

**THE FREEDOM OF INFORMATION ACT**  
**AND**  
**THE PRIVACY ACT OF 1974**

As an investigator, you should familiarize yourself with the basic rules and regulations that govern the Freedom of Information Act and the Privacy Act of 1974. These rules and procedures are important for you in the performance of your job, and your attention to the rights and restrictions governing disclosure under both acts is critical to you in the performance of your investigation. In addition, your failure to comply with these acts could result in Court initiated disciplinary action, as well as criminal and/or civil penalties to you and/or your agency.

The **Freedom of Information Act** (FOIA), 5 U.S.C. § 552, gives the public a right of access to records in the possession of Federal agencies, including the records and files of your office. Each agency has its own FOIA procedures. Generally, they require that requests for records be made in writing and include details that will reasonably describe the document. The details would usually include the date or time period involved and any other identifying details, like the names of principal persons or institutions involved, or the subject matter

of the file.

Records requested under FOIA may be withheld only by reason of one or more of the nine exemptions in the law.<sup>1</sup> As a general rule, agencies seek to protect many kinds of information they collect as long as the case remains under investigation and/or in negotiations. If a request were made under FOIA for records contained in a complaint file, your agency likely would use one of the following exemptions if it wants to protect the records from disclosure:

Exemption 5 -- inter/intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.

Exemption 6 -- personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 7 -- investigatory files compiled for law enforcement purposes, to the extent that the production of such records would:

- (a) interfere with enforcement proceedings;
- (b) deprive a person of the right to a fair trial;

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<sup>1/</sup> "Whenever . . . the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously . . . the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted. . . ." 5 U.S.C. § 552(F). Under the Administrative Procedure Act, agency personnel act arbitrarily if the agency does not follow its procedures. The potential for arbitrary action is the greatest where unauthorized employees decide to send a determination of a denial of access where the agency regulations give the denial authority to a particular office only.

- (c) constitute an unwarranted invasion of personal privacy;
- (d) disclose the identity of a confidential source; and
- (e) disclose investigative techniques;... .

These exemptions may be used in the case of both open and closed complaints.

However, the exemption can not generally be used to deny access to an entire file; rather, those parts of the file that will be withheld will be redacted, while other records or "reasonably segregable" portions of records must be released.

Even if you have a Privacy Act Release Form (see discussion below), you should not in most instances release the name of the complainant or other information that could identify him or her, or would constitute an unwarranted invasion of his or her personal privacy, in response to a FOIA request for a file.

The **Privacy Act of 1974**, 5 U.S.C. §552a, gives individuals the right of access to records about themselves that are "name retrievable" and protects individuals from misuse of personal information held by a Federal agency. The Privacy Act regulates the collection, maintenance, use, and dissemination of certain personal information in agency files. The law applies to records that are kept and that can be located by the individual's name, social security number, or other system with a personal identification system. The law applies to all such

information, whether stored in computer systems or within file jackets.

Investigators, as agents of the government, are responsible for knowing the provisions of the law and applying the law's safeguards in their everyday operations.<sup>2</sup>

Your agency should have a Privacy Act consent or release form that is provided to each complainant for signature. (See sample release form at **TAB \_\_\_**; the release form should generally be attached to your complaint form.) If the complainant is not willing to sign the release form and you must release his or her name to the recipient in order to investigate the complaint, you should notify the complainant in writing that the failure to sign the form will prevent you from investigating the complaint. Give the complainant an additional time period (15 days) to return the form and, if it is not received, close the complaint. In

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2/ The Act provides criminal and civil penalties for violations. For example, it is a crime for a Federal employee:

- ▶ to disclose information, knowing that the disclosure is prohibited by the Act;
- ▶ to maintain willfully a secret system of records; and
- ▶ to request or obtain a record about another person under false pretenses.

An individual who violates the Act may be fined up to \$5,000 for a violation. Civil remedies are also included. The agency can be assessed damages, plus attorneys' fees and other litigation costs, when it errs in its duty to provide access to a citizen who wants to examine his/her file, or when it fails to accede to a request for amending the records.

instances in which you are dealing with a problematic complainant, you may wish to send the request for the signed consent form by certified mail, return receipt requested.

You should keep the following guidelines in mind:

- 1) You may not release the name of the complainant to the recipient unless you have a signed release form.
- 2) You should not release the name of the complainant(s) unless you need to in order to conduct your investigation.

For example, if a complaint alleges that a recipient maintains a discriminatory policy or procedure, it may not be necessary to release the name of the complainant in order to conduct the investigation. You may only need to release his or her name in order to provide relief for a violation you have found; at that point, the complainant may be among a group of victims you have identified, so his or her identity can be protected.

- 3) You may not close a complaint, even though the complainant refuses to sign the release form, unless the inability to release his or her name makes you unable to investigate the complaint.
- 4) The complainant is not required by law to give confidential or personal information about himself or herself to you. However, you may close the complaint if the failure of the complainant to cooperate with you makes it impossible to investigate the complaint.
- 5) It is a good practice to also obtain a signed release from witnesses you interview.
- 6) Written permission of the subject of the file must be obtained

prior to the release of documents to a third party, even when the third person is a lawyer representing the complainant.

You should contact your agency's FOIA/Privacy Act office for questions concerning how to comply with these two laws.