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ARTICLES

THE PRIVACY ACT AND THE FREEDOM OF INFORMATION ACT: CONFLICT AND RESOLUTION

THOMAS M. SUSMAN*

I. INTRODUCTION

It is not unusual for federal statutes to come into conflict. Occasionally, Congress directs its attention to one subject or another with little apparent concern for what previous Congresses have said about the same subject. This is the grist that administrative and judicial mills sort and separate.

It is unusual, however, for Congress to step in and clearly resolve conflicting laws in a timely and decisive fashion. This article addresses a troublesome conflict between the Privacy Act and the Freedom of Information Act ("FOIA") and the congressional initiative in 1984 to resolve that conflict. The conflict sharply divided agencies and courts, and had only months before been brought to the doorstep of the United States Supreme Court for resolution. This article sets the stage for the conflict, describes the storyline of the dispute, and provides the perspectives of the various players. It is a story with a happy ending, measured by the purposes and principles of both statutes.

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II. STATUTES IN CONFLICT

A. *The Freedom of Information Act*

The FOIA,¹ enacted in 1966, established a statutory basis for public access to government information.² The senate sponsor of the law stated the principal motivation behind the FOIA: "A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens, and mocks their loyalty."³ Thus, the basic purpose of the FOIA is "to protect people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies"⁴

To facilitate this purpose, the FOIA establishes a presumption that all records of governmental agencies must be accessible to the public,⁵ unless they are specifically exempt from disclosure by the FOIA or another statute. The Act imposes a tripartite scheme of disclosure. First, each federal agency is required to publish descriptions in the *Federal Register* of the agency's organization, procedures for the public to obtain information, statements of the agency's function, the rules of procedure, a description of the agency's forms, substantive rules of general applicability, and statements of general policy.⁶ Second, each agency must make available for public inspection, or copying, final opinions in agency adjudications, statements of policy and interpretations not published in the *Federal Register*, administrative and staff manuals that affect the public, and current indices of this publicly available material.⁷ Third, all other agency records must be made public upon request,⁸ pursuant to the published rules of the agency, unless they fall into one of the enumerated exemptions of the Act.⁹ An agency, therefore, may not withhold information properly requested unless the record is covered by one of the exemptions. The structure of the statute

1. 5 U.S.C. § 552 (1982).

2. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2418.

3. 110 CONG. REC. 17,087 (July 28, 1964) (statement of Sen. E. Long).

4. *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210 (4th Cir. 1976) (citations omitted), cert. denied, 431 U.S. 924 (1977).

5. H.R. REP. NO. 199, 100th Cong., 1st Sess. 19, *Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* [hereinafter *Citizens Guide*], reprinted in 831 *Antitrust & Trade Reg. Rep.* 1 (Oct. 19, 1987).

6. 5 U.S.C. § 552(a)(1) (1982).

7. *Id.* § 552(a)(2).

8. *Id.* § 552(a)(3).

9. *Id.* § 552(b).

requires the fullest possible disclosure of information to the public.¹⁰

B. *The Privacy Act*

The Privacy Act of 1974¹¹ was designed to protect the privacy of individuals by providing them with more control over the gathering, dissemination, and accuracy of information about themselves contained in government files.¹² The legislation was a response to the "illegal, unwise, [and] overbroad, investigation[s] . . . of law-abiding citizens . . . [by] overzealous investigators, and the . . . wrongful disclosure and use . . . of personal files held by Federal agencies."¹³ Congress feared that widespread suspect information that government agencies gathered, coupled with new computer technology, greatly infringed on the privacy rights of individuals.¹⁴

Against this backdrop, Congress enacted the Privacy Act of 1974. The Act creates a number of safeguards against infringements of an individual's right to privacy.¹⁵ First, the Act sets information-gathering standards for all agencies and limits their authority to collect information about individuals.¹⁶ In addition, the Act restricts the disclosure of agency records containing personal information to a third party without the consent of the individual to whom the record pertains.¹⁷ This restriction is subject, however, to twelve exceptions.¹⁸ The Act also provides that an agency must grant to an individual an opportunity to see and copy records concerning himself;¹⁹ upon discovering information that is inaccurate or incomplete, the individual is accorded the right to ask the agency to amend these errors.²⁰ This provision is also subject to exceptions.²¹

10. *Citizens Guide*, *supra* note 5, at 2.

11. 5 U.S.C. § 552a (1982).

12. The Privacy Act, Pub. L. No. 579, 88 Stat. 1896 (1974).

13. S. REP. NO. 1183, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6916.

14. 1974 U.S. CODE CONG. & ADMIN. NEWS, at 6919.

This fear is best represented in Senator Ervin's statement on June 11, 1974:

[D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information-gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep . . . information about citizens is enhanced by computer technology . . . the resulting threat to individual privacy make[s] it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.

Id.

15. *Id.* at 6917.

16. 5 U.S.C. § 552a(e) (1982).

17. *Id.* § 552a(b). This restriction applies to third parties both within and outside the government. *Id.*

18. *Id.* §§ 552a(b)(1)-(12).

19. *Id.* § 552a(d)(1).

20. *Id.* § 552a(d)(2).

C. Relationship Between the Two Laws

The FOIA, when enacted, was intended by Congress to provide a mechanism for access to government records by the press, scholars, businesses, and others interested in the workings of government. To the extent that an individual wanted to find out what information government agencies maintained about himself, the FOIA also provided a means of access because it made no distinction regarding the relationship between the person requesting the information and the information requested.²² One of the earliest cases filed pursuant to the FOIA, and reported in a congressional subcommittee's review of the Act,²³ involved a lawsuit by a prisoner seeking his pre-sentence report.²⁴

Since the FOIA became effective, tens of thousands of individuals have used the law as a basis to request their files from agencies of the federal government. Litigation has ensued in many instances, and the question has uniformly been—before agencies at the administrative level, and before courts on review — whether one of the FOIA's nine exemptions allowed the agency to withhold the requested record. After 1975, however, the FOIA was not the sole means of access a subject²⁵ had to government files pertaining to himself. In that year the Privacy Act became effective, providing new and independent rights and procedures governing subject access to covered systems of records.²⁶

From the Privacy Act's inception, the relationship between that Act and the FOIA was ambiguous. Because both acts applied to subject access of records, a tension inevitably evolved. The potential for conflict was magnified due to a lack of explicit statutory language pertaining to the relationship between the Acts. Ultimately, Con-

21. *Id.* §§ 552a(j)-(k).

22. A FOIA request may be made by "any person." *Id.* § 552(a)(3). The requester need not meet any status requirements or demonstrate any interest in or need for the information sought. *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730 (D.C. Cir. 1987). Foreigners, corporations and prisoners all have equal rights of access along with United States citizens and the media, for example. *See generally Doherty v. United States Dept. of Justice*, 596 F. Supp. 423 (S.D.N.Y. 1984), *aff'd*, 775 F.2d 49 (2d Cir. 1985).

23. *The Freedom of Information Act (Ten Months Review): Subcomm. on Administrative Practice & Procedure of the Senate Comm. on Judiciary*, 90th Cong., 2d Sess. (1968).

24. *Cook v. Willingham*, Civ. No. L-235 (D. Kansas 1968). Order dismissing action reprinted in *The Freedom of Information Act (Ten Months Review): Subcomm. on Administrative Practice and Procedure at the Senate Comm. on Judiciary*, 90th Cong., 2d Sess. 2, at 15-16 (1968).

25. A "subject," for purposes of this article, refers to an individual who requests information concerning himself.

26. 5 U.S.C. §552a (1982). Unlike the FOIA, the Privacy Act confines the use of its access provisions to citizens and "aliens lawfully admitted for permanent residence." *Id.* § 552(a)(2).

gress had to enact legislation to resolve the conflicts between the Privacy Act and the FOIA.

1. FOIA - Privacy Act Conflict

The Privacy Act had one immediate and indisputable effect on the disclosure of information under the FOIA: it removed agency discretion to disclose information that might have been withheld under the sixth exemption. Exemption six of the FOIA protects from mandatory disclosure information which would constitute a "clearly unwarranted invasion of personal privacy."²⁷ Since the FOIA's exemptions operate only on a permissive basis,²⁸ prior to the enactment of the Privacy Act an agency could exercise its discretion to determine that disclosure would constitute a clearly unwarranted privacy invasion but nonetheless—because of other governmental or private interests in disclosure—decide to release the data anyway. The Privacy Act, however, instituted a general prohibition against public disclosure, without the written consent of the subject, of personal information from those systems of records covered by that Act unless disclosure was required by the FOIA.²⁹ Since the disclosure of privacy-invading material was not required by the FOIA, it became prohibited by the Privacy Act.³⁰ In essence, the discretion of agencies to release information under the FOIA's exemption six was eliminated after enactment of the Privacy Act.

The Privacy Act had another impact on disclosure of records that the FOIA previously governed: it expanded the information available to an individual requesting records about himself. For example, under the Privacy Act there is no exemption comparable to the FOIA's exemption five. Therefore, internal agency memoranda

27. *Id.* § 552(b)(6). The Supreme Court has interpreted this phrase to mean that the exemption requires a balancing of the individual's right to privacy against preservation of the purpose of the FOIA—the public's right to government information. "The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy." Department of Air Force v. Rose, 425 U.S. 352, 372 (1976).

28. According to the Supreme Court, the exemptions set forth in "subsection (b) demarcates the agency's obligation to disclose" but "does not foreclose disclosure." *Chrysler v. Brown*, 441 U.S. 281, 292 (1979). The *Chrysler* Court held that FOIA exemptions are not mandatory bars to disclosure but only permissive. *Id.* at 293. Thus, the information falling within the Act's nine exemptions may nonetheless be disclosed if the agency chooses to disclose it (unless some other statute or regulatory prohibition is applicable).

29. 5 U.S.C. § 552a(b)(2) (1982).

30. *Sullivan v. Veterans Admin.*, 617 F. Supp. 258, 259 (D.D.C. 1985) (holding the effect of 5 U.S.C. § 552a(b)(2) (1982) "is to permit an agency to disclose records where the FOIA requires it, but to prohibit such disclosure where a specific FOIA exemption allows the agency to withhold the information"); see also *Plain Dealer Publishing Co. v. United States Dept. of Labor*, 471 F. Supp. 1023, 1031 (D.D.C. 1979).

subject to the deliberative privilege would be exempt under the FOIA but may not be withheld from a Privacy Act requester.³¹

The relationship between the Privacy Act and the FOIA, however, soon proved to be troublesome with regard to subject requesters. Neither the Privacy Act nor its legislative history clearly states whether that law is the exclusive means of access an individual has to obtain his own record in systems of individually identifiable records. Nor does the statute precisely state how it is to relate access requests made pursuant to the FOIA. In fact, a certain superficial circularity appears on the face of the FOIA and Privacy Acts. The third exemption of the FOIA states that matters are exempt from mandatory disclosure if they are specifically exempt from disclosure by some other statute.³² At the same time, the Privacy Act states that no covered record should be disclosed, except with the consent of the subject of the record, unless the FOIA requires disclosure.³³ With the passage of the Privacy Act, both agencies and courts struggled with this apparent conundrum. Some courts and agencies asserted that the Privacy Act was an exemption three statute under the FOIA, thereby making the Privacy Act the exclusive mechanism for subject requesters to gain access to records pertaining to them. Others treated the FOIA and Privacy Act as independent and separate statutes.³⁴

Congress finally stepped in and resolved this conflict in 1984 when it enacted the Central Intelligence Agency Information Act.³⁵ Section 2(c) of that law inserted a new provision into the Privacy Act stating: "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 [FOIA]."³⁶ Congress resolved the conflict by explicitly stating that neither the Privacy Act nor FOIA were to be the exclusive

31. 5 U.S.C. § 552a(q) (1982) (providing that no agency shall rely on a FOIA exemption to withhold information accessible to an individual under the Privacy Act); see, e.g., *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985), *reh'g denied*, 800 F.2d 1402 (5th Cir. 1986) (military promotion recommendations properly withheld under the FOIA's exemption five were held possibly subject to disclosure under the Privacy Act).

32. 5 U.S.C. § 522(b)(3) (1982). The text of section 552(b)(3) (as amended in 1976) provides:

(b) This section does not apply to matters that are . . .

(3) 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.

33. *Id.* § 552a(b)(2).

34. See *infra* notes 92-113 and accompanying text.

35. Pub. L. 98-477, 98 Stat. 2209 (1984).

36. 5 U.S.C. § 552a(q) (1982).

means of disclosure with regard to subject requesters. Congress enacted this provision while the issue it addressed was squarely before the Supreme Court for resolution in two consolidated cases.³⁷ The relationship between the Privacy Act and the FOIA became subject of both Supreme Court and congressional attention and emphasized its importance to both agencies and the public.

2. *Implications of the Conflict*

The significance of the relationship between the Privacy Act and the FOIA can best be demonstrated by examining what the consequences would have been had Congress acted differently on this issue (or not acted) and had the Supreme Court upheld the position that the Privacy Act was an exemption three statute. There would have been both procedural and substantive implications had the Privacy Act been held ultimately to provide the exclusive vehicle for access by the subject to individually identifiable records.³⁸

The first implications are procedural and concern the processing of individual requests for information. Had the Privacy Act been held to be the exclusive means by which a subject of a record could obtain information about himself, the Privacy Act procedures would have controlled the request. As the following examples demonstrate, this would have imposed a more restrictive procedural mechanism on subject requesters as compared to the FOIA:

(1) The FOIA requires a response to any request for information within 10 days.³⁹ The Privacy Act does not require a response.

(2) The FOIA provides for an administrative appeal of a denial of access.⁴⁰ The Privacy Act does not provide for an appeal.

(3) A two-year statute of limitations is applicable to civil actions under the Privacy Act;⁴¹ there is a six-year limitation under the FOIA.⁴²

(4) Agencies may impose identity-verification requirements on individuals seeking access under the Privacy Act,⁴³ but there is no similar requirement under the FOIA.

37. *United States Dep't of Justice v. Provenzano*, 469 U.S. 14 (1984); *Shapiro v. Drug Enforcement Admin.*, 469 U.S. 14 (1984).

38. This type of access is sometimes referred to, in Privacy Act parlance, as "subject access."

39. 5 U.S.C. § 552(a)(6)(A)(i) (1982).

40. *Id.* § 552(a)(6)(A)(ii).

41. *Id.* § 552a(g)(5).

42. There was thought to be no statute of limitations in FOIA cases until 1987, when the District of Columbia Circuit Court of Appeals held that the general federal limitations statute, 28 U.S.C. § 2401(a) (1982), applies to FOIA cases, imposing a six year limitation. *Spannaus v. United States Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987).

43. 5 U.S.C. § 522a(f)(1) (1982).

(5) The Privacy Act permits an agency to restrict disclosure of certain medical records to the requester's physician rather than to the requester himself;⁴⁴ the FOIA contains no comparable authorization.

(6) The FOIA exemptions are to be applied on a line-by-line and page-by-page basis, with disclosure required for reasonably segregable information; Privacy Act exemptions ordinarily apply to entire agencies and to complete systems of records.⁴⁵

Because of these procedural differences between the Privacy Act and the FOIA, a congressional or Supreme Court conclusion that the Privacy Act was the exclusive mechanism for subject requesters would have clearly restricted and confined the process for the requester.

More importantly, however, would have been the substantive implication of treating the Privacy Act as the exclusive method of subject access to records. Under a preclusive Privacy Act, if the requested records were part of a Privacy Act system of records, and that system had been declared specifically exempt from the access requirements of the Privacy Act under subsection (j) or the records had been excepted from access under the more specific exemptions in subsection (k), then the subject of the records could not obtain access to them, even if no FOIA exemption applied.

This severe limitation on access by the subject of a record would not have applied, however, to third-party requesters. The exemptions from requiring a subject access to his records in subsections (j) and (k) of the Privacy Act⁴⁶ do not apply to subsection (b)(2) of that Act, which prohibits disclosure to a third party without consent of the subject unless disclosure is required under the FOIA.⁴⁷ The subject of a CIA or FBI file could thus be precluded from obtaining that record because the Privacy Act has authorized those agencies to exempt their records from access under subsections (j) and (k) of that Act. But, assuming no applicable FOIA exemption (and even exemption six might be circumvented if the subject gave his consent), a third party could obtain those same records under the FOIA while a subject requester could not if the Privacy Act was his exclusive means of access. This would have resulted in a third-party anomaly. This anomaly would have provided third-party requesters greater access under the FOIA to a record about an individual than that individual would have on his own.

44. *Id.* § 552a(f)(2).

45. Compare 5 U.S.C. § 552(b) with 5 U.S.C. § 552a(k). Note that some courts have held that a segregability requirement is to be applied to information withheld under the Privacy Act's exemption (k)(5). See *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985), *reh'g denied*, 800 F.2d 1402 (5th Cir. 1986); *Nemetz v. Department of Treasury*, 446 F. Supp. 102 (N.D. Ill. 1978).

46. 5 U.S.C. §§ 552a(j)-(k) (1982).

47. *Id.* § 552(b)(2).

Additionally, if the FOIA access were foreclosed from first-party requesters, the use of straw-men third-party requesters could have been expected to multiply and, because of the FOIA's "any person" standard,⁴⁸ could not easily be inhibited.

Had Congress declared the Privacy Act to be the exclusive means of access for subject requesters, subject access could have been severely restricted. The 1984 statutory resolution of the relationship between the two statutes thus affected both the substantive and procedural rights of the public, as well as the responsibilities of federal agencies. It is also clear that resolving the conflict between the two laws by declaring that neither was exclusive was the wisest course of action by Congress consistent with the spirit and objectives of both the Privacy Act and FOIA.

III. RELEVANT LEGISLATIVE HISTORY ON PRIVACY ACT AND FOIA RELATIONSHIP

Congress' decision to declare the FOIA and Privacy Acts as separate and independent sources of access to government records is supported by the legislative history of the Privacy Act and the 1974 amendments to the FOIA. The House and Senate reports from the enactment of the Privacy Act and the 1974 FOIA amendments clearly support the conclusion that Congress in 1984 properly resolved the conflict between the two acts and did so within the spirit and objectives of the two statutes.

A. *Evolution of Statutory Language of the Privacy Act*

The legislative history of the Privacy Act is in many ways ambiguous and confusing regarding the relationship between that law and the FOIA. At the time the Privacy Act was being developed, this confusion was not predictable because in the House of Representatives the same committee and subcommittee members were working simultaneously on both the 1974 FOIA amendments and the Privacy Act.⁴⁹ Although two different committees handled the bill in the Senate, both had been involved in joint hearings at the early stages on both of these subjects. In addition, the staff re-

48. See *supra* note 22 and accompanying text. Related to the third-party anomaly is the anomaly that might arise when a foreign national or a business enterprise seeks access to records. Neither is entitled to access under the Privacy Act, 5 U.S.C. § 552a(a)(2) (1982) (definition of individual), but the Act's exemptions also would not apply to them. Thus, were the Privacy Act a (b)(3) statute, businesses and foreign nationals would have greater rights of access than United States citizens.

49. Jurisdiction over both the Privacy Act and the FOIA in the House of Representatives rested in the Subcommittee on Government Information and Individual Rights (presently the Subcommittee on Government Information, Justice and Agriculture) of the Committee on Government Operations.

mained in close communication throughout the process.⁵⁰ Furthermore, Congress considered both bills during the same time period.⁵¹ Nevertheless, the committees apparently did not detect an ambiguity over the relationship between the Privacy Act and the FOIA. Therefore, it was not explicitly addressed in either statute.

A more careful consideration of the final language of the Privacy Act, through the mechanism of a House-Senate conference, would no doubt have shed more light on the FOIA-Privacy Act relationship and might potentially have led to a clarification in the legislation itself. As it was, the only reliable legislative history of the final Privacy Act consists principally of a staff memorandum inserted into the *Congressional Record* on the day the House and Senate⁵² adopted the final legislative language. That memorandum provides some indication of congressional intent on many important issues. Among the issues is the relationship between the FOIA and Privacy Act. Although ambiguous, there is also evidence in the larger body of legislative history to support both sides on the question of whether Congress intended the Privacy Act as the exclusive means of subject access to records.⁵³

1. Senate

When originally introduced by Senator Ervin on May 1, 1974, the first Senate version of privacy legislation contained no reference to the FOIA or how the proposed new privacy law would affect access under the FOIA.⁵⁴ As reported from the Senate Committee on Government Operations later that year, however, the bill contained two references to the FOIA. First, Section 202(c) provided that the proposed Privacy Act restrictions on disclosure "shall not apply when disclosure would be required or permitted pursuant to" the FOIA.⁵⁵ The Senate Report on S. 3418 describes that the purpose of

50. The 1974 FOIA Amendments were reported from the Senate Committee on the Judiciary; the Privacy Act was processed through the Committee on Government Operations.

51. Both the Privacy Act and 1974 FOIA Amendments were considered during the Ninety-Third Congress and both were subject to final floor consideration in the fall of 1974.

52. The staff memorandum entitled *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act* was inserted in the CONGRESSIONAL RECORD during both House and Senate debates. 120 CONG. REC. 40,405, 40,881 (1974).

53. The legislative history of the Privacy Act has been compiled in a Source Book on Privacy, COMM. ON GOVERNMENT OPERATIONS, UNITED STATES SENATE, AND COMM. ON GOVERNMENT OPERATIONS, UNITED STATES HOUSE OF REPRESENTATIVES, 94th Cong., 2d Sess. (SOURCEBOOK ON PRIVACY COMM. 1976) [hereinafter PRIVACY SOURCE BOOK].

54. S. 3418, as introduced, reprinted in PRIVACY SOURCE BOOK, *supra* note 53, at 9.

55. *Id.* at 139.

section 202(c) was "to meet the objections of press and media representatives that the statutory right of access to public records and the right of disclosure of government information might be defeated if such restrictions were placed on the public and press."⁵⁶

The second reference to FOIA was in section 205(b), which stated: "Nothing in this Act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder."⁵⁷ The report indicates that section 205(b) "[r]eflects the Committee's intent that the Act does not affect existing requirements to disclose, disseminate, or publish information which an agency is required to collect for the purpose of making such disclosure."⁵⁸

Senator Ervin, who managed the bill on the floor of the Senate, later proposed a series of perfecting amendments. Included was an amendment that simply deleted section 202(c).⁵⁹ The Senate then went on to approve privacy legislation that continued to contain section 205(b) quoted above. While not saying so directly, it appears from the language in the Senate report describing the purpose of these amendments that the Senate Committee intended its proposed privacy legislation to have no effect on individual access rights already available under FOIA.⁶⁰ The subsequent approval of Section 205(b) also supports the finding that Congress did not intend for the Privacy Act to be exclusive to the FOIA with regard to subject requesters.

2. House of Representatives

In the House, privacy legislation was originally introduced and later reported from the Committee on Government Operations with no language permitting public disclosure of personal records. In its initial report on H.R. 16373, the House Committee stated its belief that a broad exemption is desirable for CIA and criminal justice

56. S. REP. NO. 1183, 93d Cong., 2d Sess., at 71, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6916, 6985.

57. S. 3418, as reported, reprinted in PRIVACY SOURCE BOOK, *supra* note 53, at 97.

58. S. REP. NO. 1183, at 77.

59. 120 CONG. REC. 36,920 (1974).

60. The Committee somewhat contradictorily also observed that "[i]n particular, it would not be appropriate to allow individuals to see their own intelligence or investigate files. Therefore, the bill exempts such information from access and challenge requirements . . ." S. REP. NO. 1183, 93d Cong., 2d Sess. 23, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6916, 6985. The Committee continued stating that the provisions relating to law enforcement records were not adequate. It referred to additional legislation dealing specifically with criminal justice records and indicated its feeling that "general privacy legislation must assure subjects of law enforcement files at least these minimal rights until such time as the more comprehensive criminal justice legislation is passed." *Id.*

records because they contain "particularly sensitive information [and] the most delicate information regarding national security."⁶¹ At the same time, the Committee stressed that it did not intend to require the CIA and criminal justice agencies to withhold personal records from the individuals to whom they pertain. In generally precatory language, the Committee urged "those agencies to keep open whatever files are presently opened . . ."⁶² This language, contained in the Committee's discussion of its proposed exemptions, was also mirrored in its discussion of the bill's section relating to conditions of disclosure.⁶³

When the House legislation, H.R. 16,373, reached the floor for debate, a variety of amendments was offered. A few implicated specific areas involving the interrelationship between the pending privacy legislation and the FOIA, but none addressed the more basic question of which law was to prevail in case of apparent conflict.⁶⁴

3. *Compromise Bill*

The final version of the privacy bill, which became the Privacy Act of 1974, was a compromise measure attained through informal discussions between House and Senate representatives. As presented to each chamber for action, the proposed legislation contained a new subsection (2) in section (b), providing as follows:

"(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 writ-

61. H.R. REP. No. 1416, at 18.

62. *Id.* at 19.

63. The Committee language on this subject, however, appears somewhat in conflict. While it observes that "H.R. 16,373 would make all individually-identifiable information in Government files exempt from public disclosure," it also indicated that it "does not desire that agencies cease making individually-identifiable records open to the public, including the press, for inspection and copying." H.R. REP. No. 1416, at 13. The Committee explained its intention to allow "by published rule only those disclosures which would not violate the spirit of the Freedom of Information Act by constituting 'clearly unwarranted' invasions of privacy." *Id.*

64. Congressman Ichord offered an amendment to expand the Privacy Act's exemption for investigatory files compiled for law enforcement purposes by removing reference in the House bill (H.R. 16,373, §(k)(2)) to allowing material to remain open if accessible under the FOIA's exemption seven. 120 CONG. REC. 36, 650 (1974). The stated purpose of this amendment was to protect investigatory material from access by persons without "legitimate or excusable purpose." *Id.* at 36,651. Congressman Erlenborn offered an amendment adopted by the House adding additional exemptions to subsection (k). While the Congressman intended to conform protections in the Privacy Act for confidential sources and other investigatory material to those included in the FOIA Amendments, he nonetheless observed that the new privacy legislation would still provide "far greater access than individuals have at the present time." *Id.* at 36,655-58. Finally, Congresswoman Abzug proposed to eliminate the CIA exemption in the Privacy legislation; the Abzug amendment, however, was defeated. *Id.* at 36,960-62.

ten request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be

(2) required under Section 552 of this title [FOIA]”⁶⁵

The explanation for this language was contained in a staff memorandum, inserted in the *Congressional Record* in both the House and Senate by the managers of the legislation. That memorandum explained the new language as follows:

The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.⁶⁶

In explaining this new subsection, the staff memorandum referred to the absence of any specific provision in the House bill for the FOIA access to information that the Privacy Act protected, and also to the Senate bill and its section 205(b), which specifically recognized the need to permit the FOIA disclosures. In this context, section b(2) appears to be an addition to the earlier House measure and a substitute for the earlier, albeit more precise, Senate language. The compromise bill also retained subsection (q) from the Senate proposal, prohibiting any agency from relying on a FOIA exemption to withhold from an individual any record otherwise accessible under the Privacy Act.⁶⁷

There were two other references, although indirect, to the FOIA in the new privacy bill. The new legislation provided that the requirements imposed on agencies relating to determining the accuracy of information⁶⁸ and maintaining an accounting of disclosure⁶⁹ would not apply to disclosures made under the FOIA.

President Ford signed the Privacy Act of 1974 into law on the first of January, 1975. He applauded the balance struck in the legislation between the right of the individual and the interests of society, but indicated disappointment “that the provisions of disclosure of personal information by agencies make no substantive change in the current law.” This, in the President’s opinion, did not “adequately protect the individual against unnecessary disclosures of

65. 5 U.S.C. § 552a(b)(2) (1982).

66. 120 CONG. REC. 40,882 (1974).

67. 5 U.S.C. § 552a(q) (1982). This section reads as follows: “No agency shall rely on any exemption contained in Section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.” *Id.*

68. *Id.* § 552a(e)(6).

69. *Id.* § 552a(c)(1).

personal information."⁷⁰

B. Analysis of Privacy Act Legislative History

It is quite clear from the above recitation of legislative history that the House and Senate approached the relationship between the FOIA and Privacy Act very differently. The legislative history of section 3418, from its introduction through its approval by the full Senate, reflects a strong commitment of the Senate that the Privacy Act *not* become the exclusive avenue for individual access to records in a system that the Act covers. The House committee report on H.R. 16,373 and early versions of that legislation suggest that the House of Representatives either simply did not consider the relationship between the two laws or intended the Privacy Act provisions and exemptions to close alternative forms of subject access to covered records. Various comments during floor debate in the House, however, hint that members did recognize that FOIA would remain a basis for access to records, even those the new Privacy Law covered.⁷¹

Congress could have written clearer language to reflect its intentions to have the Privacy Act become a separate, but not preclusive, means of access to government records in the compromise bill. Congress specifically stated, in section (q) of the Privacy Act, that it did not intend the FOIA exemptions to affect disclosure under the Privacy Act. The Senate itself certainly knew how to draft language to accomplish this end, as it had done in sections 202(c) and 205(b) of section 3418.⁷² But, while Congress could have been clear in expressing its intent that the Privacy Act not affect the mandatory disclosure requirements of the FOIA, it failed to do so.

Nonetheless, Congress did adopt legislation that included the new section (b)(2), and indicated in the only directly applicable legislative history accompanying its ultimate compromise bill that this section was intended to replace the deleted section 205(b) in the Senate bill.⁷³ Despite the fact that Congress otherwise adopted basically the House bill, the inclusion of this new section (b)(2) appears clearly to reject the earlier position of the House that individually identifiable information should be "exempt from public disclosure."⁷⁴

In addition, references in the new privacy law to the FOIA dis-

70. Statement of President Gerald Ford upon signing the Privacy Act of 1974 (January 1, 1975), reprinted in *PRIVACY SOURCE BOOK*, *supra* note 53, at 1001.

71. *E.g.*, 120 CONG. REC. 36,647, 36,655-56 (1974).

72. *See supra* notes 54-59 and accompanying text.

73. Staff Memorandum, 120 CONG. REC. 40,881 (1974).

74. *See* H.R. REP. No. 93-416, at 13.

closure as an exception in those sections dealing with agency determination of accuracy and accounting procedures support the view that Congress contemplated continued disclosure of covered records under the FOIA.⁷⁶ In the event that the FOIA disclosures covered records the Privacy Act preempted, there would have been no need to include these FOIA exceptions in the accuracy and accounting sections. These accuracy and accounting exceptions must have been inserted in contemplation of subject access to records under the FOIA,⁷⁶ since the sixth exemption of the FOIA would inhibit many third-party disclosures.

There are further interpretations of both the statutory language and legislative history that compel the conclusion that Congress did not intend the Privacy Act to be an exemption three statute. First, the exemption language of the Privacy Act provides that the head of an agency may issue rules that "exempt any system of records within the agency from any part of this section . . ." except for specifically applicable provisions.⁷⁷ Congress could have used language to allow the agency head to exempt such records from any part "of this title," which would have included the FOIA as well as the Privacy Act. By not doing so, Congress appears to have intended that the limitation be to "this section"—section 552a, the Privacy Act itself—and not the FOIA as well.

Secondly, the Privacy Act is, in its entirety, a fair information practices statute, involving not only subject access but requirements on accounting, collection, notice, accuracy, and more.⁷⁸ The purpose of the law, expressed time and again, is primarily to insure that agency records are maintained so as not to infringe personal privacy. The FOIA, on the other hand, is purely and simply a disclosure statute.⁷⁹ Thus the Privacy Act exemptions have meaning and impact if applied only to Privacy Act requirements, while they would effect an implied repeal of certain FOIA provisions if they were applied to that Act.

Thirdly, FOIA access to covered records is recognized in various parts of the Privacy Act. Since the FOIA clearly allows disclosure to "any person" and the subject of a record is certainly a "person" under the FOIA, the Privacy Act must have contemplated continued

75. See *supra* notes 68-69 and accompanying text.

76. The FOIA-disclosure exemption to the accuracy requirement was separately and specifically added by a "technical amendment" the day after Senate passage of the compromise bill. Amendment number (1) to S. 3418, § 203(b), 120 CONG. REC. 40879; PRIVACY SOURCE BOOK, *supra* note 53, at 878.

77. 5 U.S.C. § 552a(j) (1982).

78. For a further discussion of the history and purpose of the Privacy Act see *supra* notes 11-21 and accompanying text.

79. For a further discussion of the history and purpose of FOIA see *supra* notes 1-10 and accompanying text.

FOIA access by the subject of records.

Furthermore, Congress had labored extensively over the language of exemption seven of the FOIA; the amendment to that exemption was even discussed and language from it used in the context of Privacy Act exemptions and amendments. The additional access rights to investigatory records that the seventh exemption provided would have been ephemeral if closed down by the Privacy Act.

Lastly, there is no evidence from the legislative history of the Privacy Act that Congress believed there was too much disclosure under the FOIA. The FOIA's seventh exemption had been amended specifically to increase disclosure of investigatory files, and subsection (q) was inserted into the Privacy Act to allow greater disclosure under that law than would have been allowed under the FOIA. Thus Congress did not identify any problem through which foreclosing FOIA access by Privacy Act restrictions would have provided a solution.

C. 1974 FOIA Amendments

The legislative history of the 1974 amendments to the FOIA further indicates that Congress did not intend for the Privacy Act to be the exclusive means of access for subject requesters. First, when Congress enacted the 1974 Amendments to the FOIA, it was also putting the finishing touches on privacy legislation. Thus the legislative history does not indicate an awareness by Congress that its FOIA amendments would not fully operate. The legislative history does not refer to the Privacy Act, whose future was still in doubt when both houses initially approved the FOIA legislation. This, at least, suggests Congress did not expect that the FOIA would be limited by the Privacy Act.

In addition, the 1974 amendments to the FOIA were enacted to broaden disclosure, not restrict it. On the floor of the Senate, during consideration of the 1974 FOIA Amendments, Senator Philip Hart proposed a major revision of the seventh exemption, which the Senate later adopted with some modification.⁸⁰ The plain and stated in-

80. Exemption 7 originally applied to "investigatory files compiled for law enforcement purposes." Senator Hart's amendment was a response to the Seventh Circuit's interpretation of exemption seven. The Seventh Circuit had stated that an agency needed only to demonstrate that the documents were an investigatory file compiled for law enforcement purposes and need not show why the disclosure of the document should not be made. Congress believed this was inconsistent with its intent when it passed the FOIA in 1966. In addition, Congress feared that with such an interpretation, otherwise nonexempt records would be hidden in law enforcement files to avoid disclosure. Consequently, the Senate passed Senator Hart's amendment that made the seventh exemption apply only to law enforcement information the dis-

tention behind this narrowing of the scope of the "investigatory files" exemption was to increase opportunity for public access to law enforcement records.⁸¹ Likewise, on the Senate floor Senator Muskie proposed — and the Senate adopted — a new and tighter version of the FOIA's first exemption dealing with national defense and foreign policy.⁸² Both the Hart and Muskie amendments were designed to constrict severely the scope of the first and seventh exemptions and allow greater access to the information to which these exemptions had previously been applicable.

With a clearly disclosure-oriented post-Watergate frame of mind Congress did not, in the fall of 1974, appear interested in constricting public access to information, as the 1974 amendments to the FOIA indicate. This posture by Congress, coupled with the lack of reference to the Privacy Act during the debate over the 1974 Amendments to the FOIA, emphasizes that Congress did not intend for the Privacy Act to be an exclusive mechanism for a subject requester to limit the FOIA in any way.

IV. CONGRESSIONAL, AGENCY, AND JUDICIAL INTERPRETATIONS AFTER THE ENACTMENT OF THE PRIVACY ACT

Although not explicitly stated, the legislative history of the Privacy Act and the 1974 Amendments to the FOIA support a finding that Congress did not intend for the Privacy Act to be an exemption three statute under the FOIA. Congressional statements, after the Privacy Act was enacted, consistently reflected this view. Neverthe-

closure of which would cause one of a number of enumerated harms. See Senate debate of May 30, 1974, reprinted in FREEDOM OF INFORMATION ACT AND AMENDMENTS SOURCE BOOK, COMM. ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES, AND COMM. ON THE JUDICIARY, U.S. SENATE, 94th Cong., 1st Sess., 281, 332-33 (Joint Comm. Print 1975); see also CONFERENCE REP. NO. 1200, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6285, 6287. This exemption was again amended in 1986, that time to clarify and to arguably broaden information covered by exemption seven. See 5 U.S.C. § 552a (b)(7) (1982); see also *Allen v. Department of Defense*, 658 F. Supp. 15 (D.D.C. 1986). But see *Wilkinson v. Federal Bureau of Investigation*, Civ. No. 80-1048 (C.D. Ca. July 17, 1987).

81. The Senate later adopted an amendment to its privacy bill that replaced the earlier investigatory files exemption with the same language previously adopted by the Senate for the FOIA's seventh exemption. This language was ultimately deleted in the final compromise. See amendment to section 203(b) of S. 3418, 120 CONG. REC. 36,920 (1974), reprinted in PRIVACY SOURCE BOOK, *supra* note 53, at 765-66.

82. Exemption one originally applied to records "specifically required by executive order to be kept secret in the interest of national defense or foreign policy." After the Supreme Court concluded that under this language courts could not look behind or second guess executive branch decisions to classify documents, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973), Congress amended the statute to authorize the judiciary to examine classification decisions *de novo*. See H.R. REP. NO. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6267, 6272; see also CONFERENCE REP. NO. 1200, 93d Cong., 2d Sess., reprinted in U.S. CODE CONG. & ADMIN. NEWS 6285, 6287.

less, the courts and agencies continued to struggle with the apparent conflict between the Privacy Act and the FOIA with regard to subject requesters. The disparate interpretations of the conflict among the courts, the agencies, and Congress ultimately led the Congress to resolve the conflict through legislation.

A. *Post-Enactment Congressional Statements*

From the date of enactment of the Privacy Act, there had been occasional disputes and discussions regarding whether that law was intended to preclude subject (or "first-party") access to material in systems of records covered by that Act. Both members of Congress and staff of relevant congressional committees went on record on this subject. They unanimously adhered to the view that the Privacy Act was not intended to provide an exclusive means of access to individually identifiable records and that the Privacy Act was not to be considered an exemption three statute under the FOIA.

The first expression of this view was contained in an article by the Counsel to the Senate Government Operations Subcommittee on Intergovernmental Relations, who was responsible for much of the drafting and negotiation on behalf of Senator Ervin during congressional consideration of the Privacy Act.⁸³ In that article, after noting that many of the same members of Congress and staff played important roles in the adoption of both the FOIA amendments of 1974 and the Privacy Act, the author commented: "If information about an individual would be released under an FOI [Freedom of Information] Act request, it could be released under b(2) of the Privacy Act."⁸⁴

Shortly before the Privacy Act was to become effective, Senator Edward Kennedy wrote the Attorney General a strong and detailed letter stating that "[i]t would be manifestly unreasonable to conclude that Congress intended in the Privacy Act to carve out large implied exemptions to the requirements of the Freedom of Information Act." Senator Kennedy, who had authored and managed the 1974 FOIA amendments in the Senate, recited various arguments based on analysis and legislative history and concluded as follows: "It appears clearly intended that access under the Privacy Act is to be complete, and not subject to the FOIA exemptions, where the Privacy Act grants access. But where the Privacy Act does not grant access, the FOIA — and its exemptions—apply."⁸⁵

83. Davidson, *The Privacy Act of 1974—Exceptions and Exemptions*, 34 *FED. B.J.* 279 (1975), reprinted in *PRIVACY SOURCE BOOK*, supra note 53, at 1191.

84. *Id.*

85. This correspondence is reprinted in *PRIVACY SOURCE BOOK*, supra note 53, at 1178-80. Also included with Senator Kennedy's correspondence was a study by the

The following year Congresswoman Abzug, Chairwoman of the House Subcommittee that had been responsible for enactment of both the Privacy Act and the FOIA, placed in the *Congressional Record* a study analyzing the annual reports under the FOIA submitted to the Congress by executive agencies for 1975. She noted that seven executive branch entities "cited the Privacy Act 146 times when invoking the FOIA Act exemption pertaining to statutory prohibitions." Abzug condemned this practice, commenting that "the Privacy Act specifically states that it was not intended to restrict access to records available under the Freedom of Information Act"86

Finally, the staff of the Senate Subcommittee on Administrative Practice and Procedure (the Subcommittee responsible for FOIA legislation and oversight) submitted a report to the Congress on oversight hearings relating to implementation of the 1974 FOIA amendments. In that report, the staff observed that the Privacy Act "was never intended to restrict access to reports under FOIA."⁸⁷

These congressional reports and comments consistently reflected a view that condemned an Executive branch inclination to use the Privacy Act to foreclose access to records under the FOIA. The Privacy Protection Study Commission, established by the Privacy Act to report on the functioning of that law, stated in its final report its complete agreement with this conclusion.⁸⁸ Legal commentators have also consistently adhered to this view.⁸⁹ Yet, the agencies and the courts interpreted the conflict quite differently, resulting in conflicting views on this issue.

B. Administrative Interpretation and Practice

Under the FOIA, the Department of Justice is given the role of lead agency for the purposes of reporting information and providing policy guidance to federal agencies.⁹⁰ The Office of Management and

Congressional Research Service supporting these conclusions. 121 CONG. REC. 32,888-94 (1975).

86. 122 CONG. REC. 26,447-48 (1976).

87. STAFF OF SENATE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, COMM. ON THE JUDICIARY, U.S. SENATE, 95TH CONG., 2D SESS., REPORT ON OVERSIGHT HEARINGS ON AGENCY IMPLEMENTATION OF 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 123 n.76 (1980) [hereinafter REPORT ON OVERSIGHT HEARINGS].

88. Report of the Privacy Protection Study Comm'n, *Privacy Act of 1974: An Assessment* app. 4, at 37 (1977).

89. See *Greentree v. United States Customs Serv.*, 674 F.2d 74, 87 n.29 (D.C. Cir. 1982) (citing sources). The American Bar Association, in a resolution adopted by its House of Delegates, also supported this conclusion. A single contrary view appeared in a student comment. Comment, *Greentree v. United States Custom Service: A Misrepresentation of the Relationship Between FOIA Exemption 3 and the Privacy Act*, 63 B.U.L. REV. 507 (1983).

90. See Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN.

Budget ("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.⁹¹ The two agencies' interpretations of the conflict between the Privacy Act and the FOIA are important to understanding how other agencies processed individual requests after the enactment of the Privacy Act.

1. Department of Justice

Shortly after enactment of the 1974 FOIA amendments and the Privacy Act, Deputy Assistant Attorney General Mary Lawton advised the Internal Revenue Service that the Privacy Act should be considered the exclusive avenue available to an individual seeking information about himself.⁹² Following an exchange of correspondence between other Justice Department officials and Senator Edward Kennedy,⁹³ the Department altered its view and published its own regulations affording to an individual seeking records about himself access that is coextensive with the maximum disclosure provided under both the Privacy Act and the FOIA.⁹⁴ The Department, however, noted that it was taking this approach as a matter of discretion, without waiving the position that Privacy Act exemptions were still available.⁹⁵

In early litigation on this issue, the Department of Justice ("DOJ") adhered to a position consistent with its then-applicable regulation. In fact, the government argued strongly before the district court in *Greentree v. United States Customs Service*⁹⁶ for the proposition that the Privacy Act was not an exemption three statute, citing "the government's uniform and long-standing practice" on that issue.⁹⁷

L. REV. 1, 47-53, 61-64 (1988) (discussing the role of the Justice Department in coordinating administration of the FOIA).

91. Privacy Act of 1974, Pub. L. No. 93-579, § 6, 88 Stat. 1896, 1909 (1974) (codified as amended at 5 U.S.C. § 552a (1982)).

92. PRIVACY SOURCE BOOK, *supra* note 53, at 1177-78.

93. *Id.* at 1178-80.

94. 28 C.F.R. §§ 16.1-.11, 16.40-.58 (1984).

95. 28 C.F.R. § 16.70-.103 (1976).

96. 515 F. Supp. 1145 (D.D.C. 1981), *rev'd*, 674 F.2d 74 (D.C. Cir. 1982).

97. *Greentree*, 674 F.2d at 85 n.27 (citing Brief for the Government, joint appendix 29, at 35). Frank Greentree had been convicted for attempting to smuggle several tons of marijuana into the country. *Id.* at 75. After his conviction in federal court in Louisiana, he brought suit in federal district court to enjoin pending state prosecution based on the same events. *Id.* In furtherance of this civil action, Greentree filed FOIA and Privacy Act requests with the Customs Service and the Drug Enforcement Agency ("DEA") to uncover information about the federal investigation preceding his prosecution. *See id.* Customs and the DEA located responsive records but withheld the information on various FOIA and Privacy Act exemptions. *See id.* When the agencies denied his request, Greentree sued in the United States District

On appeal, however, the Department argued that the Privacy Act was an exemption three statute. In reversing its course in the *Greentree* appeal, the Department acknowledged that it was "taking a position different from the one argued in the District Court" and indicated that its decision in this regard was supported by its examination of court precedents. Furthermore, it "was made at the highest levels of the Justice Department only after considerable discussion and analysis."⁹⁸

The DOJ did not seek Supreme Court review in the *Greentree* case. Nor did DOJ representatives, in testimony before congressional committees during both the 98th and 97th Congresses, propose that Congress amend either the FOIA or the Privacy Act to clarify this issue. Nevertheless, the DOJ continued to argue that the Privacy Act was an exemption three statute in cases pending before circuit courts of appeals.⁹⁹

In 1983, the DOJ proposed a revision of its regulations implementing the FOIA and Privacy Acts,¹⁰⁰ which purported 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 have been the deletion of the section in existing regulations providing 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 *both* the Privacy Act *and* the FOIA.¹⁰¹ Under the new proposal, the Privacy Act would become the exclusive avenue of access by an individual to records concerning himself.

The subtlety—and perhaps schizophrenia—of the Justice Department's position was more clearly reflected in advice given through the Department's publication, *FOIA Update*. There the Office of Information and Privacy warned agencies that, in light of the *Greentree* ruling,¹⁰² they should not withhold subject information that is exempt from disclosure under the Privacy Act but releasable under the FOIA. The DOJ advised agencies that while it would defend the withholding of information were a suit on this subject

Court for the District of Columbia. *Id.* On its own initiative, the district court requested briefs on whether records exempt from disclosure under the Privacy Act are covered automatically under the FOIA's exemption three. *Id.* Both *Greentree* and the government agreed that the Privacy Act was not an exemption three statute. *Id.* The district court, however, disagreed. *Greentree*, 515 F. Supp. at 1147-49.

98. Brief for the Appellees at 14, *Greentree v. United States Customs Serv.*, 674 F.2d 74 (D.C. Cir. 1982) (Nos. 81-1829, 81-1830).

99. See *infra* notes 108-13 and accompanying text.

100. 48 Fed. Reg. 35,892 (1983) (to be codified at 28 C.F.R. pts. 0 and 6) (proposed Aug. 8, 1983).

101. The new regulations would have deleted 28 C.F.R. §§ 16.1-.11, 16.40-.58 (1984).

102. *Greentree*, 674 F.2d at 74; see *supra* notes 96-99 and accompanying text.

brought in any circuit other than the District of Columbia, agencies should not apply the Privacy Act as an exemption three statute at the administrative level because by doing so they would "run the unacceptable risk that the requester would file suit in the U.S. District Court for the District of Columbia, which would inescapably result in a judicial finding of improper withholding" ¹⁰³

2. Office of Management and Budget

Initially, OMB circulated the Lawton-IRS letter¹⁰⁴ to all agencies, thereby associating itself with the position that the Privacy Act was an exemption three 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."¹⁰⁵ During consideration of the *Greentree* appeal, however, the court was notified that OMB was considering a revision of this policy. A proposed revision was published on August 10, 1983, flatly stating 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 were exempted from release under the Privacy Act.¹⁰⁶ This interpretation proposed to read the Privacy Act as a statute specifically prohibiting disclosure under the FOIA pursuant to exemption three of the FOIA.

3. Agency Practice

Given the interpretation of the FOIA and Privacy Act relationship by the Department of Justice and OMB, it is no surprise that annual FOIA reports of federal agencies written during the early years of the Privacy Act's operation disclosed that agencies often cited the Privacy Act when invoking the third exemption to the FOIA.¹⁰⁷ For awhile this phenomenon receded; it was revived in 1979 when the Drug Enforcement Agency, the FBI, and other entities in the Justice Department, along with the Customs Service, began relying anew on the Privacy Act as an exemption three statute. This reliance led to litigation challenging those agencies' position and, ultimately, to congressional action.

103. DEPARTMENT OF JUSTICE, 4 FOIA UPDATE No. 2, at 3 (Spring 1983).

104. See PRIVACY SOURCE BOOK, *supra* note 53, and text accompanying note 92.

105. 40 Fed. Reg. 56,741, 56,743 (1975).

106. 48 Fed. Reg. 36,359 (1983).

107. See REPORT ON OVERSIGHT HEARINGS, *supra* note 87, at 25.

C. Judicial Consideration of FOIA-Privacy Relationship

Before Congress acted to resolve the conflict, courts of appeals had split on the question whether the Privacy Act could be used to exclude first-party access to individually identifiable materials under FOIA. The District of Columbia¹⁰⁸ and Third¹⁰⁹ Circuits ruled in the negative; the Fifth¹¹⁰ and Seventh¹¹¹ Circuits concluded in the affirmative.¹¹²

The arguments presented to these courts by both requesters and the government on whether the Privacy Act should preclude FOIA access have been discussed in preceding sections. One single generalization can be made about these cases: courts upholding reliance on the Privacy Act as an exclusive avenue for access to materials and systems covered by that act offered little or no analysis of the detailed relationship between the Privacy Act and the FOIA, the legislative history of the Privacy Act, and the implications of their holdings. It was not at all surprising that the Supreme Court accepted *certiorari* on two conflicting cases¹¹³ before Congress enacted legislation reaffirming the primacy of the FOIA as governing access to all government records.

V. CONGRESSIONAL RESOLUTION OF FOIA-PRIVACY ACT CONFLICT

The diverse interpretations of the relationship between the Privacy Act and the FOIA by Congress, the agencies, and the courts motivated Congress to resolve the issue through legislation. In 1984,

108. *Greentree*, 674 F.2d at 74; see also National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1488 (D.D.C. 1984).

109. *Porter v. United States Dep't of Justice*, 717 F.2d 787 (3d Cir. 1983); *Provenzano v. United States Dep't of Justice*, 717 F.2d 799 (3d Cir. 1983) (*per curiam*), *cert. granted*, 466 U.S. 926 (1984), *vacated as moot*, 469 U.S. 14 (1984).

110. *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980).

111. *Shapiro v. Drug Enforcement Admin.*, 721 F.2d 215 (7th Cir. 1983), *cert. granted*, 466 U.S. 926 (1984), *vacated as moot*, 469 U.S. 14 (1984), *remanded*, 762 F.2d 611 (7th Cir. 1985); *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Stimac v. United States Dep't of Treasury*, 586 F. Supp. 34 (N.D. Ill. 1984); *Stimac v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 577 F. Supp. 923 (N.D. Ill. 1984); *Martin v. Federal Bureau of Investigation*, Nos. 83-C-123, 80-C-1620, 83-C-1846 (N.D. Ill. filed Sept. 30, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983).

112. The Fourth Circuit held that where a disclosure to a third party was authorized under the FOIA, it would not violate the Privacy Act. *Jafari v. Department of the Navy*, 728 F.2d 247 (4th Cir. 1984). Law enforcement records were not at issue in this case, and it is not clear what result would have been reached had the court concluded that the Privacy Act would have barred disclosure of the records to the individual to whom they pertained.

113. *Provenzano*, 717 F.2d 799; *Shapiro*, 721 F.2d 215. For a fascinating analysis of the Justice Department's maneuvers in an effort to focus Supreme Court review on the case with the most sympathetic facts, see SULLIVAN, 4 CONST. COMMENTARY 452 (1987).

Congress amended the Privacy Act to comport firmly with the original language of that Act, FOIA, and their legislative histories. The amendment stated that the Privacy Act is *not* an exemption three statute under the the FOIA. This resolution by Congress was most consistent with the objectives and purposes of both statutes.

The Privacy Act amendment was hardly the subject of a groundswell of public and congressional interest. In January 1984, Congressman Glenn English introduced a short bill to clarify that the Privacy Act in no way inhibits access, by either third parties or the subject of the records sought, to information not exempt from disclosure under the FOIA.¹¹⁴

Aware that the matter was still in litigation, the sponsors of this bill made clear that its language was not intended to effect any change in the Privacy Act, but simply to restate the proper relationship between the FOIA and the Privacy Act intended by Congress from the start.¹¹⁵

Early in the 98th Congress, the House and Senate Intelligence Committees had been working to address the administrative problems the Central Intelligence Agency ("CIA") had in implementing the FOIA. This gave rise to consideration of legislation to modify application of the FOIA to the CIA. In the House, Congressman English obtained agreement that his subcommittee of the Committee on Government Operations would have an opportunity to review legislation that the House Intelligence Committee reported on this subject. Congressman English also held his own hearings on the CIA Information Act.¹¹⁶ During those hearings witnesses addressed the Justice Department's efforts to establish, through litigation, that Privacy Act exemptions could serve to block access to records under the FOIA.¹¹⁷

When the CIA Information Act was reported from the House Committee on Government Operations, it contained as an amendment section two, which inserted a subsection in the Privacy Act stating: "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

114. H.R. No. 4696, 98th Cong., 2d Sess. (1984).

115. 130 CONG. REC. H310-312 (daily ed. Jan. 31, 1984).

116. *Central Intelligence Agency Information Act: Hearings on H.R. 5164 Before the Subcomm. on Government Information, Justice & Agriculture, of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984).

117. *Id.* at 58, 62. In another set of hearings on FOIA reform generally, the author urged Congressman English and his subcommittee to clarify through statute that the Privacy Act was not a bar to disclosure under the FOIA. *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Government Information, Justice & Agriculture of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 962 (1984).

[FOIA].” The House Government Operations Committee report explained this amendment in the following terms:

With the enactment of the Privacy Act Amendment and H.R. 5164, individuals will continue to be able to make requests for records about themselves using the procedures in either the Privacy Act, FOIA, or both. Agencies will be obliged to continue to process requests under either or both laws. Agencies that had made it a practice to treat a request made under either law as if the request were made under both laws should continue to do so. Information that is exempt under FOIA but not under the Privacy Act will have to be disclosed when requested under the Privacy Act. Information that is exempt under the Privacy Act but not under FOIA will have to be disclosed when requested under the FOIA.¹¹⁸

This amendment remained in the House bill, which was not conferred but was sent to the Senate for its final approval.

A conflict arose between the CIA and the DOJ over the proposed House amendment. The CIA, with enactment of the new bill, would obtain substantial relief from the administrative burdens of the FOIA. Therefore, it explicitly agreed, as part of a compromise allowing this relief, that it would continue to allow individuals access to their own files under Privacy Act standards. The DOJ's objective was just the opposite. It wanted the FBI and other law enforcement agencies to be able to invoke Privacy Act exemptions to block subject access to files in those agencies. The Department was most unhappy with this proposed House amendment and lobbied behind the scenes to attempt to have it removed in both the House and the Senate.¹¹⁹ In the end, the views of the CIA prevailed and the Administration supported Senate acceptance of the legislation, as passed by the House.¹²⁰ The Senate proceeded to approve the legislation without dissent.¹²¹ The result was an amendment to the Privacy Act, that explicitly resolved the conflict between that act and FOIA. Thus, no longer could either Act be claimed to diminish access under the other.

VI. JUDICIAL AND AGENCY CONSIDERATION OF THE RESOLUTION

The congressional amendment to the Privacy Act in 1984 resolved the conflict between that Act and the FOIA. Congress explicitly stated that neither Act was to be treated as the exclusive means of disclosure for a subject requester. Subsequent interpretations by the courts indicate that this resolution was sound and free from am-

118. H.R. REP. NO. 726, 98th Cong. 2d Sess., at 16-17 (1984).

119. 10 ACCESS Repts. No. 19, at 1-2 (Sept. 26, 1984).

120. See 130 CONG. REC. S12,396 (daily ed. Sept. 28, 1984).

121. *Id.* at S12397. The House vote, on September 19, 1984, approved the bill by a vote of 369 to 36. 130 CONG. REC. H9817 (daily ed. Sept. 19, 1984).

biguities. Agency implementation after the amendment also reinforces that the resolution of the conflict between the two Acts was workable and consistent with the objectives and purposes of both statutes.

A. Judicial Consideration

As indicated earlier, the federal courts were divided on the issue of whether the Privacy Act was an exemption three statute under the FOIA. The Supreme Court accepted *certiorari* on two conflicting cases.¹²² While these cases were pending, Congress enacted legislation stating neither the Privacy Act nor the FOIA is to be treated as exclusive to the other.¹²³ Accordingly, the Supreme Court vacated and remanded the two cases for action consistent with the amendment.¹²⁴

On remand, the Seventh Circuit reconsidered whether the subject requester was entitled to documents under the FOIA, even though they were exempt from disclosure under the j(2) exemption of the Privacy Act.¹²⁵ The court held that:

Congress intend[ed] that the courts to construe the Privacy Act and the FOIA separately and independently so that exemption from disclosure under the Privacy Act does not exempt disclosure under the FOIA, and visa versa [I]nformation may be unavailable when a party requests access to that information under the Privacy Act but may be available when that information is requested under [FOIA].¹²⁶

Later court decisions concur with the Seventh Circuit's clear construction of the amendment to the Privacy Act.¹²⁷ The D.C. Circuit has recently set forth the procedure agencies should follow in determining whether documents should be withheld in light of the Privacy Act amendment.¹²⁸ The court stated:

In order to withhold these documents . . . the agency must demonstrate that the documents fall within some exception under each act. If a FOIA exemption covers the documents, but the Privacy exemption does not, the documents must be released under the Privacy Act;

122. See *supra* note 113.

123. See *supra* notes 114-21 and accompanying text.

124. Department of Justice v. Provenzano, 469 U.S. 14 (1984).

125. Shapiro v. Drug Enforcement Admin., 762 F.2d 611 (7th Cir. 1983).

126. *Id.* at 612.

127. See *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985); *Ely v. Federal Bureau of Investigation*, 781 F.2d 1487 (11th Cir. 1986); *Smith v. Department of Justice*, Civ. No. 86-6162 (E.D. Pa. filed Sept. 2, 1987).

128. *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181 (D.C. Cir. 1987). *But see Miller v. United States*, 630 F. Supp. 347 (E.D.N.Y. 1986). In *Miller*, the agency claimed that documents were exempt under both the Privacy Act and the FOIA. The district court found that the records were properly withheld by the agency under the FOIA. It did not, however, proceed to determine whether the documents were properly withheld under the Privacy Act. *Id.*

if a Privacy Act exemption but not a FOIA exemption applies, the documents must be released under FOIA.¹²⁹

It seems quite plain that all courts that subsequently examined the FOIA-Privacy Act relationship with regard to subject access agree on the meaning of the Privacy Act amendment. Their consistent treatment of the amendment indicates that Congress' resolution was clear and left no ambiguities regarding the relationship between the two Acts; each is to be treated independently from the other.

B. *Agency Treatment of the Resolution*

The DOJ, in keeping with the spirit as well as the letter of the 1984 congressional action, has advised federal agencies not only to provide maximum access afforded by both the FOIA and Privacy Acts, but to process requests by individuals for information concerning themselves under both laws. The DOJ has concluded: "[W]ere an agency to process an access request which cites only the Privacy Act (or, for that matter, no statute at all) under the Privacy Act alone, it would likely have to reprocess that request under FOIA once the requester (or, ultimately, a court) realized the narrowness of the agency's action."¹³⁰ The Department states that it is therefore good policy for agencies to treat all subject access requests as FOIA requests (as well as possibly Privacy Act requests), regardless of whether the FOIA is cited in a requester's letter.¹³¹

Some agencies, however, have not amended their regulations to conform explicitly with the new amendment. For example, the Treasury Department's regulations state "exemptions from disclosure under [FOIA] may not be invoked for the purpose of withholding from an individual any record which is otherwise accessible to such individual under the Privacy Act."¹³² Yet, there is not similar provision indicating that the Privacy Act exemptions cannot be invoked to deprive a person of records if the records are accessible under the FOIA.¹³³ There are no other agency regulations that even refer to the new amendment. In the interest of clarity and notice to the public, agencies should be urged to amend their regulations to comport with the new amendment to the Privacy Act.

129. *Martin*, 819 F.2d at 1184.

130. DEPARTMENT OF JUSTICE, 7 FOIA UPDATE No. 1, at 6 (Winter 1986).

131. *Id.*

132. 31 C.F.R. § 1.26(g)(5) (1987).

133. The regulation does, however, refer the reader to 5 U.S.C. § 552a(q) (1982). 31 C.F.R. § 1.26(g)(5) (1987).

VII. THE NEED FOR FURTHER LEGISLATIVE CLARIFICATION

The amendment to the Privacy Act in 1984 resolved the conflict between that Act and the FOIA with regard to subject requesters. The amendment made it clear that neither the Privacy Act nor the FOIA could preclude disclosure to a subject requester under the other. Subsequent judicial and agency consideration of the amendment indicates that it has clarified any ambiguity and confusion that existed on this issue. There are, however, other aspects of the FOIA-Privacy Act relationship that remain ambiguous and unclear.

A. Mailing Lists

Disclosure of mailing lists has proved to be a perplexing problem under the FOIA. The problem has become more complicated by the Privacy Act. Under the FOIA, exemption six has traditionally governed disclosure of mailing lists. Pursuant to this exemption, an agency must disclose a mailing list unless it finds that the disclosure will constitute a "clearly unwarranted invasion of personal privacy."¹³⁴ In making this determination, the agency must balance the public interest in disclosure against the individual's interest in privacy.¹³⁵

A number of agencies, however, have concluded that, while the privacy intrusion involved in the disclosure of mailing lists may not be sufficient to warrant protection under exemption six, the cost of providing lists regularly impose an administrative burden out of line with the costs that may be recovered under the FOIA. This is especially the case where names and addresses are maintained in a computerized database and the agency does not ordinarily print hard copy or store the data precisely in the format requested by the person asking for the list. This has led the DOJ to recommend, and some agencies to adopt, a policy of denial of all requests for mailing lists under exemption two of the FOIA protecting matters relating to internal personnel rules and practices.¹³⁶

The burden justification for the invocation of exemption two over mailing lists can be challenged. If agencies were permitted to

134. 5 U.S.C. § 552(b)(6) (1982).

135. *Department of Air Force v. Rose*, 425 U.S. 352 (1976). *See supra* note 27.

136. The Justice Department's position is set forth in 7 FOIA UPDATE No. 3, at 3 (Summer, 1986). The Department of Defense ("DOD") has recently issued a memorandum promulgating its policy on the issue. Memorandum on DOD Policy on the Release of Lists Containing the Names and Duty Addresses of DOD Personnel, Ref. No. 88-Corr-16 (January 13, 1988). In its memorandum the Department states that "it shall be DOD policy that DOD components shall not release lists containing the names and duty addresses of DOD personnel . . . All requests for such lists are to be processed pursuant to the [FOIA] . . . under Exemption 2." *Id.*

charge the requester for the mailing list the administrative-burden argument would disappear. Under such circumstances, the lists would be disclosed so long as there was no invasion of personal privacy. Since commercial entities make most of the requests for mailing lists, the charge by the agencies could be based on an assessment of the value of the list. Consequently, the sale of mailing lists could actually generate revenue for the agency.

The ability for agencies to charge for mailing lists is unclear because the Privacy Act prohibits the sale or rental of mailing lists unless the law specifically authorizes it.¹³⁷ Although the Privacy Act adds that this prohibition "shall not be construed to require the withholding of names and addresses otherwise permitted to be made public," as a practical matter, this has been the result of the provision.

It is unclear how this problem will be resolved. Reliance on exemption two of the FOIA to withhold mailing lists is currently being challenged in the courts.¹³⁸ Congress needs to clarify its intention regarding the disclosure and the sale of mailing lists. In resolving this issue Congress should consider the following issues. There is no compelling reason to believe that privacy interests are served by a prohibition on the sale of mailing lists where, but for the administrative burden, agencies would readily release those lists under the FOIA. In addition, where some special programming is necessary to render the lists disclosable, or to put them in a format useful to the requester, the FOIA may not even compel disclosure without regard to the exemptions, since no existing "record" has been requested.¹³⁹ Since this is claimed to be one of the greatest burdens on the agency, the justification under exemptions two is clearly underlined. Both the public and the government would benefit by allowing agencies to sell lists under these circumstances. Congress should explicitly state that the government may exact appropriate charges for these mailing lists.

B. *Fees and Deadlines*

Another unsettled aspect of the FOIA-Privacy Act relationship

137. See 5 U.S.C. § 552a(n) (1982).

138. Compare *Army Times Publishing Co. v. Department of the Army*, 684 F. Supp. 720 (D.D.C. 1988) (exemption two inapplicable), with *Schwanner v. Department of the Air Force*, Civ. No. 88-0560 (D.D.C. Aug. 8, 1988) (exemption two applicable).

139. The FOIA only applies to agency records. The FOIA, however, does not compel government agencies to create records. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). This concept has been extended to computer programs. An agency is under no obligation to develop a computer program to extract disclosable information from a database. *Clarke v. Department of Treasury*, Civ. No. 84-1873 (E.D. Pa. filed Jan. 24, 1986).

is whether agencies may charge fees to a requester who invokes both laws in making a request, and whether any time limits control the required response. The FOIA allows agencies to charge for search and copying¹⁴⁰ and imposes deadlines on the agency response;¹⁴¹ the Privacy Act does neither. Agency regulations, with scant exceptions, address handling of requests under these statutes as separate and distinct matters. But when both laws are invoked there is no indication of which law should control with regard to fees and deadlines.

Perhaps a reasonable approach to this problem would be to give requesters the choice of invoking the Privacy Act procedures and avoiding costs at the expense of time constraints on the agency, or invoking the FOIA procedures and obtaining the agency deadlines at the cost of search and copying fees. As long as agencies maintained separate queues and staffed both equally, so that the "free" track would involve only a longer queue and not a place in the queue behind paying customers, government and requester interests might readily be balanced. This would not require legislative resolution. Agencies could under existing law institute such procedures on their own.

C. Privacy Reforms

There are other, far more important weaknesses in the Privacy Act and its implementation aside from its relationship to the FOIA. These have been documented in hearings and a report by the House Subcommittee on Government Information.¹⁴² Congress has spent a great deal of time over the past decade examining problems with the FOIA,¹⁴³ and ultimately in 1986 amended that statute.¹⁴⁴ The Privacy Act could use the same attention.

VIII. CONCLUSION

Since enactment of the FOIA, Congress has continued to expand public access to government information. Through amend-

140. 5 U.S.C. § 552(a)(4) (1982).

141. *Id.* § 552(a)(6).

142. H.R. REP. No. 455, 98th Cong., 1st Sess. 1 (1983).

143. See, e.g., *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1730, and S.1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1 (1981); *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Government Information, Justice and Agriculture of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 1 (1984).

144. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 §§ 1801-1804, 100 Stat. 3207, 3248-49 (1986).

ments in 1974,¹⁴⁵ in 1976,¹⁴⁶ and 1986,¹⁴⁷ Congress responded to adverse judicial decisions and administrative interpretations to clarify and emphasize that conflicts or ambiguities should be resolved in favor of maximum disclosure of information. Congress' 1984 amendment to the Privacy Act resolving that FOIA disclosure mandates are to take primacy over Privacy Act exemptions is in keeping with this pattern. It provides a message that, in future conflicts over disclosure, should not be lost on the courts or government agencies.

145. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

146. Government in the Sunshine Act, Pub. L. No. 94-409 § 5, 90 Stat. 1241, 1247 (1976).

147. Anti-Drug Abuse Act of 1986, Pub. L. No. 9-570 §§ 1801-1804, 100 Stat. 3207, 3248-49 (1986).

