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THE PRIVACY ACT AFTER A DECADE

RICHARD EHLKE*

September, 1985 marks the tenth anniversary of the federal Privacy Act.¹ The Act prescribes a "code of fair information practices"² for federal agencies. It regulates agency collection, maintenance, use, and dissemination of records pertaining to individuals. Ambitious in concept and sweeping in its application to practically all aspects of agency handling of personal records, the Act nevertheless suffers from inherent weaknesses that undermine its effectiveness as an enforceable check on agency information practices. Exceptions to the Act's restrictions on disclosure of personal records, broad-based exemptions for agencies and categories of records, and a weak remedial scheme serve to make individual enforcement of the Act difficult. Administrative oversight of the operation of the Act has also been found to be lax.³ Thus, ten years after the enactment of the Privacy Act, in a period when technological change is posing new and complex privacy questions, serious thought must be given to the adequacy of the Act as an effective restraint on abuses of personal information gathering.

I. THE PRIVACY ACT IN BRIEF

The Privacy Act is intended to "provide certain safeguards for an individual against an invasion of personal privacy" by requiring federal agencies to observe certain requirements and prohibitions regarding the maintenance of personal information.⁴ The operative

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1. Privacy Act of 1974, Pub. L. No. 93-579, § 3, 88 Stat. 1896 (1974). The operative provisions of the Act codified in Title 5 became effective on September 27, 1975. Other provisions relating to the Privacy Protection Study Commission, Office of Management and Budget, development of guidelines and disclosure of Society Security numbers, became effective immediately upon enactment on December 31, 1974. Privacy Act of 1974, Pub. L. No. 93-579, § 8, 88 Stat. 45 (1974).

2. *Smiertka v. Department of Treasury*, 447 F. Supp. 221, 224 (D.D.C. 1978); see S. REP. NO. 1183, 93d Cong., 2d Sess. 45 (1974).

3. See generally *Who Cares About Privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress*, H.R. REP. NO. 455, 98th Cong., 2d Sess. (1983) [hereinafter cited as *Who Cares About Privacy?*]; *Hearings on Oversight of the Privacy Act of 1974 Before a Subcomm. of the House Government Operations Comm.*, 98th Cong., 1st Sess. (1983).

4. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896 (1974).

provisions of the Act, which are contained in the Freedom of Information Act ("FOIA"), prohibit agencies from disclosing records pertaining to an individual without his consent except under prescribed circumstances.⁵ Federal agencies must account for disclosures that are made of such records.⁶ An individual is to be granted access to the records an agency possesses concerning him, and accorded an opportunity to amend inaccurate records or object to their content.⁷

Agencies must abide by several maintenance requirements, which include: (1) maintaining only those personal records that are relevant and necessary for agency purposes;⁸ (2) collecting information to the greatest extent practicable from the subject individual;⁹ (3) informing suppliers of information of the authority for and purposes of the gathering of the information;¹⁰ (4) publishing information in the Federal Register about its records systems and administrative procedures for access to such records;¹¹ (5) assuring the accuracy, relevance, timeliness, and completeness of personal records;¹² (6) maintaining no records on the first amendment activities of individuals;¹³ and (7) establishing rules of conduct for persons handling personal records and safeguards to protect records systems.¹⁴

Civil remedies and criminal penalties for violations of the Act are available.¹⁵ There are specific provisions for the treatment of archival records,¹⁶ mailing lists,¹⁷ and the use of Social Security numbers.¹⁸ Government contractors are also subject to the Act under certain circumstances.¹⁹ Agencies and the President must submit reports on agency actions under the Act.²⁰ Finally, the Act contains provisions concerning the relationship between the Privacy Act and the FOIA.²¹

5. Freedom of Information Act, 5 U.S.C. § 552a(b) (1982).

6. *Id.* § 552a(c); *see also id.* § 522a(e)(8).

7. *Id.* § 552a(d).

8. *Id.* § 552a(e)(1).

9. *Id.* § 552a(e)(2).

10. *Id.* § 552a(e)(3).

11. *Id.* § 552a(e)(4).

12. *Id.* § 552a(e)(5), (6).

13. *Id.* § 552a(e)(7).

14. *Id.* § 552a(e)(9), (10).

15. *Id.* § 552a(g), (i).

16. *Id.* § 552a(1).

17. *Id.* § 552a(n).

18. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1909 (1974).

19. 5 U.S.C. § 552a(m) (1982).

20. *Id.* § 552a(o), (p).

21. *Id.* § 552a(b)(2). Section 552a(q) (1982), was amended by Pub. L. No. 98-477, on Oct. 15, 1984. 98 Stat. 2211-12 (1984).

This overview of the Privacy Act's statutory framework gives a flavor for the workings of the law. It is, however, the exceptions, exemptions, and qualifications to the Act's basic provisions that provide a true picture of its overall strengths and weaknesses as a safeguard against invasions of privacy.

Some of the initial definitional provisions serve to severely limit the Act's scope and protections. The Act applies only to records about an individual contained in a "system of records."²² This key term is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."²³ Thus, the method used to retrieve a record rather than its substantive content determines its coverage under the Privacy Act.

The restrictions on nonconsensual disclosure of records, individual access to records, and most of the record maintenance requirements imposed on agencies, are triggered only if records in a system of records are involved. Personal data that is retrieved by means other than some personal identifier is outside the scope of these Privacy Act provisions. Much of the litigation under the Act has concerned this question of retrieval from a system of records. Many litigants have failed to overcome this threshold requirement and have thus been denied relief under the Act.²⁴

Among the exceptions to the prohibition against nonconsensual agency disclosure of personal records is disclosure for a "routine use."²⁵ This term is broadly defined in the Act to mean "the use of such record for a purpose which is compatible with the purpose for which it was collected."²⁶ The only real restraints on an agency's utilization of the "routine use" provision are the requirements that

22. 5 U.S.C. § 552a(a)(4), (a)(5) (1982).

23. *Id.* § 552a(a)(5).

24. *See infra* notes 117-18 and accompanying text. The Privacy Protection Study Commission was critical of the system of records construct in its 1977 report. It decried "wholesale exclusion from the Act's scope of records that are not accessed by name, identifier or assigned particular." Privacy Protection Study Commission, *Personal Privacy in an Information Society*, at 504 (1977). The report concluded:

In summary, the system-of-records definition has two limitations. First, it undermines the Act's objective of allowing an individual to have access to the records an agency maintains about him, and, second, by serving as the activating, or "on/off switch" for the Act's other provisions, it unnecessarily limits the Act's scope. To solve this problem without placing an unreasonable burden on the agencies, the Commission believes *the Act's definition of a system of records should be abandoned and its definition of a record amended.*

Id. (emphasis in original).

25. 5 U.S.C. § 552a(b)(3) (1982).

26. *Id.* § 552a(a)(7).

the agency publish information about its routine uses of its system records, that the agency enable interested persons to comment on any new intended uses of such records, and that the agency inform sources of information of the routine uses to which the information may be put.²⁷ Much of the recent spate of computer matching, in which the records of agencies are compared to determine such things as whether ineligible persons are receiving benefits or whether individuals have defaulted on government loans, has been justified under the "routine use" rationale.²⁸

The "routine use" exception is only one of twelve exceptions to the Privacy Act's prohibition against disclosure of an individual's personal record without that individual's consent. What was once described as the most important provision of the Act²⁹ is now limited by numerous exceptions, some of which are quite broad. For instance, nonconsensual disclosure of records is permitted if disclosure is (1) to other agency employees with a "need to know;"³⁰ (2) required under the FOIA;³¹ (3) for a routine use;³² (4) to the Census Bureau;³³ (5) for use solely as a statistical record;³⁴ (6) to the National Archives;³⁵ (7) to a law enforcement agency upon written request of the agency head;³⁶ (8) for compelling health or safety reasons;³⁷ (9) to Congress;³⁸ (10) to the Comptroller General;³⁹ (11) pursuant to a court order;⁴⁰ or (12) to a consumer reporting agency pursuant to the Debt Collection Act.⁴¹

An agency must keep an accounting of disclosures made under these nonconsensual disclosure provisions except for employee "need to know" disclosures and FOIA-required disclosures.⁴² Any corrections or amendments made to a record must be disclosed to recipients of the record for which accountings were made.⁴³ Furthermore, an individual may obtain access to the accounting of dis-

27. *Id.* § 552a(e)(3)(C); see *id.* § 552a(e)(4)(D), (e)(11).

28. See, e.g., *Hearings on Oversight of Computer Matching to Detect Fraud and Mismanagement in Government Programs Before a Subcomm. of the Senate Governmental Affairs Comm.*, 97th Cong., 2d Sess. 122 (1982).

29. H.R. REP. NO. 1416, 93d Cong., 2d Sess. 12 (1974).

30. 5 U.S.C. § 552a(b)(1) (1982).

31. *Id.* § 552a(b)(2).

32. *Id.* § 552a(b)(3).

33. *Id.* § 552a(b)(4).

34. *Id.* § 552a(b)(5).

35. *Id.* § 552a(b)(6).

36. *Id.* § 552a(b)(7).

37. *Id.* § 552a(b)(8).

38. *Id.* § 552a(b)(9).

39. *Id.* § 552a(b)(10).

40. *Id.* § 552a(b)(11).

41. *Id.* § 552a(b)(12).

42. *Id.* § 552a(c).

43. *Id.* § 552a(c)(4).

closures of his records, except for disclosures made to law enforcement agencies.⁴⁴ The accounting requirement serves as a form of restraint on the wholesale disclosure of personal records.⁴⁵ There is, however, little evidence that agency accountings are frequently sought by individuals.⁴⁶

The Privacy Act contains both criminal and civil remedies⁴⁷ for violations of its terms, but the effectiveness of these remedies is problematic, because they fail to provide relief to an individual for agency violations of the Act. An agency officer or employee who willfully discloses personal records in violation of the Act is guilty of a misdemeanor and subject to a maximum fine of five thousand dollars.⁴⁸ Prosecution under this provision is rare, however, although the deterrent effect of potential criminal liability may be substantial.

An individual may also seek civil relief for violations of the disclosure provision, and for violations of the other provisions of the Act.⁴⁹ However, for most violations of the Act, only actual damages (as well as court costs and attorneys fees) are recoverable, and then only if the agency action was intentional or willful and had an adverse effect on the individual.⁵⁰ Court authority is split as to the amount of damages that may be recovered. Some courts have held that only out-of-pocket expenses may be recovered.⁵¹ Other courts have permitted recovery for physical and/or emotional damages caused by an agency violation of the Act where the other prerequisites for recovery were satisfied.⁵²

An individual may not seek to enjoin an agency from disclosing

44. *Id.* § 552a(c)(3).

45. The Privacy Protection Study Commission reported that agencies consider the accounting requirement the most burdensome provision of the Privacy Act. Privacy Protection Study Commission Report, *Personal Protection in an Information Society*, at 525.

46. See *supra* note 45 and accompanying text.

47. 5 U.S.C. 552a(g), (i) (1982).

48. *Id.* § 552a(i)(1).

49. *Id.* § 552a(g).

50. *Id.* § 552a(g)(1)(C), (D), (g)(4).

51. See, e.g., *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982) ("actual damages" refers to pecuniary loss and does not extend to generalized mental injuries, loss of reputation, embarrassment or other nonquantifiable injuries); *Albright v. United States*, 558 F. Supp. 260 (D.D.C. 1982), *aff'd*, 732 F.2d 181 (D.C. Cir. 1984) ("actual damages" limited to out-of-pocket expenses); *Houston v. Department of the Treasury*, 494 F. Supp. 24 (D.D.C. 1979) (claims for loss of reputation and emotional distress are not compensable under the Privacy Act).

52. See, e.g., *Johnson v. Department of the Treasury*, 700 F.2d 971 (5th Cir. 1983) (plaintiff entitled to compensation for proven mental and physical injuries); *Parks v. IRS*, 618 F.2d 677 (10th Cir. 1980) (plaintiff sought damages based upon psychological injury). See generally Note, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 *FORDHAM L. REV.* 611 (1984).

his records under the Privacy Act.⁵³ Injunctive relief is only available to obtain access to records and to amend records.⁵⁴ After-the-fact recovery of damages is, therefore, the only recourse for individuals aggrieved by agency violations of many provisions of the Privacy Act.

The Act's prohibition against nonconsensual disclosure of records contains twelve exceptions. There are also exemptions from other provisions contained in the Act. There are general exemptions⁵⁵ and specific exemptions,⁵⁶ and both types must be affirmatively claimed by an agency for particular systems of records through the promulgation of rules. They may not be asserted by an agency for the first time in an administrative proceeding or in response to a lawsuit brought by an individual under the Act.⁵⁷

The general exemptions permit the CIA and criminal law enforcement agencies to exempt their systems of records from specified provisions of the Privacy Act.⁵⁸ The primary provisions from which these agencies may be exempted are the access and amendment provisions, the maintenance and collection provisions, and the civil remedies provision.⁵⁹ Record systems of these agencies may not be exempted from the disclosure prohibition or the requirement that accountings of disclosures be made.⁶⁰ With respect to these provisions that remain applicable, however, the ability of covered agencies to exempt themselves from the civil remedies provision may make individual enforcement of the provisions' requirements against these agencies impossible.

The Act also contains specific exemptions.⁶¹ These exemptions are keyed to the content of records and may be asserted by any agency that maintains a covered system of records. The seven specific exemptions apply to: classified information,⁶² law enforce-

53. *Edison v. Department of the Army*, 672 F.2d 840 (11th Cir. 1982) (Privacy Act authorizes courts to issue injunctions only to amend or produce records and not to prevent disclosure); *Parks v. IRS*, 618 F.2d 677 (10th Cir. 1980) (it is improper to imply a broad right to injunctive relief from the Act); see *supra* note 50 and accompanying text.

54. 5 U.S.C. §§ 552a(g)(2)(A), and (g)(3)(A) (1982).

55. *Id.* § 552a(j).

56. *Id.* § 552a(k).

57. *Id.* § 552a(j), (k); see *Ryan v. Department of Justice*, 595 F.2d 954 (4th Cir. 1979). This is in contrast to the nine exemptions to mandatory disclosure under the Freedom of Information Act. They need not be established in advance by rule and may be asserted initially against an individual in administrative and judicial proceedings.

58. 5 U.S.C. § 552a(j) (1982).

59. *Id.*

60. *Id.*

61. *Id.* § 552a(k).

62. *Id.* § 552a(k)(1).

ment investigatory material,⁶³ records maintained in connection with providing protection to the President,⁶⁴ statistical records,⁶⁵ investigatory material for federal employment, military service, government contracts or access to classified data,⁶⁶ federal employment testing records,⁶⁷ and material used to determine promotions in the armed services.⁶⁸ Like the general exemptions, the specific exemptions may not be applied to exempt an agency from the disclosure prohibition nor from the civil remedies provision of the Act.

II. AMENDMENTS TO THE PRIVACY ACT

The Privacy Act has been amended three times in its ten year history. The most significant amendments occurred in 1982 and 1984.⁶⁹ The former added a new exception to the disclosure prohibition for disclosures made to consumer credit reporting agencies pursuant to the Debt Collection Act of 1982.⁷⁰ The 1984 amendment resolved a long-standing controversy over the relationship between the Privacy Act and the FOIA.⁷¹

The interrelationship between the Privacy Act and the FOIA has been a point of controversy since the early days of the operation of the Privacy Act.⁷² This controversy arose because of the different provisions contained in the Acts regarding an individual's access to his records. The FOIA mandates disclosure of requested records to any person unless one of nine exemptions applies.⁷³ The Privacy Act affords an individual the right of access to agency records pertaining to him,⁷⁴ however, the general exemptions (applicable to particular agencies) and the specific exemptions (geared to the content of records) may be asserted by agencies to deny such access to an individual's records under the Privacy Act.⁷⁵

63. *Id.* § 552a(k)(2).

64. *Id.* § 552a(k)(3).

65. *Id.* § 552a(k)(4).

66. *Id.* § 552a(k)(5).

67. *Id.* § 552a(k)(6).

68. *Id.* § 552a(k)(7).

69. The third amendment, also in 1982, changed the annual report requirement in 5 U.S.C. § 552a(p) and modified the provision for publication of agency systems of records, 5 U.S.C. 552a(e)(4). Pub. L. No. 97-375, 96 Stat. 1821 (1982).

70. Debt Collection Act, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (adding 5 U.S.C. § 552a(b)(12)).

71. Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2211 (1984) (adding 5 U.S.C. § 552a(q)(2)).

72. For a discussion about this controversy in the context of Privacy Act amendments, see H.R. REP. NO. 726, Part 2, 9th Cong., 2d Sess. 13-17 (1984).

73. 5 U.S.C. § 552(a) (1982).

74. *Id.* § 552a(d)(1).

75. *Id.* § 552a(j)-(k).

With respect to third-party requests (requests for records pertaining to another individual), the FOIA is the available access route, because the Privacy Act provides that an agency need not obtain the consent of the record subject before disclosing his record to a third party if the FOIA requires disclosure.⁷⁶ The FOIA requires disclosure if none of the exemptions to that Act are applicable. An individual seeking his own records (a first-party request) may proceed under the Privacy Act, which provides that an agency may not rely on an FOIA exemption to deny access.⁷⁷

The controversy arose over the ability of an individual to utilize the FOIA to gain access to his records if, for instance, an exemption in the Privacy Act barred disclosure under that Act. Given the breadth of some of the Privacy Act's exemptions, particularly those that permit agency-wide exemption from the Act's provisions, it is not unlikely that records could be exempt from the access provision of the Privacy Act but not fall within any of the exemptions of the FOIA. If the Privacy Act was the exclusive vehicle for an individual seeking access to his own records, he could be denied access even though a third party proceeding under the FOIA could obtain access to those same documents because that Act's exemptions were not applicable.

Both the Department of Justice and the Office of Management and Budget initially advised agencies that an individual was to be accorded the maximum access to his records obtainable under either Act.⁷⁸ However, beginning in 1979, some courts took the position that an individual was confined to the Privacy Act in seeking access to his own records.⁷⁹ They relied on exemption three of the FOIA in denying access under the FOIA if the records were exempt from disclosure under the Privacy Act. That exemption provides that records may be withheld from disclosure under the FOIA if some other statute specifically provides for nondisclosure.⁸⁰ The Privacy Act was viewed as such a statute. Thus, if one of the Privacy Act's exemptions was asserted in order to bar an individual from access to his records under that Act, he could not turn to the FOIA as an alternative means of disclosure.

Contrary decisions appeared, however, and some pointed out that such an interpretation could result in what was called the third-party anomaly. This was the situation where a third party, under the FOIA, could obtain access to an individual's records, but

76. *Id.* § 552a(b)(2).

77. *Id.* § 552a(q).

78. *See* 28 C.F.R. § 16.57 (1983); 40 Fed. Reg. 56742 (1974).

79. *See, e.g.,* Shapiro v. Drug Enforcement Admin., 721 F.2d 215 (7th Cir. 1983), *vacated and remanded*, 105 S. Ct. 413 (1984); Painter v. FBI, 615 F.2d 689 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979).

80. 5 U.S.C. § 552b(e)(3) (1982).

the record subject would be denied access if confined to the Privacy Act as the means of access.⁸¹ With the courts split, the Justice Department and the Office of Management and Budget opted to reverse their initial guidance. They adopted the position that the Privacy Act was an FOIA exemption three statute, and that an individual confronted with an exemption in the Privacy Act could not utilize the FOIA to obtain access to records pertaining to him.⁸² The United States Supreme Court ultimately granted certiorari for two cases involving this question. The Court consolidated these cases for purposes of appeal. They were the first cases under the Privacy Act that the Court agreed to hear.⁸³

Supreme Court resolution of the question was short-circuited, however, by congressional enactment of the Central Intelligence Agency Information Act ("CIA Act") in October, 1984.⁸⁴ Section 2(c) of this Act added a provision to the Privacy Act prohibiting an agency from relying on an exemption in the Privacy Act to withhold records from an individual that would otherwise be accessible under the FOIA. The pertinent provision of the Privacy Act now reads:

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

(2) No agency shall rely on any exemption in this section [Privacy Act] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 [FOIA] of this title.⁸⁵

The upshot of the amendment is that an individual may proceed under both the Privacy Act and the FOIA to obtain access to records pertaining to him, and he is entitled to the maximum access available under either Act. Both Acts have their advantages in terms of access to records. For instance, the Privacy Act has no exemption comparable to exemption five of the FOIA,⁸⁶ which is possibly the broadest exemption of that Act, permitting the withholding of inter-agency and intra-agency memoranda. On the other hand, the FOIA does not contain institutional exemptions like

81. See, e.g., *Porter v. Department of Justice*, 717 F.2d 787 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74 (D.C. Cir. 1982).

82. See 49 Fed. Reg. 12248, 12338 (March 29, 1984).

83. *Department of Justice v. Provenzano*, 104 S. Ct. 1706, *vacated and remanded*, 105 S. Ct. 413 (1984).

84. Pub. L. No. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C. § 401 (1982)). The Supreme Court acknowledged that the CIA Act mooted the issue it had decided to review when it vacated and remanded both cases that had presented the issue. *Department of Justice v. Provenzano*, 105 S. Ct. 413, 414 (1984).

85. *Id.* (codified at 5 U.S.C. § 552a(q)(1) (1982)).

86. 5 U.S.C. § 552(b)(5) (1982).

those enjoyed by the CIA and law enforcement agencies under the Privacy Act.⁸⁷ In fact, it was this exemption for CIA records that enabled proponents to include the Privacy Act amendment in the CIA Act. The CIA Act permits the CIA to exempt its operational files from the FOIA. However, requests from individuals for their own records are excluded from the exemption. Such an exclusion would have little meaning if the agency could assert its general exemption under the Privacy Act and exemption three of the FOIA to effectively deny access to records.⁸⁸

The Debt Collection Act of 1982⁸⁹ contains several provisions that affect implementation of the Privacy Act. The Act, designed to facilitate the collection of debts owed to the United States, permits the utilization of a number of debt collection techniques, including governmental use of private debt collection agencies. Federal agencies are authorized to disclose information regarding debtors to collection agencies. Such disclosures from agency record systems necessitated amendments to the Privacy Act. The primary amendment was the addition of a twelfth exception to the Privacy Act's prohibition against nonconsensual disclosure of personal records.⁹⁰ As a result, an agency need not obtain the consent of the individual before disclosing his record to a consumer reporting agency that is in the business of collecting and evaluating consumer credit information for transmission to third-parties.⁹¹

The Debt Collection Act and OMB implementing regulations place limits on the disclosure process.⁹² Agencies may not indiscriminately disclose information about an individual to a consumer reporting agency.⁹³ Prior notice must be given to the debtor who must be afforded an opportunity to satisfy the debt.⁹⁴ The agency must publish notice of the systems of records from which disclosures will be made,⁹⁵ and only a narrow range of information relevant to collection of the debt is to be disclosed.⁹⁶

87. *Id.* § 552a(j).

88. See H.R. REP. NO. 726, Part 2, 98th Cong., 2d Sess. 16 (1984).

89. Pub. L. No. 97-365, 96 Stat. 1749 (1982) (codified primarily at 31 U.S.C. §§ 3701-3731, 26 U.S.C. § 6103, and 5 U.S.C. § 5514 (1982)).

90. Pub. L. No. 97-365, § 2(a), 96 Stat. 1749 (1982) (amending 5 U.S.C. § 552a(b)(12) (1982)).

91. The Act adopts the definition of "consumer reporting agency" in the Fair Credit Reporting Act and also supplies its own definition. See 31 U.S.C. § 3701(a)(3)(B) (1982).

92. *Id.* § 3711; 48 Fed. Reg. 15556 (April 11, 1983).

93. 48 Fed. Reg. 15557 (1983) (OMB guidelines on how P.L. 97-365 affects the Privacy Act of 1974).

94. 31 U.S.C. § 3711(f)(1)(C) (1982); 48 Fed. Reg. 15556 (1983).

95. 31 U.S.C. § 3711(f)(1)(A) (1982); 48 Fed. Reg. 15558 (1983).

96. 31 U.S.C. § 3711(f)(1)(F) (1982); 48 Fed. Reg. 15558 (1983).

Finally, the agency must receive assurance from the consumer reporting agency to which information is to be disclosed that it will comply with all laws governing consumer credit information, that it will keep information current, and that it will not misuse the information.⁹⁷ Such consumer reporting agencies, however, are not deemed to be contractors under the Privacy Act. If they were, the remedial provisions and maintenance requirements of the Act would apply to them as well.⁹⁸

The Debt Collection Act also permits the Internal Revenue Service to disclose to other agencies the mailing address of a taxpayer for purposes of locating him and seeking to collect a debt.⁹⁹ The Act operates to "provide the authority for the establishment of a 'routine use' disclosure of this information pursuant to subsection (b)(3) of the Privacy Act. It does so by providing a statutory basis for agencies to assume the disclosure is compatible with the purpose for which the data was originally collected."¹⁰⁰ Finally, the Act authorizes agencies to require loan applicants to furnish their Social Security numbers as a condition for obtaining a government loan.¹⁰¹ This provision supplies the necessary authority under section seven of the Privacy Act to condition the granting of a benefit on the applicant supplying his Social Security number.¹⁰²

The Debt Collection Act represents the first significant statutory inroad on the protections of the Privacy Act. Despite its breadth, however, the Act itself and the OMB implementing regulations contain limitations that serve to confine the operation of the Act to the stated purpose of collecting government debts. The Act and the regulations promulgated thereunder provide procedural protections designed to prevent indiscriminate agency disclosure of personal information.

The foregoing discussion demonstrates the relative stability of the Privacy Act. In contrast, its sister statute, the FOIA, was significantly amended in 1974,¹⁰³ and major amendments passed the Senate in 1984.¹⁰⁴ There has been a push to significantly amend the

97. 31 U.S.C. § 3711(f)(1)(E) (iii) (1982); 48 Fed. Reg. 15558 (1983).

98. 5 U.S.C. § 552a(m)(2) (1982); 48 Fed. Reg. 15559 (1983).

99. 26 U.S.C. § 6103(m)(2) (1982).

100. 48 Fed. Reg. 15558 (1983). The Privacy Act defines "routine use" thusly: "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7) (1982).

101. Pub. L. No. 97-365, § 4, 96 Stat. 1751 (1982); 26 U.S.C. § 6103 (1982).

102. Pub. L. No. 93-579, § 7, 88 Stat. 1909 (1974); 5 U.S.C. § 552a (1982); 48 Fed. Reg. 15559 (1983).

103. Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552(a)-(b) (1982)).

104. S. 774 passed the Senate on February 27, 1984. See 130 CONG. REC. S1822 (daily ed. Feb. 27, 1984).

FOIA since at least 1978. The amendment drive has come primarily from law enforcement and intelligence agencies seeking relief from the burdens of the Act. Amendments have also been proposed by those with business interests seeking enhanced protection for confidential business data submitted to agencies.¹⁰⁵ The CIA obtained FOIA exemption for its operational files in 1984,¹⁰⁶ as discussed above,¹⁰⁷ and the 99th Congress will seek renewal of the omnibus FOIA amendment effort.¹⁰⁸

No such amendment drive exists with respect to the Privacy Act. Congress held its first general oversight hearings on the Act in 1983.¹⁰⁹ However, with no legislative proposals forthcoming, the committee report instead concentrated primarily on the shortcomings that exist regarding OMB oversight of the Act's operation.¹¹⁰ The Privacy Protection Study Commission in its 1977 report suggested several amendments to the Act,¹¹¹ but no concerted action has been taken on the Commission's recommendations.

The lack of use of the Privacy Act, compared to the FOIA, may explain why there is no impetus to amend it. FOIA amendments have frequently been occasioned by judicial construction of the Act. Relatively little case law on the Privacy Act exists, however, and what there is has essentially confirmed the weaknesses in the Act that had been identified earlier by the Privacy Protection Study Commission and others. Fear of opening up complex legislation like the Privacy Act to congressional tinkering may also be a factor in the lack of a movement to revise the Act. The emergence of new technologies and threats to privacy not contemplated when the Privacy Act was enacted may also demand separate, more focused legislative solutions.

105. See *Hearings on the Freedom of Information Reform Act Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. (1984); *Hearings on the Freedom of Information Act Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (2d vol.) (1982); *Freedom of Information Act*, S. REP. No. 221, 98th Cong., 1st Sess. (1983), see also Ehlke & Relyea, *Congress' Look at FOIA Changes Stirs Controversy*, *Legal Times* (Jan. 3, 1983).

106. Pub. L. No. 98-477, 98 Stat. 2209 (1984).

107. See *supra* text accompanying note 87.

108. S. 150, a bill identical to that which passed the Senate in 1984, has been introduced. S. 150, 99th Cong., 1st Sess., 131 CONG. REC. 263 (1985).

109. *Hearings on Oversight of the Privacy Act of 1974 Before a Subcomm. of the House Government Operations Comm.*, 98th Cong., 1st Sess. (1983).

110. *Who Cares About Privacy?*, *supra* note 3, at 22-24.

111. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, at ch. 13 (1977); see also Appendix 4 to the Report (Appendix B sets forth an illustrative revised Privacy Act).

III. LITIGATION TRENDS UNDER THE PRIVACY ACT

The Privacy Protection Study Commission noted that after two years of operation, the Privacy Act did not share the same degree of visibility and awareness that the FOIA enjoys in the eyes of potential users of the Act.¹¹² This is borne out by the relative number of cases decided under both Acts.¹¹³ The United States Supreme Court has issued opinions in 18 FOIA cases in the last eleven years.¹¹⁴ It has decided none under the Privacy Act in its ten year history.¹¹⁵

The lack of litigation under the Privacy Act might also be explained by features of the Act that are not hospitable to obtaining effective relief for violations of the Act. The complementary route of access to individual records afforded by the FOIA may also contribute to the greater body of case law under that statute. On the other hand, the Privacy Act is more than merely an access law. It contains disclosure prohibitions, collection and maintenance requirements, and civil remedies. Despite the apparent scope of the protections afforded by the Privacy Act, it nevertheless suffers from inherent definitional limitations, extensive exceptions and exemptions, and a generally ineffective remedial scheme.

The Privacy Act contains a number of definitional provisions that serve as triggers to use and application of the Act. Only individual citizens of the United States or resident aliens may use the Act.¹¹⁶ Unlike the FOIA, noncitizens and corporations are barred

112. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, at 508-09 (1977).

113. See United States Department of Justice, Office of Information Policy, Freedom of Information Case List (September 1984).

114. *United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488 (1984); *FTC v. Grolier, Inc.*, 103 S. Ct. 2209 (1983); *FBI v. Abramson*, 456 U.S. 615 (1982); *Department of State v. Washington Post*, 456 U.S. 595 (1982); *Baldrige v. Shapiro*, 455 U.S. 345 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980); *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980); *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Comm.*, 445 U.S. 136 (1980); *Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Department of Air Force v. Rose*, 425 U.S. 352 (1976); *FAA v. Robertson*, 422 U.S. 255 (1975); *Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink*, 410 U.S. 73 (1973).

115. The Court agreed to hear its first Privacy Act cases in 1984, but Congress settled the issue involved—the relationship between the access provisions of the Privacy Act and the FOIA—by statute, mooting the question that the Court had agreed to decide. *Department of Justice v. Provenzano*, 104 S. Ct. 1706 (1984); *Shapiro v. Drug Enforcement Admin.*, 104 S. Ct. 1706 (1984). These cases, however, were consolidated for appeal and then vacated and remanded. *Department of Justice v. Provenzano*, 105 S. Ct. 413 (1984). See *supra* text accompanying notes 80-84.

116. Privacy Act of 1974, Pub. L. No. 93-579, § 3(a)(2), 88 Stat. 1896 (1974).

from employing the Act to gain access to records or from utilizing the Act's other provisions.¹¹⁷

Another key threshold concept in the Privacy Act is the definition of information covered by the Act. Whereas the FOIA contains no definition of accessible records, the Privacy Act defines the "records" to which its various requirements apply.¹¹⁸ Furthermore, for the Privacy Act to apply, the record must be contained in a "system of records."¹¹⁹ Thus, access to records and other rights under the Privacy Act depend not only on the substantive content of the record, but also on its method of maintenance and retrieval. Only records that are retrievable and are actually retrieved from a system of records are covered by the Act. Records not placed in a system of records, i.e., not filed under an individual's name or identifier, are outside the scope of the Act. Many litigants have been frustrated in their attempts to press Privacy Act claims because of this technical bar posed by the system of records construct.¹²⁰

117. See *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369 (9th Cir. 1981); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); *Cell Ass'n v. National Inst. of Health*, 579 F.2d 1155 (9th Cir. 1978). OMB Guidelines implementing the Act would bar individuals acting in an entrepreneurial capacity (e.g., as sole proprietors) from using the Act, equating them with corporate users. 40 Fed. Reg. 28951 (1975). Most courts, however, have rejected this distinction. *Metadure Corp. v. United States*, 490 F. Supp. 1368 (S.D.N.Y. 1980); *Florida Medical Ass'n v. HEW*, 479 F. Supp. 1291 (M.D. Fla. 1979). *But see Shermco Indus. v. Secretary of the Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978).

118. The term "record" is defined as:

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4) (1982).

The record must be reflective of some quality of an individual or contain a means of identifying an individual. See *Albright v. United States*, 631 F.2d 915 (D.C. Cir. 1980); *American Fed'n of Gov't Employees v. NASA*, 482 F. Supp. 281 (S.D. Tex. 1980). Private notes to refresh the memory, so-called "memory joggers", have been excluded from coverage of the Act as long as they are kept private. *Chapman v. NASA*, 682 F.2d 526 (5th Cir. 1982), *cert. denied*, 105 S. Ct. 517 (1984).

119. See *supra* notes 22 & 23 and accompanying text.

120. See *Chapman v. NASA*, 682 F.2d 526 (5th Cir. 1982), *cert. denied*, 105 S. Ct. 517 (1984); *Doyle v. Behan*, 670 F.2d 535 (5th Cir. 1982); *Savarese v. HEW*, 620 F.2d 298 (5th Cir. 1980), *cert. denied sub nom. Savarese v. Harris*, 449 U.S. 1078 (1981); *Johnson v. Department of the Air Force*, 526 F. Supp. 679 (W.D. Okla. 1980); *Grachow v. United States Customs Serv.*, 504 F. Supp. 632 (D.D.C. 1980); *Jackson v. Veterans Admin.*, 503 F. Supp. 653 (N.D. Ill. 1980); *Smiertka v. Department of Treasury*, 447 F. Supp. 221 (D.D.C. 1978). *But see Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984) (disclosure held covered by the Act because, while official making disclosure had not retrieved records from a system of records in order to disclose them, he had a role in creating the underlying documents). An

The prohibition against disclosure of a record without the consent of the record subject is the centerpiece of the Privacy Act's regulatory structure. However, twelve exceptions to this nondisclosure requirement serve to effectively limit the Act's reach.¹²¹ Despite the breadth of some of the exceptions (or maybe because of it) there has been relatively little litigation over application of these nondisclosure exceptions. The ability to recover damages only after a disputed disclosure has been made, rather than to enjoin disclosure before it occurs (and then only under limited circumstances) may account for the dearth of cases. Nevertheless, courts have found some disclosures to violate the Act.¹²²

An individual may obtain access to his records under the Privacy Act if they are contained in a system of records and they are not exempt from disclosure. The 1984 amendment to the Act reinforces an individual's right to the maximum access available under either the Privacy Act or the FOIA.¹²³ One issue that has split the courts is whether an individual has a right of access to information concerning third parties that is contained in his record. The Privacy Act's access provision entitles a person to access to "his record or to any information pertaining to him."¹²⁴ Furthermore, the term "record" is defined as information "about an individual."¹²⁵ It has been held that information concerning third parties that is contained in an individual's record is not information pertaining to him and is, therefore, not accessible.¹²⁶ A contrary holding viewed such third-party information as part of the individual's record and thus subject to disclosure under the Act.¹²⁷

Access to records is often a prelude for efforts to seek amendment of assertedly inaccurate records. The right to amend erroneous information contained in an individual's records is one of the innovative features of the Privacy Act.¹²⁸ A key issue in amendment cases is determining what type of information is susceptible to

exception to the system of records requirement has been recognized with respect to the Act's requirement that an agency "maintain no record describing how any individual exercises rights guaranteed by the First Amendment. . . ." 5 U.S.C. § 552a(e)(7) (1982). This exception has been held to apply to the mere collection of information regardless of its placement in a system of records. *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915 (D.C. Cir. 1980).

121. 5 U.S.C. § 552a(b)(1)-(12) (1982).

122. *See Parks v. IRS*, 618 F.2d 677 (10th Cir. 1980); *Fitzpatrick v. IRS*, 1 GDS 80, 232 (N.D. Ga. 1980), *aff'd in part, vacated in part on other grounds*, 665 F.2d 327 (11th Cir. 1982).

123. *See supra* text accompanying notes 80-84.

124. 5 U.S.C. § 552a(d)(1) (1982).

125. *Id.* § 552a(a)(4).

126. *DePlanche v. Califano*, 549 F. Supp. 685 (W.D. Mich. 1982).

127. *Voelker v. IRS*, 646 F.2d 332 (8th Cir. 1981).

128. 5 U.S.C. § 552a(d)(2) (1982).

amendment. Some courts have rejected efforts to correct what are viewed as matters of judgment in situations such as personnel performance ratings or military promotion actions.¹²⁹ Other courts have not confined the amendment right to purely factual matters, although the difficulty of reconstructing a subjective decision-making process has resulted in the denial of relief under the Act.¹³⁰

The collection and maintenance requirements of the Privacy Act impose affirmative obligations on agencies.¹³¹ The Act's prohibition against agency maintenance of records relating to an individual's first amendment activities embodies one of the concepts that motivated enactment of privacy legislation in the first place. The provision states that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."¹³² While the requirement is not limited to records in a system of records and in that sense is more expansive than most of the other provisions of the Act,¹³³ its protections have been diluted by broad court interpretations of the proviso "pertinent to and within the scope of an authorized law enforcement activity."¹³⁴ Furthermore, as with all the agency requirements, only damages are recoverable for violations of this maintenance requirement.

Throughout the foregoing overview of litigation under the Privacy Act, the scope of remedies for violations of the Act has been briefly noted. The failure of the Privacy Act as an enforceable tool in the hands of aggrieved individuals is probably nowhere more apparent than in its remedial scheme. Injunctive relief is available to force access to and amendment of agency records. However, with respect to all other provisions of the Act, only actual damages (including costs and attorneys fees with a minimum recovery of \$1000) are recoverable for their violation. In addition, in order to recover, an individual must demonstrate that the agency action had an ad-

129. *Blevins v. Plummer*, 613 F.2d 767 (9th Cir. 1980); *Sweatt v. Department of the Navy*, 2 GDS 81,038 (D.D.C. 1980), *aff'd per curiam*, 683 F.2d 420 (D.C. Cir. 1982); *Turner v. Department of the Army*, 447 F. Supp. 1207 (D.D.C. 1978).

130. *Murphy v. National Security Agency*, 2 GDS 81,389 (D.D.C. 1981); *R.R. v. Department of the Army*, 482 F. Supp. 770 (D.D.C. 1980).

131. 5 U.S.C. § 552a(e) (1982). *See supra* text accompanying notes 8-14.

132. 5 U.S.C. § 552a(e)(7) (1982).

133. *See supra* note 118.

134. *See Jabara v. Webster*, 691 F.2d 272, 280 (6th Cir. 1982) (investigation of first amendment activity permissible if "relevant to an authorized criminal investigation or to an authorized intelligence or administrative [investigation]"); *cert. denied*, 104 S. Ct. 193 (1984); *Tate v. Bindsell*, 2 GDS 82,114 (D.S.C. 1981); *Pacheco v. FBI*, 470 F. Supp. 1091, 1108 (D.P.R. 1979) (some investigative files of the FBI within the exception); *American Fed'n of Gov't Employees v. Schlesinger*, 443 F. Supp. 431, 435 (D.D.C. 1978).

verse effect on him and that the action was intentional or willful.¹³⁵ First, courts seldom find that agency action has risen to that level of culpability.¹³⁶ Second, demonstrating adverse effect is often difficult, with some courts refusing to accept subjective showings of harm or declining to find a causal link between the harm and the agency action.¹³⁷

Finally, the courts are split on the scope of damages recoverable under the Act. The statute specifies that only "actual damages" are recoverable. Initial interpretations of this provision limited recovery to out-of-pocket pecuniary losses.¹³⁸ However, at least one circuit has held that "actual damages" includes physical and mental injuries as well as out-of-pocket expenses.¹³⁹

Thus, an individual seeking relief under the Privacy Act faces a number of hurdles. Limiting definitions and expansive exemptions combine with an ineffective remedial scheme to render much of the Act practically unenforceable in the hands of an individual. It is not surprising, therefore, that a body of case law comparable to that under the FOIA (a law which virtually invites litigation) has not developed.

IV. CONCLUSION

The Privacy Act has been in operation for ten years. Its weaknesses have been apparent since its inception. The product of hurried congressional consideration in the closing days of the 93rd Congress, the Act displays its compromises in the form of broad exemptions and qualifications. As one commentator has noted, the Act is "its own worst enemy."¹⁴⁰ Individuals seeking to enforce its provisions must contend with an ineffective remedial scheme, and substantive provisions that are subject to numerous exceptions and broad interpretations. The weaknesses of the Act have been illumi-

135. 5 U.S.C. § 552a(g)(1)(C), (D), (G)(4) (1982).

136. See *Edison v. Department of the Army*, 672 F.2d 840 (11th Cir. 1982); *Bruce v. United States*, 621 F.2d 914 (8th Cir. 1980); *Doe v. General Services Admin.*, 544 F. Supp. 530 (D. Md. 1982); *Zeller v. United States*, 467 F. Supp. 487 (E.D.N.Y. 1979). Cf. *Johnson v. IRS*, 2 GDS 81,370 (W.D. Tex. 1981), *rev'd on other grounds*, 700 F.2d 971 (5th Cir. 1983) (plaintiff entitled to compensation for proven mental and physical injuries).

137. See *Albright v. United States*, 558 F. Supp. 260 (D.D.C. 1982), *aff'd*, 732 F.2d 181 (D.C. Cir. 1984); *Zeller v. United States*, 467 F. Supp. 487 (E.D.N.Y. 1979); *Harper v. United States*, 423 F. Supp. 192 (D.S.C. 1976).

138. *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982); *Houston v. Department of Treasury*, 494 F. Supp. 24 (D.D.C. 1979).

139. *Johnson v. IRS*, 700 F.2d 971 (5th Cir. 1983).

140. *Hearings on Oversight of the Privacy Act of 1974 Before a Subcomm. of the House Government Operations Comm.*, 98th Cong., 1st Sess. 231 (1983) (statement of Ronald Plessler).

nated by case law that, on the whole, has not been kind to aggrieved persons seeking relief under the Act.

Some have suggested replacing the present system of agency self-enforcement of the Act (guided by OMB oversight) with a permanent body to strengthen compliance with the Act.¹⁴¹ Others have examined the possibility of extending the Privacy Act concept to the private sector in such areas as medical and insurance records.¹⁴² All agree, however, that flawed as it may be, the Privacy Act does represent a statement of fair information principles and practices. If the Act is implemented faithfully by agency record handlers and officials, it can serve to prevent the abuse of personal information, and help insure that privacy interests are weighed alongside other governmental interests.

141. *Id.* at 6 (statement of Chairman English); see H.R. 3743, 98th Cong., 1st Sess. (1983).

142. See *Hearings on Privacy of Medical Records Before a Subcomm. of House Government Operations Comm.*, 96th Cong., 1st Sess. (1979); *Hearings on Legislation to Protect the Privacy of Medical Records Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. (1979); *Hearings on Confidentiality of Insurance Records Before a Subcomm. of House Comm. on Government Operations*, 96th Cong., 1st & 2nd Sess. (1979-80).