendant-Appellees.

_____

BRIEF OF APPELLANTS

_____

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Plaintiffs-Appellants ("Plaintiffs") hereby submit their Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici. The Plaintiffs appearing in the lower court were Cara Leslie Alexander, Joseph P. Duggan, Patrick Adam Beers, David Lee Black, Marjorie Anne Bridgman, Michael John Grimley, Linda Arey Skladany, and Joseph Nelson Cate. The Plaintiffs-Appellants ("Plaintiffs") on appeal are Cara Leslie Alexander and Joseph P. Duggan. The Defendants in the lower court were the Federal Bureau of Investigation, the Executive Office of the President, Hillary Rodham Clinton, Bernard W. Nussbaum, David Craig Livingstone, and Anthony Marceca. Defendant-Appellee ("Defendant") on appeal is the Executive Office of the President. Intervenors below were Northrop Grumman Corporation, and Williams & Connolly LLP, on behalf of President William Jefferson Clinton. Movants below were Kenneth H. Bacon, Daniel A. Barry, Clifford Bernath, Jonathan Broder, James Carville, William Jefferson Clinton, J. Lowe Davis, Lanny J. Davis, Department of Defense, Sandra Golas, Terry W. Good, Robert Haas, Harold Ickes, Terry F. Lenzner, Mark Lindsay, Craig Livingstone, Jane Mayer, Thomas F. McLarty, III, Michelle Peterson, John D. Podesta, Betsy L. Pond, Larry Potts, Salon Magazine, Jane Sherburne, George Stephanopoulos,

Linda R. Tripp, U.S. Department of Justice, United States of America, United States Secret Service, and Stephen Waudby.

B. Rulings Under Review. The ruling under review in this appeal is the March 9, 2010 Memorandum Opinion and Order of the Honorable Royce C. Lamberth. The official citation is *Alexander v. Federal Bureau of Investigation*, 691 F. Supp. 2d 182 (D.D.C. 2010).

C. Related Cases. This case was previously before this Court on a petition for writ of mandamus sought by EOP. The matter was captioned *Alexander v. Executive Office of the President*, Appeal No. 97-8059. The petition was denied on October 10, 1997. Counsel for Plaintiffs are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY OF ABBREVIATIONS

JA	Joint Appendix
EOP	Executive Office of the President
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
OPS	White House Office of Personnel Security
ORM	White House Office of Records Management

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based upon 5 U.S.C. § 552a(g)(1) and 28 U.S.C. § 1331(a). Joint Appendix ("JA") at 238, ¶ 1 (Alexander Complaint); JA at 307, ¶ 1 (Grimley Complaint). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because a final judgment disposing of all claims was entered by the District Court on March 9, 2010. JA at 621-22 (Order). This appeal was timely filed because Plaintiffs filed their appeal on May 7, 2010. JA at 623 (Notice of Appeal).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in holding that the Privacy Act does not apply to the White House Office of Personnel Security (hereafter "OPS") and White House Office of Records Management (hereafter "ORM"), units within Defendant Executive Office of the President (hereafter "EOP").

STATUTES AND REGULATIONS

The two relevant statutes, 5 U.S.C. § 552 and 5 U.S.C. § 552a, are included in the addendum that is attached to this brief.

STATEMENT OF THE CASE

In this action, Plaintiffs Alexander and Duggan allege, among other claims, that two administrative units within EOP – OPS and ORM – improperly maintained records of background investigations conducted on Plaintiffs

Alexander and Duggan by the FBI. Plaintiffs Alexander and Duggan allege that the maintenance of these records by OPS and ORM violated the Privacy Act, 5 U.S.C. § 552a.

Important for purposes of this appeal, EOP filed a motion to dismiss and for summary judgment on January 17, 1997, arguing, *inter alia,* that neither OPS nor ORM are "agencies" subject to the Privacy Act. Plaintiffs opposed the motion, the District Court heard argument, and by Memorandum Opinion dated June 12, 1997, the District Court denied EOP's motion as to the Privacy Act coverage issue. JA at 317-25 (Memorandum Opinion); *see also Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997). In its ruling, the Court confirmed that the Privacy Act applied, on its face, to EOP, including OPS and ORM, emphasizing that "the plain language of this statute includes EOP as an 'agency'. . . ." JA at 318 (Memorandum Opinion); *see also Alexander*, 971 F. Supp. at 606. The Court also found that a limited, judicially created exception for cases arising under the Freedom of Information Act (hereafter "FOIA") did not apply to the Privacy Act because the two statutes have very different purposes. JA at 318-19 (Memorandum Opinion); *see also Alexander*, 971 F. Supp. at 606-07. On August 12, 1997, the District Court certified its decision for an interlocutory appeal to this Court pursuant to 28 U.S.C. § 1292(b). JA at 19 (Docket Entry No. 81). On October 10, 1997, this Court

declined to rule on the issue as an interlocutory matter. JA at 19 (Docket Entry No. 83).

EOP tried to raise the issue again in a motion for judgment on the pleadings, but the District Court denied EOP's motion on December 7, 1998. JA at 55 (Docket Entry No. 587) and 168 (Docket Entry No. 143); *see also Alexander v. FBI*, 1998 U.S. Dist. LEXIS 22481 (D.D.C. Dec. 7, 1998). EOP then tried to raise the issue yet again by filing an "Emergency Petition for Writ of Mandamus" in this Court, but, again, this Court declined to consider the issue:

> Almost the entire thrust of EOP's petition is that the District Court erred in concluding that the White House is subject to the Privacy Act. And EOP's principal claim for relief is a request that this court "issue a writ of mandamus directing dismissal of the Privacy Act claim." Petition at 20. This court has already ruled that the matter regarding the applicability of the Privacy Act raises a question that properly may be addressed on an appeal of the final judgment in the underlying case. We declined to address the issue as a certified question under 28 U.S.C. § 1292(b), and we see no basis now to address the issue pursuant to a petition for mandamus.

In re Executive Office of the President, 215 F.3d 20, 23 (D.C. Cir. 2000).

On September 17, 2009, EOP raised the issue for a third time in a renewed motion for summary judgment. With little, if any, substantive analysis or a refutation of the grounds for its previous, well-reasoned decision, the District Court reversed its earlier holding that EOP and its component units, OPS and ORM, are covered by the Privacy Act. JA at 593-622 (Memorandum Opinion). By Memorandum Opinion and Order dated March 9, 2010, the District Court granted

EOP's renewed motion for summary judgment. JA at 593-622 (Memorandum Opinion). Plaintiffs filed a timely notice of appeal. *See* JA at 623 (Notice of Appeal).

STATEMENT OF FACTS

Plaintiff Alexander is a former employee of the United States Government who worked in the White House Correspondence Office as a correspondence analyst from July 1990 until October 1992. JA at 578, ¶ 1 (Plaintiffs' Rule 7(h) Statement of Facts ("Plaintiffs' Statement")). Plaintiff Alexander required regular access to the White House while she was employed in the White House Correspondence Office. JA at 578, ¶ 2 (Plaintiffs' Statement). In order to be granted regular access to the White House, Plaintiff Alexander underwent a background investigation by the FBI. JA at 578, ¶ 3 (Plaintiffs' Statement). The FBI's Central Records System, in which records of FBI background investigations conducted by the FBI are maintained, "is classified as a 'Privacy Act System of Records.'" JA at 578, ¶ 4 (Plaintiffs' Statement). The FBI maintains records of its background investigation of Plaintiff Alexander as part of its "Privacy Act System of Records." JA at 579, ¶ 5 (Plaintiffs' Statement).

On December 3, 1993, OPS requested records of Plaintiff Alexander's background investigation from the FBI. JA at 579, ¶ 6 (Plaintiffs' Statement). The reason identified by OPS on the request form was "access" to the White House.

JA at 579, ¶ 7 (Plaintiffs' Statement). At the time the request was made, however, Plaintiff Alexander no longer required access to the White House, as she had left her White House employment in October of 1992. JA at 579, ¶ 8 (Plaintiffs' Statement). Nonetheless, on December 13, 1993, the FBI provided OPS with records of Plaintiff Alexander's background investigation. JA at 579, ¶ 9 (Plaintiffs' Statement). OPS maintained the records of Plaintiff Alexander's background investigation in its own system of records from approximately December 13, 1993 until June 13, 1996, despite knowing that Plaintiff Alexander no longer required access to the White House or otherwise having any lawful reason to maintain the records. JA at 580 and 582-84, ¶¶ 10, 22-29 (Plaintiffs' Statement). On June 13, 1996, OPS returned the records of Plaintiff Alexander's background investigation to the FBI. JA at 580, ¶ 11 (Plaintiffs' Statement).

Like Plaintiff Alexander, Plaintiff Duggan also is a former employee of the United States Government who worked in the White House as a speech writer for President George H. W. Bush from September 1991 until approximately August 1992. JA at 580, ¶ 12 (Plaintiffs' Statement). Mr. Duggan required regular access to the White House while he was employed as a speech writer for President Bush. JA at 580, ¶ 13 (Plaintiffs' Statement). In order to be granted access to the White House, Plaintiff Duggan underwent a background investigation by the FBI. JA at 580, ¶ 14 (Plaintiffs' Statement). The FBI maintains records of its background

investigation of Plaintiff Duggan as part of its "Privacy Act System of Records." JA at 581, ¶ 15 (Plaintiffs' Statement).

On January 18, 1994, OPS requested records of Plaintiff Duggan's background investigation from the FBI. JA at 581, ¶ 16 (Plaintiffs' Statement). The reason identified by OPS on the request form was "access" to the White House. JA at 581, ¶ 17 (Plaintiffs' Statement). At the time the request was made, however, Plaintiff Duggan no longer required access to the White House, as he had left his White House employment in approximately September 1992. JA at 581, ¶ 18 (Plaintiffs' Statement). Nonetheless, on January 27, 1994, the FBI provided OPS with records of Plaintiff Duggan's background investigation. JA at 581, ¶ 19 (Plaintiffs' Statement). OPS maintained the records of Plaintiff Duggan's background investigation it received from the FBI in its own system of records until it transferred them to ORM. JA at 582-84, ¶¶ 20-29 (Plaintiffs' Statement). Plaintiff Duggan's records were maintained by these components of EOP from approximately January 27, 1994 to June 6, 1996 despite knowing that Plaintiff Duggan no longer required access to the White House or otherwise having any lawful reason to maintain the records. JA at 581-84, ¶¶ 19-29 (Plaintiffs' Statement). On June 6, 1996, ORM returned the records of Plaintiff Duggan's background investigation to the FBI. JA at 582, ¶ 21 (Plaintiffs' Statement).

SUMMARY OF THE ARGUMENT

In enacting the Privacy Act, Congress borrowed the definition of the term "agency" from section 552(f) of FOIA. FOIA expressly defines "agency" to include EOP. Where, as here, the statute's language is plain, the sole function of the court is to enforce the statute according to its terms. The District Court erred in ignoring the plain language of the statute.

In interpreting the term "EOP" under FOIA, the United States Supreme Court assumed that Congress would not have intended for FOIA to apply to the President and close presidential advisors. Consequently, the Court excepted the President and close presidential advisors from the term "EOP" for purposes of FOIA. The purposes and effects of FOIA and the Privacy Act are quite different, however. Including the EOP within the Privacy Act's coverage, as the plain language requires, in no way chills discussion between close presidential advisors, as was found to be the case with FOIA. As a result, there is no need to ignore the plain language of the statute and limit the applicability of the Privacy Act to EOP, and, in particular, to OPS and ORM. The District Court erred in holding otherwise.

ARGUMENT

I. Standard of Review.

Because this appeal raises a pure question of law, the District Court's decision is entitled to *de novo* review. *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories and admissions on files, together with the affidavits, if any, show that there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

II. The District Court Erred in Granting Summary Judgment in Favor of EOP.

The District Court incorrectly held that EOP, and, in particular, OPS and ORM, are exempt from the protections of the Privacy Act. JA at 598-604 (Memorandum Opinion). As will be shown below, the District Court erred because: (1) the plain language of the Privacy Act expressly states that EOP, and consequently OPS and ORM, are covered by its provisions; and (2) the limitation on the definition of the term "agency" created by the courts for FOIA does not apply to the Privacy Act because the two statutes serve very different purposes and have very different effects.

A. The Plain Language of the Privacy Act Expressly Includes EOP.

The Privacy Act governs federal agencies' acquisition, maintenance, use, and disclosure of information concerning individuals. When applicable, the Privacy Act provides that agencies may maintain "only such information about an individual that is relevant and necessary to accomplish a purpose of the agency as required by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). The Act further requires agencies maintaining such information to "establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity . . . ." *Id.* at § 552a(e)(10). The Privacy Act grants jurisdiction to federal courts for civil actions seeking to compel compliance with its terms and, in cases of intentional or willful violations, awards of damages. *Id.* at § 552a(g).

The single issue raised in this appeal is whether EOP, and, in particular, OPS and ORM, are "agencies" subject to the terms of the Privacy Act. The issue has not been resolved definitively by this Court.[1] Instead of crafting a unique

[1] Although this Court intimated how it might rule on the issue in *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), its discussion was mere dicta. *See Wilson v. Libby*, 498 F. Supp.2d 74, 89 (D.D.C. 2007) ("This Court does not need to resolve the issue here [of whether the Office of the President and the Vice President fall within the Privacy Act's definition of agency.]"). Dicta obviously is not entitled to any precedential effect, however. *In re Executive Office of the President*, 215 F.3d

definition of the term "agency" when it enacted the Privacy Act, Congress simply adopted the definition that it used when it enacted FOIA.[2] FOIA defines the term "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (***including the Executive Office of the President***), or any independent regulatory agency." 5 U.S.C. § 552(f) (emphasis added). Clearly, the plain language of this provision unambiguously includes EOP. The language of the statute could not be any clearer. And, nothing in the statute suggests that a narrower or more limited interpretation of the phrase "including the Executive Office of the President," is necessary or appropriate. "Where, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)); *see also Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (Plain language in a statute "must ordinarily be regarded as conclusive."). The District Court erred in holding that EOP, and thus OPS and OPM, are not subject to the provisions of the Privacy Act.

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at 24. For the reasons stated herein, which were not expressly considered by the Court in *Wilson*, a different result should occur here.

[2] Until 1986, the definition of "agency was codified at 5 U.S.C. § 552(e). After the Anti-Drug Abuse Act of 1986, the definition was recodified at 5 U.S.C. § 552(f). There was no substantive change to the definition, and no technical conforming amendment was made to the Privacy Act.

B. FOIA and the Privacy Act Serve Distinctly Different Purposes.

In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), the United States Supreme Court was asked to review the U.S. Department of State's denial of a FOIA request that sought records of then-Secretary of State Henry Kissinger regarding conversations Kissenger had while serving a White House advisor. In analyzing whether Kissinger's records were "agency" records subject to FOIA, the Court looked to FOIA's legislative history to determine what Congress had intended. *Id.* at 156. The Court discovered a Conference Report concerning amendments made to FOIA in 1974 that indicated that Congress did not intend FOIA to apply to "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* (quoting H. R. Conf. Rep. No. 93-1380, p. 15 (1974)). As a result, the Court interpreted the term "agency" narrowly so as to exclude the President and close presidential advisors from the requirements of FOIA. *Id.* It thus upheld the lower courts' decisions denying access to the requested records. *Id.*

In this case, the District Court held that the narrow interpretation applied to FOIA in *Kissinger* applied to the Privacy Act as well. The District Court erred, however, because the two statutes serve distinctly different purposes and have distinctly different effects.

As the District Court found in initially declining to apply a narrow definition of the term "agency" for purposes of the Privacy Act, "[t]he chief purpose of FOIA is to provide citizens with better access to government records than first provided under the Administrative Procedures Act." *Alexander*, 971 F. Supp. at 606 (citing *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971)). "'FOIA is intended to enlighten citizens as to how they are governed.'" *Id.* (quoting *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995)). "By providing exceptions for the disclosure requirements, Congress was balancing between the 'public interest in freedom of information and countervailing public and private interests in secrecy.' *Soucie*, 448 F.2d at 1076." *Id.*

By contrast,

> the Privacy Act was adopted in order to "provide certain safeguards for an individual against an invasion of personal privacy" (citing Section 2(a)(4), Preamble to the Privacy Act, *5 U.S.C. § 552a(a)* note). Congress recognized the need of the government to have sensitive information on individuals and provided the means by which the government could maintain this type of information and adequately protect the rights of individuals.

Id. Thus, as the District Court correctly articulated in its first opinion regarding this matter,

> the concerns of FOIA and the Privacy Act are quite different. When passing FOIA, Congress was addressing the need for individuals to have access to government information. When passing the Privacy Act, Congress was addressing the need for individuals to have protection for their privacy concerns. In interpreting the word "agency" to exclude, under FOIA, the immediate staff of the

> President, the courts recognize, as Congress did, that the access provided by FOIA must be limited. However, . . . there is no evidence that the privacy protections provided by Congress in the Privacy Act must also be necessarily limited. Through the several exceptions to the restrictions on information covered by the Privacy Act, the President and those who work for the President will always have access necessary for the many executive decisions. Thus there is no need to ignore the plain language of the statute and limit the word "agency" as has been done under FOIA.

Id. at 606-607.

This case is no different than *U.S. v. Espy*, 145 F.3d 1369 (D.C. Cir. 1998), in which this Court refused to apply by inference *Kissinger's* judicially-narrowed definition of the term "agency" to a statute with distinctly different purposes from FOIA. In *Espy*, the former Secretary of Agriculture Alphonso Espy was indicted under the False Statement Statute, 18 U.S.C. § 1001 (1994), for making false statements to the President's Chief of Staff and Counsel. The statute made unlawful false statements made "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001. Espy argued that the term "agency" in the False Statement Statute should receive the same limiting judicial interpretation as the Supreme Court applied to FOIA in *Kissinger*.

The Court rejected Espy's argument, declaring that "Espy's analogy to FOIA does not work." 145 F.3d at 1373. The Court found that Espy's analogy failed because the policy reason for the narrow interpretation of the term "agency"

in FOIA was not applicable to the False Statement Statute because of the different purposes the two statutes served:

> The Supreme Court defined "agency" narrowly under FOIA on the assumption that Congress would not have wished to chill discussion between close presidential advisors. It is by no means obvious that Congress, for analogous policy reasons, would have wished a similarly narrow definition of agency for purposes of *§ 1001*. Indeed, the independent counsel argues that a broad definition would more likely serve the policy of this statute by protecting the Executive Office against false statements in the course of its investigations.

Id.

Likewise, it is by no means obvious that Congress, for analogous policy reasons, intended a similarly narrow definition of the term "agency" for purposes of the Privacy Act. The two statutes serve very different purposes and obviously have very different effects. Requiring EOP to "provide certain safeguards for an individual against an invasion of personal privacy" will in no way chill discussion between close presidential advisors, as may be the case with FOIA. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1896 (1974). As a result, there is no reason to ignore the plain language of the statute and impose limitation on the definition of the term "agency" created by the courts for a different statute. What is more, only a broad interpretation of the term "agency" will fully achieve the Privacy Act's congressionally-expressed purpose of protecting individuals against invasions of personal privacy by government bureaucrats, as occurred in this case. The District Court erred in holding otherwise.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's March 9, 2010 Memorandum Opinion and Order holding that EOP is not covered by the Privacy Act and remand this case for further proceedings.

Dated: February 22, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO F.R.A.P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(2)

I certify that pursuant to F.R.AP. 32(a)(7)(C) and District of Columbia Circuit Rule 32(a)(2), the attached principal brief is proportionally spaced, has a typeface of 14 points and contains 4, 448 words.

Dated: February 22, 2011 /s/ Paul J. Orfanedes

ADDENDUM

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5 U.S.C. § 552

LEXSTAT 5 USC 552

*** CURRENT THROUGH PL 111-382, APPROVED 1/4/2011 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

Go to the United States Code Service Archive Directory

5 USCS § 552

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 3 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) 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.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (*50 U.S.C. 401a(4)*)) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

(A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this

section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $ 250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, 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, has jurisdiction

to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F) (i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the

fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters 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 (other than section 552b of this *title [5 USCS § 552b*]), if that statute--

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

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

(5) inter-agency or intra-agency memorandums 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) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(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 or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this *title [5 USCS § 551(1)*] 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; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44 [*44 USCS §§ 3501* et seq.], and under this section.

(h) (1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

HISTORY:

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P.L. 90-23 § 1, 81 Stat. 54; Nov. 21, 1974, P.L. 93-502, §§ 1-3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P.L. 94-409, § 5(b), 90 Stat. 1247; Oct. 13, 1978, P.L. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225;Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(2), 98 Stat. 3357; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle N, §§ 1802, 1803, 100 Stat. 3207-48, 3207-49; Oct. 2, 1996, P.L. 104-231, §§ 3-11, 110 Stat. 3049; Nov. 27, 2002, P.L. 107-306, Title III, Subtitle B, § 312, 116 Stat. 2390.)

(As amended Dec. 31, 2007, P.L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, 121 Stat. 2525, 2526, 2527, 2530; Oct. 28, 2009, P.L. 111-83, Title V, § 564(b), 123 Stat. 2184.)

5 U.S.C. § 552a

LEXSTAT 5 USCS § 552A

*** CURRENT THROUGH PL 111-382, APPROVED 1/4/2011 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

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5 USCS § 552a

§ 552a. Records maintained on individuals

(a) Definitions. For purposes of this section--
(1) the term "agency" means agency as defined in section 552[(f)](e) of this title;
(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
(3) the term "maintain" includes maintain, collect, use, or disseminate;
(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 identifying particular assigned to the individual, such as a finger or voice print or a photograph;
(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
(6) the term "statistical record" means 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 13;
(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and
(8) the term "matching program"--
(A) means any computerized comparison of--
(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--
(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or
(II) recouping payments or delinquent debts under such Federal benefit programs, or
(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or

payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to *section 6103(d) of the Internal Revenue Code of 1986* [*26 USCS § 6103(d)*], (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code [*26 USCS § 6103(b)(4)*], (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act [*42 USCS § 604(e), 664*, or 1337]; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act [*42 USCS § 1320b-7*];

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in *section 6103(k)(8) of the Internal Revenue Code of 1986* [*26 USCS § 6103(k)(8)*];

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (*42 U.S.C. 402(x)(3), 1382(e)(1)*); or

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(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;

(2) required under section 552 of this *title [5 USCS § 552*];

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(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;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(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 [Government Accountability Office];

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures. Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records. Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or

complete; or

(ii) inform the individual of its 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 review of that 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;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(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 or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements. Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(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;

(3) inform each individual whom it asks 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--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

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

(D) the effects on him, if any, of not providing all or any party of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can 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; and

(I) the categories of sources or records in the system;

(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;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made 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;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining 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;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and 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;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. 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 [5 USCS § 553*], which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination 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 be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g) Civil remedies.

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(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

(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,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(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.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(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.

(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 recovery receive less than the sum of $ 1,000; and

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

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. 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.

(i) Criminal penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of 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.

(2) Any officer or employee of any agency who willfully maintains 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.

(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.

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including

general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1),* (2), and (3), (c), and (e)], to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)*], the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1),* (2), and (3), (c), and (e)], to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this *title [5 USCS § 552(b)(1)*];

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* 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 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;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(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;

(6) testing or examination material used solely 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; or

(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.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)*], the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival records.

(1) Each agency record which is accepted by the Archivist of the United States 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 Archivist of the United States 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.

(2) 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, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(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 [effective 270 days following Dec. 31, 1974], shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A) (i) the agency has independently verified the information; or

(ii) the Date Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report. The President shall biennally submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974 [note to this section].

(t) Effect of other laws.

(1) No agency shall rely on any exemption contained in section 552 of this *title [5 USCS § 552*] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this *title [5 USCS § 552*].

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4) (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5) (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities. The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) Applicability to Bureau of Consumer Financial Protection. Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

HISTORY:

(Added Dec. 31, 1974, P.L. 93-579, § 3, 88 Stat. 1897; Dec. 31, 1975, P.L. 94-183, § 2(2), 89 Stat 1057; Oct. 25, 1982, P.L. 97-365, § 2, 96 Stat. 1749; Dec. 21, 1982, P.L. 97-375, Title II, § 201(a), (b), 96 Stat. 1821; Jan. 12, 1983, P.L. 97-452, § 2(a)(1), 96 Stat. 2478; Oct. 15, 1984, P.L. 98-477, § 2(c), 98 Stat. 2211; Oct. 19, 1984, P.L. 98-497, Title I, § 107(g), 98 Stat. 2292; Oct. 18, 1988, P.L. 100-503, §§ 2-5, 6(a), 7, 8, 102 Stat. 2507-2514; Nov. 5, 1990, P.L. 101-508, Title VII, Subtitle C, § 7201(b)(1), 104 Stat. 1388-334; Aug. 10, 1993, P.L. 103-66, Title XIII, Ch 2, Subch A, Part V, § 13581(c), 107 Stat. 611; Aug. 22, 1996, P.L. 104-193, Title I, § 110(w), 110 Stat. 2175; Oct. 2, 1996, P.L. 104-226, § 1(b)(3), 110 Stat. 3033; Oct. 19, 1996, P.L. 104-316, Title I, § 115(g)(2)(B), 110 Stat. 3835; Aug. 5, 1997, P.L. 105-34, Title IX, Subtitle C, § 1026(b)(2), 111 Stat. 925; Nov. 10, 1998, P.L. 105-362, Title XIII, § 1301(d), 112 Stat. 3293; Dec. 17, 1999, P.L. 106-170, Title IV, § 402(a)(2), 113 Stat. 1908.)

(As amended March 23, 2010, P.L. 111-148, Title VI, Subtitle E, § 6402(b)(2), 124 Stat. 756; July 21, 2010, P.L. 111-203, Title X, Subtitle H, § 1082, 124 Stat. 2080.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Section 6 of the Privacy Act of 1974", referred to in subsec. (s)(1), is § 6 of Act Dec. 31, 1974, 88 Stat. 1908, which was repealed by § 6(c) of Act Oct. 18, 1988. Such § 6 of the Privacy Act formerly appeared as a note to this section.

The "Consumer Financial Protection Act of 2010", referred to in subsec. (w), is Title X of Act July 21, 2010, P.L. 111-203, which appears generally as *12 USCS §§ 5481* et seq. For full classification of such Title, consult USCS Tables volumes.

With respect to the Committee on Government Operations, referred to in this section, § 1(a)(6), (c)(2) of Act June 3, 1995, P.L. 104-14, which appears as a note preceding *2 USCS § 21*, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to the Committee on Government Reform and Oversight of the House of Representatives, except that it shall be treated as referring to the Committee on the Budget of the House of Representatives in the case of a provision of law relating to the establishment, extension, and enforcement of special controls over the Federal budget. The Committee on Government Reform and Oversight of the House of Representatives was renamed the Committee on Government Reform of the House of Representatives, pursuant to H. Res. No. 5, One Hundred Sixth Congress, Jan. 6, 1999.

Explanatory notes:

The bracketed subsection designator "(f)" has been inserted in subsec. (a)(1) to indicate the subsection of *5 USCS § 552* which Congress probably intended to cite. Subsec. (e) of *5 USCS § 552* was redesignated subsec. (f) of such section by § 1802(b) of Act Oct. 27, 1986.

"Government Accountability Office" has been inserted in brackets in subsec. (b)(10) on the authority of § 8 of Act July 7, 2004, P.L. 108-271 (*31 USCS § 702* note), which redesignated the General Accounting Office as the Government Accountability Office, and provided that any reference to the General Accounting Office in any law in force on July 7, 2004, shall be considered to refer and apply to the Government Accountability Office.

A former *5 USC § 552a* was transferred by Act Sept. 6, 1966, which enacted *5 USCS §§ 101* et seq., and now appears as *7 USCS § 2244*.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2011, I filed the foregoing **BRIEF OF APPELLANTS** with the Court via the CM/ECF system and by hand (the original and eight copies of) and served the foregoing **BRIEF OF APPELLANTS** on the following counsel of record via the CM/ECF system and first-class U.S. mail (two copies):

Mark B. Stern
Michael S. Raab
Elizabeth J. Shapiro
United States Department of Justice
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Washington, DC 20535

/s/ David Rothstein