The Privacy Act of 1974*

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When President Ford signed the Privacy Act of 1974, he partially assuaged the concern of those who were afraid that individual privacy might disappear in the computer age. The computer has made it economically feasible to collect in one location personal data previously scattered in the files of numerous organizations – private and governmental. Hence, while the Privacy Act controls the gathering and dissemination of personal information by Federal agencies, additional proposals, some already enacted, are in the legislative hoppers of several state legislatures and Congress. The temper of the times makes favorable action on more of these bills likely.

THE BACKGROUND

The COSATI Recommendations

In January 1969, the Committee on Scientific and Technical Information (COSATI) of the Federal Council of Science and Technology established a panel on the Legal Aspects of Information Systems. In June 1972, this group sponsored a symposium in Washington, and the report of the conference and the background papers have been published in "7 Honeywell Computer J." No. 1 (1973). The group proposed a set of principles for the guidance of the federal government.

Data Origination – In gathering information from individual citizens, Federal agencies have an obligation to disclose to them the purpose for which the information is being collected, to state clearly the use or uses to which it will be put, to identify the governmental and nongovernmental individuals and organizations that will be given access to it, and to indicate whether the individual’s name will be associated, either directly or indirectly, with the information. Informed consent is not necessary when information is required by an Act of Congress. The use of coercion or intimidation in gathering the information must be avoided, the collec-

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* Reprinted from "The Practical Lawyer" September 1, 1975, pp. 15-24. Portions of this article have previously appeared in the "Computer Law Service" (Callaghan & Co.) and "Computer Law and Tax Report" (Warren, Gorham & Lamont) [Editor’s Note].
tor of data should verify its accuracy, and the agency should not engage in repetitious information-gathering exercises.

Data Storage and Dissemination - Agencies have an obligation to develop and enforce appropriate personnel standards for employees who have access to, or handle, personal information. The procedures should assure accuracy and proper processing of personal information. Legitimate scope of access should be clearly defined, and if the data is to be put to uses not originally contemplated, the consent of the person from whom the information was originally gathered should be obtained and the individual should be granted access to the information recorded about him and procedures should be established that enable him to insure the accuracy of the information to determine whether his files have been abused.

Data Elimination - Personal information should be thought of as having a finite life span. When a Federal agency determines that personal information is no longer of utility and should be destroyed, that decision should be communicated to any other governmental or private agency or organization that has received a copy of the data, which should be required to destroy that copy, or other copies that may have been made. Citizens should have the right to request the destruction of personal information that is maintained without statutory authority.

The Secretary's Advisory Committee on Personal Data Systems

On February 27, 1972, then Secretary of Health, Education and Welfare, Elliot L. Richardson, established the Secretary's Advisory Committee on Personal Data Systems to analyze the consequences of using computers to keep records about people. Its report, entitled Records, Computers, and the Rights of Citizens, was released on July 30, 1973.

It recommended Federal legislation:

- Guaranteeing and individual's right to discover and to obtain a copy of information that is being maintained about him in computerized systems;
- Allowing a person to contest the accuracy, pertinence, and timeliness of any information in a computer-accessible record about him;
- Requiring record-keeping organizations to inform individuals on request, of all uses made of information that is being kept about them in computerized files; and
- With respect to Social Security numbers:

a) Giving each individual a right to refuse to disclose his or her number to any person or organization not authorized by federal statute to collect and use the number; and
b) Prohibiting organizations with authority to use the number from disclosing it to organizations lacking such authority.

Numerous bills were introduced in the 92nd and 93rd Congress, and the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, was passed at the end of the 1974 session. It was signed on January 1, 1975.

THE PROVISIONS

Coverage

The major portion of the Privacy Act, which becomes effective on September 27, 1975, applies only to the federal government and covers all executive departments, the military, independent regulatory agencies, government corporations, and government-controlled corporations such as the Federal Reserve Banks and the Federal Home Loan Corporation. 5 U.S.C. §§ 552a(a)(1) and 552(e). (All subsequent citations will be to 5 U.S.C.). It does not apply to Congress, the governments of United States territories of possessions, the District of Columbia, or the federal courts. It is still not clear whether it covers court-martial records.

If a federal agency contracts with a private business or a state or local government to run the agency's record system, the contractor's employees are considered to be the agency's employees. § 555a(m).

The term « record » is defined broadly as « 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 ». § 552a(4).

The Act uses the phrase « system of records » to define a group of records from which information can be retrieved by using an individual's name or other identifying particular. § 552a(5). The term « statistical record » means a record in a system of records used for research or reporting purposes and not for making determinations about individuals. Census data is excepted from this definition. § 552a(6).

Data Collection

An agency must inform in writing each individual from whom it requests information concerning:

— The authority under which the information is solicited;
— Whether disclosure is mandatory or voluntary;
— The principal purposes for which the information will be permitted to be used;
— The routine uses that may be made of the information; and
— The effects on him if the information is not provided.

To the greatest extent practicable, it must collect information directly from the individual whose rights, benefits, and privileges under Federal programs may be extremely affected by the information. § 552a(e)(2) and (3).

**Data Retention**

An agency may maintain information about an individual only if it is « relevant and necessary to accomplish » an agency purpose required by law. § 552a(e)(1). An agency must keep records used by it to make determinations about an individual « with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual ». § 552a(e)(3).

Records cannot be kept that describe an individual’s exercise of first amendment rights unless a statute or the individual himself authorizes the keeping of the record, or the record is pertinent to and within the scope of an authorized law enforcement activity. § 552a(e)(6).

**Data Disclosure**

An agency may not disclose « by any means of communication » any record to any person or another agency § 552a(b). Disclosure may be made:
— Upon the written consent of the individual to whom the record pertains;
— To the agency personnel who need the information to perform their duties;
— When required by the Freedom of Information Act, 5 U.S.C. § 552;  
— For a purpose compatible with the purpose for which it was collected;
— To the Bureau of the Census, for planning or carrying out a census or survey;
— For statistical research, in a form that is not individually identifiable;
— To the National Archives, if the record has sufficient historical value, or to the Administration of General Services for a determination of historical importance;
— Upon a written request specifying the portion of the record sought and the law enforcement activity involved, to an agency or instrumentality of any governmental jurisdiction in the United States for a civil or criminal law enforcement activity authorized by law;
— When the health or safety of the individual is involved, providing that notification of disclosure is sent to the individual’s last known address;
— To Congress or to any congressional committee with jurisdiction over the subject matter;
— To the Comptroller General in the course of performance of his duties; and

— Pursuant to a court order, if reasonable efforts to notify the individual involved are made once the legal process becomes a matter of public record. See § 522a(e)(8).

Before an agency discloses an individual record to any person other than an agency, unless the disclosure is required by the Freedom of Information Act, it must make reasonable efforts to assure that the record is « accurate, complete, timely, and relevant for agency purposes ». § 522a(e)(6).

For most of these disclosures, the agency must make and retain for at least 5 years a record of the date, nature, and purpose of the disclosure, and to whom it was made. § 552a(c)(1) and (2). This record must be available to the individual named in the disclosure. § 552a(c)(3).

An agency must permit an individual access to his record or information about him, and an opportunity to make a copy. § 552a(d)(1). He may be denied access to any information compiled in reasonable anticipation of a civil action or proceeding. § 552a(d)(5).

Data Amendment

An individual may request amendment of a record about him. This request must be acknowledged within 10 days of receipt. Then either the correction is made, or he must be notified of the refusal of the request and the reasons therefor and of the procedures for a review of the refusal. He may appeal the refusal to amend his record, and a final determination must be made, normally within 30 working days.

If still dissatisfied, the individual may seek judicial review in the Federal District Court and he may file with the agency a concise statement indicating the reason for his disagreement. Thereafter, this statement of disagreement must accompany that portion of the record that he disputes. § 552a(d)(2), (3), and (4). The agency must also inform those to whom a recorded disclosure was made of any corrections or disagreements by the individual with the accuracy of the record. § 552a(c)(4).

Data Protection

An agency must « establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records », § 552a(e)(10). It must also establish rules of conduct for persons involved in the operation and maintenance of any system of records. § 552a(e)(9).

Exemptions

The heads of some agencies may establish rules, in accordance with the Administrative Procedure Act, that exempt any record system in their
agency from the provisions that individuals have access to their records and that data be collected in accordance with Privacy Act’s specifications. The agency head can also exempt a system from some of the Privacy Act’s provisions for accuracy and criminal penalties for non-compliance. These exemptions are permitted only if the record system is maintained either by the Central Intelligence System or by an agency whose principal activity is in the criminal justice field and the records consist of information identifying individual offenders or are compiled for the purpose of a criminal investigation or about an individual at any criminal law enforcement stage. § 552a(j).

Furthermore an agency head may also by rule exempt certain record systems from the Privacy Act’s requirements that:

— The identity of those who examined an individual’s records be disclosed;
— An individual have access to his records;
— Only relevant information be maintained;
— Agency procedures for individual access and information be published annually; and
— The agency establish rules for individual access. § 552a(k).

These exemptions apply only to records that are:

— Classified as secret in the interests of national defense and foreign policy;
— Composed of investigatory material required for law enforcement purposes, unless the information will lead to a denial of an individual’s right of privilege under federal law;
— Maintained in connection with the protection of government personnel by the Secret Service;
— Required by statute to be maintained solely for statistical purposes;
— Investigatory data compiled for the purpose of determining suitability for federal employment, military service, contracts, or access to classified material, but only insofar as disclosure would reveal the identity of the government’s source;
— Testing and examination materials used to determine qualifications for employment or promotion, if disclosure would compromise the objectivity of the testing process; and
— Materials used to evaluate promotion potential in the Armed Services to the extent that access would disclose a source that gave information under a promise of confidentiality.

The Freedom of Information Act also contains a number of exemptions to its disclosure requirements. These exemptions include classified material, personnel medical files, and specified investigatory records. Realizing that an agency might rely on these exemptions to withhold an individual’s record, Congress specifically provided that Freedom of Information Act
exemptions cannot be used to withhold a record from an individual that is accessible to him under the Privacy Act. § 552a(q).

Public Notice

Every agency must publish annually in the Federal Register a notice of the existence and character of the system of records it maintains. The notice must include information about:

— The name and location of the system;
— The types of individuals on whom records are maintained;
— The categories of the records in the system;
— Each routine use of the records, including the categories of users and why they use it;
— The agency’s policies and practices regarding the storage, retrievability, access controls, retention, and disposal of records;
— The title and address of the agency official responsible for the system;
— The procedure by which the individual can request notification if the record system contains information on him;
— How an individual can obtain access to his record and contest its contents; and
— The categories of sources of records that are in the system. § 552a-(e)(4).

Before establishing or altering a record system, an agency must notify both Congress and the Office of Management and Budget sufficiently in advance to permit them to evaluate the “probable or potential effect of such proposal on the privacy or other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.” § 552a(o).

In addition, agencies must publish a notice of any new use or intended use of the information in their systems in the Federal Register, and give interested persons an opportunity to submit comments. § 552a(e)(11).

Civil Remedies

Any agency may be civilly sued in the United States District Court in the district in which the complainant resides or has his place of business or the agency records are situated, or the District of Columbia, if it:

— Refuses an individual access to his records;
— Refuses to amend an individual’s record in accordance with his request, or fails to review the denial;
— Fails to maintain an accurate, relevant, timely, or complete record about an individual who is adversely affected thereby; or
— Fails to comply with any provision of the Act or any rule promulgated thereunder in a way that adversely affects any individual. § 552a-(g)(1).
The District Court determines the matter de novo. It may order the agency to produce or amend a record and to pay attorney and litigation fees where the complainant has substantially prevailed. § 552a(g)(2), (3), and (5).

Where the agency action was intentional and willful and affected the individual adversely, he may recover his actual damages, but in no case less than $1,000, as well as attorney fees and costs. § 552a(g)(4).

Criminal Penalties

Agency personnel are guilty of a misdemeanor and subject to a maximum fine of $5,000 if they willfully:
— Disclose information in violation of Act knowing that the disclosure is prohibited; or
— Maintain a system of records without publishing annually in the Federal Register a notice of the existence and character of the system.

Any person who knowingly and willfully requests or obtains any record about an individual under false pretenses is similarly punishable. § 552a(1).

Mailing Lists

An individual’s name and address may not be sold or rented by an agency unless specifically authorized by law. § 552a(n).

Social Security Number

No federal, state, or local government agency may deny any individual any right or benefit because of his refusal to disclose his social security account number, unless the disclosure is required by federal statute, or the agency operated a system of records prior to January 1, 1975, where disclosure of the number was required by statute regulation for identification purposes. Pub. L. No. 93-579, 88 Stat. 1895, § 7(a)(1).

Every government agency requesting a social security number must inform the individual whether the disclosure is mandatory or voluntary, by what authority the number is solicited, and what uses will be made of the number. Pub. L. No. 93-579, 88 Stat. 1895, § 7(6).

The Privacy Protection Study Commission

Section 5 of the Privacy Protection Study Commission, which is required to:
— Study data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in
order to determine the standards and procedures in force for the protection of personal information; and
— By June 10, 1977, recommend to the President and Congress the extent, if any, to which the requirements and principles of the Privacy Act should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption.

In the course of this study, the Commission may look into the interstate transfer of information about individuals, both manually and by electronic means; the operation of data banks and information systems that affect privacy and personal rights; the use of social security numbers, license plates, and other universal identifiers in data banks; and the matching and analysis of personal data in automobile records, telephone directories, and the like. The Commission may also investigate personal information activities in the medical, insurance, educational, employment, financial, telecommunications and travel industries.

Four areas that the Commission must examine are:
— Whether a person who maintains mailing lists should be required to remove an individual's name upon the individual's request;
— Whether the Internal Revenue Service should be prohibited from transferring individual data to other agencies and to state governments;
— Whether the federal government should be liable for general damages for willful and intentional failure to comply with any section of the Privacy Act to the detriment of an individual; and
— Whether or how the standards for security and confidentiality of records should be applied when a record is disclosed to a person other than an agency.

The Commission will also examine the laws and regulations now in effect to determine whether they are consistent with privacy and the other guarantees in the Constitution, and may also investigate what specific categories of information should not be collected in order to preserve the individual's right to privacy.

CONCLUSION

The Privacy Act seeks to permit an individual to determine what information and records about him are being collected, maintained, used, and disseminated by the Executive Branch of the federal government, and to assure their correctness and completeness. It is one response to the common fear of undue surveillance and interference by "Big Brother." Because it is a reaction to fear of privacy invasion, further congressional and state legislation, particularly with reference to the private sector, is very likely.