REPORT NO. 1 OF THE SECTION OF ADMINISTRATIVE LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association favors amendments to Exemption 7(D) of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to afford clearer protection to all confidential sources and to make clear that all information furnished to criminal or national security investigations by confidential sources is exempt from disclosure.

REPORT

Background

Congress enacted the Freedom of Information Act in 1966 to provide the public with a legal right of access to government records, subject only to seven specifically enumerated exemptions. The statute requires publication of certain information and disclosure of other “agency records” to “any person” requesting them. This right of access is enforceable through de novo judicial review of agency decisions to withhold information.

Following hearings which revealed the failure of the FOIA to provide effective and timely public access, Congress amended both the procedures and exemptions of the Act in 1974. A further amendment was made to one exemption two years later.

Congress has been considering yet additional amendments in recent sessions and can be expected to do so again in the current Congress.

Since the early 1960s, the American Bar Association has participated in legislative activities relating to the FOIA. It supported the enactment of the legislation in 1966 and revision of it in 1974. Administrative Law Section representatives appeared at congressional hearings in 1974 and proposed amendments based on resolutions adopted by the House of Delegates.

In the light of the renewed congressional activity on this subject, the Administrative Law Section has studied the FOIA again. So have other sections. In 1981, the Administrative Law Section and the Section of Corporation, Banking and Business Law developed recommendations relating to protection of business information. These were approved by the House of Delegates at the 1982 Midyear Meeting. Recommendations of the Administrative Law Section alone, dealing with matters other than business records, were on the House's agenda for the 1982 Annual Meeting, but consideration of them was deferred. Some of these were approved by the House at the 1983 Midyear Meeting. Others were approved at the 1983 Annual Meeting; one of the proposals was put over for future consideration and is presented herein with certain modifications approved by the Council of the Administrative Law Section in October 1983.

Discussion

Under Exemption 7 of the FOIA (section 522(b)(7)), investigatory records compiled for law enforcement purposes can be withheld from disclosure to the extent, and only to the extent, that disclosure would cause specifically enumerated harms. The scope of the exemption and its history are detailed in NLRB v. Robins Tire and Rubber Co., 437 U.S. 214 (1978).

One of the grounds for nondisclosure of law enforcement information (subsection D) is that production of the records would "disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence

*The recommendation was amended, then approved. See page 293.
investigation, confidential information furnished only by the confidential source.

The legislative history of the 1974 Amendments to the FOIA make quite plain that Congress intended to provide blanket protection for all information furnished by a confidential source to a criminal or national security investigation. See statement of Senator Phillip Hart, 120 Cong. Rec. 36871 (1974). This construction has generally been adopted in the case law. E.g., Radovich v. United States Attorney, 658 F.2d 947 (4th Cir. 1981).

Law enforcement agencies, however, fear that the language might be read differently. Some believe that it may be construed to protect only information which is found to reveal the identity of a confidential source. Others believe that "non-confidential" information, even if furnished by a confidential source, is not protected. These agencies fear that the processing of FOIA requests by analysts who inevitably are unfamiliar with particular investigations will lead to disclosure of information which could be used to identify a confidential source. President Ford vetoed the 1974 Amendment, which contained this language, partly because of this fear.

As the sponsor of the language made clear, however, these fears are not well-founded. The law enforcement agency "not only can withhold information which would disclose the identity of a confidential source, but can also provide blanket protection for any information supplied by a confidential source." Statement of Senate Phillip Hart, supra.

Nevertheless, the perception remains that confidential sources are not fully protected; the volume of FOIA requests filed by prisoners, as well as testimony before congressional committees, make clear that requests are often filed in the hope the documents will in fact reveal sources. Law enforcement agencies are also concerned that sources themselves still perceive a risk of identification and thus decline to cooperate with law enforcement. This reduction in cooperation can harm law enforcement, whether or not the perception is justified.

Amending the confidential source exemption as recommended below would bring it into line with congressional intent and judicial construction. The recommended amendment would settle any doubts that law enforcement agencies may still have about their right to protect confidential sources. It is consistent with legislative language approved unanimously by the Senate Judiciary Committee (S. 794) in July 1983.

The change would not affect, however, the meaning of the term "confidential source," which was defined by the 1974 FOIA Amendments Conference Report as a person who "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." S. Rept. 93-1200, 93rd Cong., 2d Sess. at 13.

The proposed amendment also would not affect criminal defendants' constitutional rights to obtain information, for example, the name of an eyewitness, which is relevant and useful to their defense. See, McCray v. Illinois, 386 U.S. 300 (1967); United States v. Valenzuela-Bernal, 50 U.S.L.W. 5108 (1982).

The applicable rules of discovery — in civil as well as criminal litigation — would remain unchanged by this proposed amendment to the FOIA. Rights of litigants under Fed. R. Civ. Proc. Rule 26 and Fed. R. Crim. Proc. Rule 16(a) would thus be unaffected by this change.

To make clear that line-by-line review is not required and lessen both the risk of inadvertent disclosure and the perception of diminished source protection, subparagraph D of Exemption 7 should be amended as follows (new material underlined; deleted language in brackets):

(D) (ii) be reasonably likely to disclose the identity of a confidential source, [and] or (ii) in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose information furnished [only by the] by a confidential source.

MARTIN F. RICHMAN
Chairman
REPORT NO. 2 OF THE SECTION OF ADMINISTRATIVE LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association urges the Department of Justice, the Office of Management and Budget, and other Federal agencies to adhere to regulations and guidelines which provide that, to the extent a person seeks access to individually identifiable records concerning himself, he shall receive, in addition to records he is entitled to receive under the Privacy Act, access to all records required to be disclosed under the Freedom of Information Act.

REPORT

I. Recent Justice Department and OMB Proposals

The Department of Justice proposed by Federal Register Notice of August 8, 1983 (48 Fed. Reg. 35892) a revision of its regulations implementing the Freedom of Information and Privacy Acts, which purports to address solely the procedural aspects relating to the handling of requests under these two laws. Although the proposed regulations made no affirmative reference to this point, the effect of their adoption would be deletion of a section in its present regulations (28 C.F.R. § 16.57) which makes clear that whenever an individual requests information pertaining to himself, he is entitled to receive access to all those records to which he would be entitled under either the Privacy Act or the Freedom of Information Act (FOIA). Under the new proposal, the Privacy Act would apparently become the exclusive avenue of access by an individual to records concerning himself.

A direct statement of this new government policy appears in a proposed Guidance on Implementation of the Privacy Act, published by the Office of Management and Budget ("OMB") in the August 10, 1983 Federal Register (48 Fed. Reg. 36359). There OMB states flatly that the Privacy Act and the FOIA should be read to allow an agency to deny access to records sought by a subject individual under the FOIA on the basis that

those records are exempted from release under the Privacy Act. This interpretation proposes to read the Privacy Act as a statute specifically prohibiting disclosure under exemption 3 of the FOIA.

The principle embodied in these proposed Justice Department regulations and OMB guidelines, would, if adopted, establish a government-wide policy, inconsistent with the disclosure requirements and policies of the FOIA and Privacy Act. This conclusion follows generally from the discussion below.

II. Judicial Authority, Agency Positions, and Commentators’ Conclusions

A. Judicial Authority

The circuit courts of appeals have split evenly in decisions construing whether the Privacy Act constitutes an independent basis for exempting information which would otherwise be required to be disclosed under the Freedom of Information Act. Two circuits have ruled that the Privacy Act falls within the FOIA's third exemption—that is, constitutes “a b(3) statute”—and have refused to order disclosure of information which, but for the restrictions contained in the Privacy Act, would have been made available to the requester under the Freedom of Information Act: Seventh Circuit—Shapiro v. DEA, Nos. 82-C-88 and 243, 7th Cir. (Nov. 16, 1983); Terez v. Kelly, 399 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); Fifth Circuit—Painter...
v. FBI, 615 F.2d 669 (5th Cir. 1980). A few district court cases have also taken this position. E.g., Heinz v. Immigration and Naturalization Service, No. C 80-1210 SAW (N.D. Cal., Dec. 18, 1981).

Standing on the other side of the proposition (and containing the most detailed analysis and extensive consideration of legislative history) is the District of Columbia Court of Appeals, Greentree v. Customs Service, 674 F.2d 74 (D.C. Cir. 1982), and the Third Circuit, Porter v. Department of Justice, No. 82-1833 (Sept. 15, 1983); Provenzano v. Department of Justice, No. 82-5681 (Sept. 15, 1983). One district court opinion is in accord with this view, Antonelli v. FBI, 536 F. Supp. 568 (N.D. Ill. 1982), clarified by 553 F. Supp 19, appeal pending.

B. Agency Positions

Under the Freedom of Information Act, 5 U.S.C. § 552(d), the Department of Justice is given the role of lead agency for the purposes of reporting information and providing policy guidance to federal agencies. OMB, on the other hand, is charged with developing “guidelines and regulations for the use of agencies in implementing” the Privacy Act and with providing “continuing assistance to and oversight of the implementation” of that law. P.L. 93-579, § 6.

1. Department of Justice. Shortly after enactment of the 1974 Amendments to the Freedom of Information Act and the Privacy Act, the Justice Department advised the Internal Revenue Service that the Privacy Act should be considered the exclusive avenue available to an individual seeking information about himself. Following an exchange of correspondence with Congress, the Department published section 16.57 of its regulations (proposed to be deleted by the August 8 revised regulations) which affords access to an individual seeking records about himself that is coextensive with the maximum disclosure provided under both the Privacy Act and the FOIA. The Department did note in those regulations that their issuance was “not to be deemed a waiver of the government’s position that the materials in question are subject to all of the exemptions contained in the Privacy Act.”

2. Office of Management and Budget. Initially, OMB circulated the DOJ-IRS letter to all agencies, associating itself with the position that the Privacy Act was a b(3) statute. After the Justice Department modified its view on that subject, OMB adopted a policy that would assure that “individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.” 40 Fed. Reg. 56742-43. During consideration of the Greentree appeal the court was notified that OMB was considering a revision of this policy; the proposal published on August 10 constitutes such a revision.

C. Commentators

The Privacy Protection Study Commission and various statements and reports from the Congress, as well as commentators on FOIA and privacy, have uniformly held the view that the Privacy Act is not an exemption 3 statute and should not be read to provide the exclusive right of access an individual might have to government records pertaining to himself. A sampling of the authorities on this point is cited in Greentree, 674 F.2d at 85-86 n.28, 87 n.29.

III. Arguments and Analysis

A. Statutory Framework

1. FOIA. The FOIA was originally enacted in 1966 to establish firmly the presumption that all government records were available to the public, with only those exceptions contained in nine specific exemptions, and to provide for judicial enforcement of that public right of access. Among the original exemptions in the FOIA is one dealing with protection of individual privacy. The sixth exemption (5 U.S.C. § 552(b)(6)) excepts from mandatory disclosure under the Act “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

A number of amendments to the FOIA were made in 1974, strengthening the procedural rights of the public to obtain access to agency records and narrowing two exemptions—the first (relating to classified information) and the seventh (concerning law enforcement records). While exemption 7 had originally applied broadly to all “investigatory files compiled for law enforcement purposes,” the amended exemption covered only such investigatory files whose disclosure would cause certain specifically enumerated harms. Item (C) enumerated in that exemption refers to information the disclosure of which would cause an unwarranted invasion of personal privacy.

In 1976 the FOIA was again amended to narrow and clarify application of the third
exemption. Exemption 3 of the FOIA now reads in full:
This section does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
Finally, the FOIA provides, in subsection (c), that “this section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.”
2. Privacy Act. The overriding goal of the Privacy Act was protection of personal privacy for all individuals in their dealings with and relationship to the federal government. The granting of a private right of access to government records was only one element in its overall scheme. Other were: limiting the government’s ability to collect and maintain data; requiring that the existence and characteristics of personal information systems be published; restricting disclosure to third persons of personal information, both inside and outside the government; and according individuals the right to correct erroneous personal records. The Privacy Act applies only to “records” defined as agency files or documents about individuals, and “systems of records” defined as a group of agency records from which information is retrieved by the name of an individual or by some other person identifier. (5 U.S.C. § 552a(e)-(f)).
The Privacy Act is founded on the basic principles, stated in the legislation, that there should be no secret federal information in records systems on individuals and that the dissemination of and access to personal information in records systems should be strictly controlled. The Act represents an attempt to balance the government’s interest in obtaining information and maintaining its confidentiality, on the one hand, and the interest of individuals in knowing what information the government has on them and obtaining access to that information, on the other.
Subsection (g) of the Privacy Act generally provides procedures under which an individual can obtain access to records, while subsection (b) contains restrictions on disclosure. That subsection provides:
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 . . . required under section 552 of this title [FOIA].
Subsection (b) additionally authorizes the agency to disclose material covered by the Privacy Act under ten other specified circumstances.
There are two sets of permissive exemptions in the Privacy Act. The first is a general one: Subsection (j) allows agencies to exempt systems of records from various requirements of that act—including the access provisions for the subject individual in subsection (d), but not the conditions of disclosure (allowing FOIA release) in subsection (b)—if the system is maintained by the CIA or a criminal law enforcement agency. The second is a set of specific narrower exemptions in subsection (k)—again, exemptions from the individual access provisions but not the disclosure conditions—covering classified records, investigatory material compiled for law enforcement purposes, Secret Service files, certain statistical records, federal employment testing and examination material, and certain Armed Services evaluation material.
Additionally, subsection (d), authorizing individual access to records, provides in clause 5 that “nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.”
Finally, the Privacy Act prohibits agencies from relying on any FOIA exemption to withhold information otherwise accessible under the Privacy Act. 5 U.S.C. § 552a(q).
B. Analysis of Statutory Language
The Justice Department now argues that the only way to give full effect to both the Privacy Act and the FOIA is to prevent a requester from being able to evade the subsection (j) and (k) exemptions of the Privacy Act by use of the FOIA to obtain records on himself. It also points to many procedural and substantive inconsistencies between the two laws and concludes that the more specific, restrictive, and later-enacted provisions of the Privacy Act must be read as exclusively applicable to all first-party requests, not just to the areas of incremental access which that Act provides beyond that of the FOIA.
Despite these arguments, it is clear that to hold the Privacy Act as the exclusive means of access to records by a subject individual is to nullify a significant portion of the
Freedom of Information Act, since that Act could no longer provide access for an individual to material relating to himself; for example, if that material is maintained by the CIA or a law enforcement agency. Why would Congress in 1974 go through so much trouble to amend FOIA exemptions 1 (classified information) and 7 (law enforcement records) if those exemptions were to be rendered meaningless in a large percentage of cases by Privacy Act exemptions enacted only a few weeks later, without any statement of intent to do so?

Further, the Privacy Act exemptions in both subsections (j) and (k) specify that they may be used to restrict individual access only under subsection (d) of the Privacy Act, but not disclosure to third parties as authorized by subsection (b), including a FOIA requester as authorized in subsection (b)(2). Moreover, when agencies choose to adopt exemptive rules, they must give notice and state "the reasons why the system of records is to be exempted from a provision of this section"—i.e., of the Privacy Act, § 552a, not the FOIA, § 552.

Section 552a(b)(2), quoted above, was inserted in the Privacy Act specifically to preserve the public's right to continue to obtain personal information under the FOIA.

The court in Shapiro, supra, decided that the Privacy Act exemptions would be emasculated if they do not limit FOIA disclosures. That view is mistaken, however, for it overlooks the important application of those exemptions to other Privacy Act requirements, for example, those relating to collection of information (in sections (e)(1)-(e)(5) and (b)) and those giving individuals rights relating to correction of erroneous data (in section (d)). In these respects, the exemptions retain full force and meaning.

C. Legislative History

The legislative history of the Privacy Act is not without ambiguity on the question of the interface between that law and the Freedom of Information Act. A more careful consideration of the final proposed compromise in language for the Privacy Act, through the mechanism of a House-Senate conference, would have brought greater enlightenment on this issue; a staff memorandum inserted into the Congressional Record upon adoption of the final language by both Houses provides the only indication of congressional intent on many important issues. On balance, however, the legislative history supports the conclusion that the Privacy Act was not intended by Congress as the exclusive means of first-party access to records.

There are three principal arguments for the Justice Department's position that Congress intended the Privacy Act to be a b(3) statute. The first relies on numerous statements in the legislative history to the effect that Congress was affording added protection for certain criminal justice information. While such broader protection could be had if the FOIA continued to apply to such information, Congress seemed only to be referring to added protection in terms of the incremental Privacy Act rights afforded individuals. The second argument is based on the fact that an earlier bill passed by the Senate clearly prohibited use of the Privacy Act to withhold information disclosed under the FOIA. That precise language was not contained in the final legislation. However, the present section b(2) (referring to disclosures required by the FOIA) appears to have been inserted in its stead. The third argument is that the Privacy Act was passed following enactment of the Freedom of Information Act and its 1974 Amendments, and is more precise and narrowly drawn as to those records addressed by it. Hence, Congress must have intended the later and more narrowly drawn statute to control over the earlier, more general one. In fact, the two laws were enacted almost contemporaneously, and the third exemption of the FOIA was actually amended two years after the Privacy Act was passed.

The stronger side of the legislative history debate supports the conclusion that the Privacy Act was not intended to foreclose access under the FOIA. Early versions of the House privacy bill did not exempt from the disclosure restrictions of section 552a(b) information required to be disclosed under the FOIA; the House recognized that this might make individually identifiable information exempt from public disclosure, and urged agencies generally to continue to make certain kinds of this information available. The final legislative product contained the new section 552a(b)(2), modifying the House restriction on disclosure so that the Privacy Act would not interfere with public access under the FOIA. The compromise was explained in legislative history as being "designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information" under the FOIA. (This "status quo" language was echoed in President Ford's statement upon signing the Privacy Act into law: "I am disappointed that the provisions for disclosure of personal information by agencies
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make no substantive change in the current
law [which], does not adequately protect
the individual against unnecessary disclo-
sure of personal information.")

Further, on the question whether the
Privacy Act's enactment after passage of the
FOIA b(7) amendments should be taken as
evidence of congressional intent to resolve
conflicts in favor of the later-enacted statute,
Congress would have had no reason to labor
over the language of exemption 7 if we
intended to allow agencies to withhold all
law enforcement files in the systems of
records, and Congress could not have
intended, by implication in the Privacy Act,
to cut such a large loophole in legislation it
drafted just a few weeks earlier.

Additionally, the two sections of the
Privacy Act requiring agencies to make
efforts to assure accuracy of records before
their release (§ 552a(e)(6)) and to keep an
accounting of disclosures (§ 552a(c)(1))
especially from these requirements
any disclosure under the FOIA. Congress
must, therefore, have contemplated contin-
disclosures under the FOIA of records
covered by the Privacy Act. There is no
suggestion, however, that Congress intended
to distinguish third-party FOIA requests
from subject requests under the FOIA.
(Accounting and accuracy requirements
would in fact have made sense if only
third-party requests were contemplated.)

Finally, as to the inconsistencies between
the two statutes, both OMB and Justice,
as well as the rest of the federal establish-
ment, have found no insurmountable practical
problems with coordinated implementation
of the two laws over the past eight years
(save maintaining accurate statistics seg-
regating Privacy Act and FOIA costs and
requests).

D. Third-party and First-party Anomalies

One of the strongest arguments against the
government's current position that the
Privacy Act is a b(3) statute and thus
provides exclusive access to first-party
requesters seeking records on themselves is the
do-called "third-party anomaly": Under
this interpretation of the law, third-party
requesters would have greater access under
the FOIA to a record about an individual than
that individual would have on his
own.

The exemptions in subsections (i) and (k)
of the Privacy Act, as noted earlier, do not
apply to subsection (b) of that Act which
prohibits disclosure without consent of the
subject unless disclosure is required under
the FOIA. Thus the subject of a CIA or FBI
file could be precluded from obtaining that
record because the Privacy Act, if his
exclusive avenue of access, has authorized
those agencies to exempt their records from
access under that Act. But, assuming no
applicable FOIA exemption (and even
exemption 6 might be circumvented if the
subject gave his consent), a third party could
obtain those same records under the
FOIA.

While the government asserts in its
Greentree brief that this would be a rare
occurrence, that argument does not rebut
the existence of such a blatant anomaly. In fact,
it was presented in both the circuit court
and district court cases agreeing with Greentree.
See, Antonelli v. FBI, supra; Porter v.
Department of Justice, supra. Additionally,
if FOIA access were foreclosed from first-
party requesters, use of straw-men third-
party requesters could be expected to mul-
tiply and, because of the FOIA's "any
person" standard, could not be inhibited.

There is also what has been referred to as a
"first-party anomaly," which recognizes
the possibility that an individual may
simply seek records on himself solely under
the FOIA. The FOIA's recognition of the
right of "any person" to seek records and to
see to enforce a right of access would surely
include an "individual" in Privacy Act
parlance as a "person" under the FOIA. The
Congress at no time in enacting either the
Privacy Act or the 1974 FOIA Amendments
suggested that FOIA requests and FOIA
litigation could no longer be brought by a
person seeking access to records concerning
himself.

It is difficult to fathom why Congress
could have allowed such results as the third-
and first-party anomalies described above.
The most compelling response is that it did
not. Careful review of the Privacy Act's
legislative history fails to unearth a single
expression of congressional discontent
regarding first-party FOIA access. State-
ments in the House that criminal or intel-
ligence records should not be open were
made to support the broad Privacy Act
exemptions in sections (i) and (k) favored by
the House. Without those exemptions, there
would have been no safeguards for such
sensitive records; the FOIA exemptions
would not be available against strictly
Privacy Act disclosure. 5 U.S.C. § 552a(q).
The House did not believe that the FOIA
required too much disclosure already; one
congressman had already failed in widely
reported FOIA litigation to gain access to his
own FBI files; moreover, the House adopted
the Senate-initiated amendment narrowing
the seventh FOIA exemption precisely to
expand access under that law.
E. Developments After Enactment of Privacy Act.

The varying administrative interpretations of the relationship between the Privacy Act and the FOIA have been discussed above. These developments are discussed in some detail in the Greenpeace opinion, 674 F.2d at 84-85. While the positions taken by government agencies add little to the debate, it is clear that at each time subsequent to enactment of the Privacy Act that a member of Congress, congressional staff or a congressional committee has taken the opportunity to address this question, they have supported the position that the Privacy Act does not constitute independent authority to withhold records sought under the provisions of and required to be disclosed by the FOIA. See, e.g., 674 F.2d at 85-86 n.28. Language in the most recent Senate Judiciary Committee report on proposed FOIA amendments incorporates this view (S. Rept. 98-221), and recent correspondence to the Department of Justice from various members of Congress involved in enacting the Privacy Act strongly adopts this position.

IV. Conclusion

The conclusion which appears to comport most firmly with the language of the statutes and their legislative histories, and which appears to be most reasonable given the objectives and purposes of the statutes, is that the Privacy Act is not an exemption 3 statute under the FOIA.

It would appear to strain credulity to find that Congress would labor so long and hard on the detailed enumerated harms spelled out in exemption 7—and that agencies and courts would have labored for the last nine years to give them meaning—if Congress intended those provisions to apply only to third-party requests for information. There is also no satisfactory answer to the charge that Congress would not have done such a poor job of fashioning the Privacy Act as a b(3) restriction upon disclosure if that restriction could be circumvented simply by the use of a third-person requester. And it is difficult to ignore the plain meaning of section b(2) of the Privacy Act and the only direct statement in the legislative history describing the final compromise language as intended to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information under" the FOIA. Finally, there had been no indication of discontent on the part of Congress regarding disclosures of first-party records under the FOIA before Privacy Act passage.

Thus the prior Department of Justice regulations and OMB guidelines, not the newly proposed ones, appear more faithfully to reflect the objectives and purposes of the FOIA and Privacy Act.

Justice and OMB should adhere to existing regulations and guidelines, which embody the proposition that, to the extent a person seeks access to records exempted under the Privacy Act, he shall receive, in addition to records he is entitled to receive under that Act, access to all records required to be disclosed under the FOIA. Additionally, how the requester frames his request should not affect his substantive rights of access.

The FOIA was intended to regulate the government’s collection and maintenance of personal information and to cover access requests by "any person," and it was unquestionably applicable to requests to see records pertaining to the requester. The Privacy Act was intended to protect individuals’ interests in obtaining and correcting information pertaining to themselves by various means, including access rights. The Privacy Act was thus clearly intended to add to the individual’s rights, not to take away rights enjoyed prior to 1974 under the FOIA.

Martin F. Richman
Chairman