

THE PRIVACY ACT OF 1974: AN OVERVIEW

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. *Olmstead v. United States, Brandeis, J., dissenting.*¹

Almost fifty years ago, Justice Brandeis recognized the threat posed by the growing technological capacity of society and its government.² 1974³ is to provide protection from this threat. Prior to adoption of the Act, there existed no effective means of protecting this vital individual interest; the executive branch had no general policy governing data collection and use,³ and judicial action by its nature tended to be more remedial than preventive. Individuals lacked any meaningful capacity to protect themselves and no responsibility for that protection lay in any institution.

The Privacy Act seeks to preserve the individual's interest in privacy while at the same time recognizing the legitimate needs of government for information. It reflects the belief that every individual should have a right to control to some extent what information the government may maintain concerning him and what uses may be made of that information,⁴ and deals as well with the individual's procedural

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 [hereinafter cited as Privacy Act];

Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 CONG. REC. 12,243 (daily ed. Dec. 18, 1974); *id.* at 21,815 (daily ed. Dec. 17, 1974) [hereinafter cited as *Privacy Act Compromise Analysis*, with page references to both];

Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948 (July 9, 1975) [hereinafter cited as *OMB Guidelines*].

1. 277 U.S. 438, 479 (1928).

2. Privacy Act.

3. The confidentiality of information collected by the Bureau of the Census was governed by statute, 13 U.S.C. § 9 (1970), and other agencies, such as the Civil Service Commission, had developed their own elementary rules. *See, e.g.*, 5 C.F.R. §§ 294.702, 294.703 (1975). *See also* Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1297-1303 (1975).

4. The rights and remedies provided by the Act may be viewed as creating a general "Code of Fair Information Practice" with five basic principles:

[1.] There must be no personal data record-keeping systems whose very existence is secret.

due process rights attendant to government maintenance and use of information.⁵ This Note will provide a general explanation of the manner in which these rights are protected by the Privacy Act. The Act will be examined in the context of specific rights granted to individuals and the extent to which statutory exemptions, agency discretion, and weak enforcement mechanisms combine to effect a potential dilution of those rights. Throughout the discussion, the language of specific measures will be viewed in light of the explicit congressional recognition that the right to privacy is a personal and fundamental right protected by the Constitution of the United States.⁶ This premise, coupled with the Supreme Court's discussion of other facets of the right to privacy,⁷ should provide a foundation for a broad construction of the Act. Considerations of privacy should weigh heavily against administrative convenience, while any construction of the Act in a "gray area" should be resolved in favor of granting rather than restricting rights.⁸

SCOPE

The Act applies only to agencies of the federal government;⁹ state,

[2.] There must be a way for an individual to find out what information about him is in a record and how it is used.

[3.] There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.

[4.] There must be a way for an individual to correct or amend a record of identifiable information about him.

[5.] Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data. DEPT OF HEALTH, EDUCATION AND WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, REPORT OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS XX-XXI (1973).

5. One of the congressional findings prefacing the Act was that "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems . . ." Privacy Act § 2(a)(3) (emphasis added).

6. *Id.* § 2(a)(4).

7. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *Symposium—The Griswold Case and the Right to Privacy*, 64 MICH. L. REV. 197 (1965).

8. S. REP. NO. 1183, 93d Cong., 2d Sess. 45, 47-48, 63 (1974). Such a construction, even when not dictated by the congressional history, seems appropriate, since the Act is meant to provide a means to effectuate constitutional rights and guarantees. See note 6 *supra* and accompanying text.

9. Pursuant to section 3 of the Act, Privacy Act § 3(a)(1), 5 U.S.C.A. § 552a(a)(1) (Supp. 1976), the term "agency" as used in the Act refers to the definition given in the Freedom of Information Act, 5 U.S.C.A. § 552(e) (Supp. 1976), and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the

local, and private systems of information are essentially unaffected.¹⁰ Within the federal government, the Act applies only to systems of records "from which information is retrieved by the name of the individual" or by some other individual identifier.¹¹ A system which does not meet this definition, yet possesses the potential for conversion into an individual identifier system, will not fall within the Act until the time of conversion.¹²

An individual is not granted access to information unless it is contained in an individual identifier system.¹³ This requirement raises the possibility that information about an individual's activities, if filed under the name of a group or by some other category, could be beyond individual access under the Privacy Act. This should not be a major problem, however. First, the Act does prohibit the maintenance of certain records of first amendment activities,¹⁴ records about which the individual would otherwise be appropriately concerned. In addition, most records maintained under identifiers other than the individual's name will not be used in specific determinations about the individual, and the Freedom of Information Act¹⁵ will grant some access. The cost and great inconvenience to the agency of searching out all information pertaining to an individual, even if not filed under his name, must also

Government (including the Executive Office of the President), or any independent regulatory agency." *Id.*

10. Certain peripheral provisions, such as the application of the Act to agency contractors, Privacy Act § 3(m), 5 U.S.C.A. § 552a(m) (Supp. 1976); see Bedell, *Government Contractors and the Initial Steps of the Privacy Act*, 34 FED. B.J. 330 (1975), and the moratorium on extension of the use of the Social Security number, Privacy Act § 7, do apply to nonfederal systems. The preoccupation of the Act with federal agencies is in large part the result of the felt necessity for dealing with the federal system promptly, since it commands the greatest information resources and has the greatest capacity for causing harm. Other systems, while posing a threat, are not seen as so immediately dangerous and can be studied and dealt with at a later date. This study is in large part a function of the Privacy Protection Study Commission set up by the Act. See *id.* § 5(a)(1) (establishing Commission); *id.* §§ 5(c)(1)-(3) (scope of study function); *Privacy Act Compromise Analysis* 21,816, 12,243-44. See text accompanying notes 162-68 *infra*.

Legislation which would extend the protections of the Privacy Act into the private sector has been introduced in Congress. See H.R. 1984, 94th Cong., 1st Sess. (1975). For a discussion of the bill, see Note, *Let Industry Beware: A Survey of Privacy Legislation and Its Potential Impact on Business*, 11 TULSA L.J. 68, 76-81 (1975).

11. Privacy Act § 3(a)(5), 5 U.S.C.A. § 552a(a)(5) (Supp. 1976).

12. *OMB Guidelines* 28,952.

13. Privacy Act § 3(d)(1), 5 U.S.C.A. § 552a(d)(1) (Supp. 1976). See text accompanying note 11 *supra*.

14. See note 86 *infra* and accompanying text.

15. 5 U.S.C.A. § 552 (Supp. 1976), amending 5 U.S.C. § 552 (1970). For a discussion of the interaction of the Privacy Act and the FOIA, see text accompanying notes 63-72 *infra*.

be considered.¹⁶ Thus, the present definition does provide a balance, and like the Act as a whole, it is an appropriate starting point in the protection of privacy interests.

The Act clearly intends to grant no rights to corporations. It is concerned with the individual only.¹⁷ The Office of Management and Budget, in its guidelines issued pursuant to the Act, takes the position that a distinction can be made in granting rights under the Act between individuals "acting in a personal capacity and individuals acting in an entrepreneurial capacity."¹⁸ This distinction is based upon the Senate Report, which states that the definition of individual is intended to

distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act. This distinction was to insure that the bill leaves untouched the Federal Government's information activities for such purposes as economic regulations.¹⁹

While not illogical, the distinction would seem to have more viability in the context of the Senate bill²⁰ than of the statute as enacted, which

16. It has been argued that the Privacy Act may make it difficult for agencies in need of individually identifiable data for statistical purposes to obtain the information. See Duncan, *The Impact of Privacy Legislation on the Federal Statistical System*, 3 REV. PUB. DATA USE 51, 53 (Jan. 1975). For example, if a statistical exploration of the relationship between Social Security applications and receipt of other federal aid is desired, the agency should not be required to obtain the permission of every individual. See *id.* Subsection 3(k)(4) of the Act exempts records maintained solely for statistical purposes, Privacy Act § 3(k)(4), 5 U.S.C.A. § 552a(k)(4); see Project, *supra* note 3, at 1336; however, not all records which would prove useful for statistical purposes could meet the strict definition of "statistical record" contained in subsection 3(a)(6): "the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual . . ." Privacy Act § 3(a)(6), 5 U.S.C.A. § 552a(a)(6) (Supp. 1976) (emphasis added).

17. The term "individual" as defined in the Act, Privacy Act § 3(a)(2), 5 U.S.C.A. § 552a(a)(2) (Supp. 1976), is used throughout the Act. For a discussion of the term, see S. REP. NO. 1183, 93d Cong., 2d Sess. 79 (1974); *Hearings on Access to Records Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 98 (1974) (testimony of Rep. Koch); *id.* at 110-11 (statement of Rep. Abzug). The individual must be either a United States citizen or an alien who is a permanent resident. Privacy Act § 3(a)(2), 5 U.S.C.A. § 552a(a)(2) (Supp. 1976). This denies foreign diplomats access to any information maintained about them by the United States Government, a concern discussed in House debate. 120 CONG. REC. 10,955-56 (daily ed. Nov. 21, 1974).

18. *OMB Guidelines* 28,951.

19. S. REP. NO. 1183, 93d Cong., 2d Sess. 79 (1974).

20. S. 3418, 93d Cong., 2d Sess. (1974); 120 CONG. REC. 19,858 (daily ed. Nov. 21, 1974) (passed by Senate).

COLLECTION OF DATA

The right to privacy is primarily reflected in the provisions which govern the collection and maintenance of information.³² The statute provides that agencies may keep in their records only "relevant and

accompanying text, is accepted. It is true that, at least in the context of collection and maintenance of information, the need for protection from governmental use of irrelevant or unnecessary data would seem to be as urgent in business matters as in personal matters. See notes 26, 27 *supra* and accompanying text. The need for privacy here seems to spill over into business interests, notwithstanding the congressional finding that privacy is a strictly personal right. See note 6 *supra* and accompanying text. This need for business information privacy would not be limited to individual proprietors, and would extend to disclosure of entrepreneurial data as well as their collection and maintenance. Cf. Note, *Protection from Government Disclosure*, *supra* note 30. But cf. Engman, *Remarks*, 34 FED. BAR. J. 340, 341 (1975). It is thus arguable that the right to privacy recognized as fundamental in the Privacy Act is as crucial for business concerns as for personal matters.

Armed with this reasoning, one might urge that the Privacy Act is violative of the equal protection clause unless it protects business data as well as personal information. Congress, however, has gone far beyond any articulated constitutional requirement in creating and protecting rights under the Privacy Act. The constitutional boundaries of a right to privacy have yet to be clearly defined, but it is plain that the Supreme Court cases have established privacy rights only in extremely intimate personal activities. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital sex). As the Court of Appeals for the Eighth Circuit recently stated, "the federal courts have generally rejected efforts by plaintiffs to constitutionalize tortious invasions of privacy involving less than the most intimate aspects of human affairs." *McNally v. Pultizer Publishing Co.*, Civil No. 75-1295, at 13 (8th Cir., Mar. 5, 1976). It is thus clear that Congress in enacting the Privacy Act has undertaken a reform measure, and has in no way attempted to restrict constitutional rights of privacy with regard to business information. The OMB analysis, then, should withstand constitutional scrutiny under the one-step-at-a-time notion most clearly enunciated in *Katzenbach v. Morgan*, 384 U.S. 641, 656-58 (1966). In *Katzenbach*, the Supreme Court rejected an equal protection challenge to a congressional suspension of state literacy tests (for voting purposes) for one class of citizens—those educated in American-flag schools. To the contention that such a restricted suspension discriminated against other foreign-language citizens, the Court replied that it would not strike down such a reform measure merely because it did not go so far as it might have. *Id.* at 658; see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Under *Katzenbach*, the OMB interpretation of the Act would be sustainable as a limited reform statute, the argument that the need for business privacy is just as great notwithstanding. Congress has acted to provide new rights and remedies without restricting any recognized right; it has come to a rational stopping place in distinguishing personal and entrepreneurial information; and the judiciary would not require as a matter of constitutional law that it go further.

32. Privacy Act § 3(e), 5 U.S.C.A. § 552a(e) (Supp. 1976). If any statute provides greater protection than the Privacy Act itself, that statute should govern. H.R. REP. No. 1416, 93d Cong., 2d Sess. 13-14 (1974). The congressional concern here is largely directed to the Federal Reports Act, 44 U.S.C. §§ 3501-11 (1970). H.R. REP. No. 1416, 93d Cong., 2d Sess. 13-14 (1974). See text accompanying notes 59-86 *infra* for discussion of information maintenance.

necessary" information,³³ language designed to require agencies to make a conscious and continuous evaluation of their needs for information.³⁴ Not only must the information which goes into a file be relevant to an agency need, but that need must also be a legitimate one. Agencies cannot maintain information except pursuant to an agency purpose "required to be accomplished by statute or by executive order of the President."³⁵ While decisions concerning maintenance of information will be based largely on agency judgment,³⁶ the agency must nevertheless be able to point to some authority for its action, either in a statute or in an executive order.³⁷ There can be no independent agency judgment that it "would be a good idea" to collect or retain certain information.

Furthermore, the information maintained must be "necessary."³⁸ It is not enough that it merely be relevant; rather, it must be determined that the "needs of the agency and goals of the program cannot reasonably be met through alternative means."³⁹ Such a determination will require a great deal of balancing of interests and, in the final analysis, agency judgment. The right to privacy should be given substantial weight in these determinations, for the basic goal of the Act is the protection of that right.⁴⁰

33. Privacy Act § 3(e)(1), 5 U.S.C.A. § 552a(e)(1) (Supp. 1976).

34. S. REP. NO. 1183, 93d Cong., 2d Sess. 45 (1974); *Privacy Act Compromise Analysis* 12,244, 21,816.

35. Privacy Act § 3(e)(1), 5 U.S.C.A. § 552a(e)(1) (Supp. 1976).

36. See *OMB Guidelines* 28,960-61 (discussion of factors which agencies should find appropriate to consider when making such decisions).

37. Privacy Act § 3(e)(1), 5 U.S.C.A. § 552(e)(1) (Supp. 1976). This provision should prevent (or at least provide a basis for sanctions against) activity such as the army civilian surveillance program of the late 1960s. See *Hearings on Federal Data Banks, Computers and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2 (1971). The executive order provision, however, seemingly allows authorization of such programs without congressional approval, assuming them to be not otherwise prohibited by the first amendment provision of the Act. Privacy Act § 3(e)(7), 5 U.S.C.A. § 522a(e)(7) (Supp. 1976). See note 86 *infra*.

38. Privacy Act § 3(e)(1), 5 U.S.C.A. § 552a(e)(1) (Supp. 1976).

39. S. REP. NO. 1183, 93d Cong., 2d Sess. 46 (1974).

40. The Senate Report suggests that "ordinary efficiency and small economies should not outweigh the right to privacy." S. REP. NO. 1183, 93d Cong., 2d Sess. 48 (1974). The interpretation of "necessary" will be the key to the effectiveness of this provision. If it is given an interpretation favorable to the protection of the individual, thus restricting information gathering, major agency re-evaluation of collection and maintenance practices would follow. If, as seems more likely, the agency is given broad discretion in determining what is "necessary," this section of the statute will have little practical effect. For a suggestion of a "balancing" approach which would require the collecting agency to "show a clearly demonstrable need that outweighs the individual privacy interests," see Project, *supra* note 3, at 1307-08.

essentially tracked the House version.²¹ "Personal information," as opposed to simply "information," is used only in the introductory section of the Act²² and not throughout the statute itself, as was done in the Senate bill. The provision granting access to records speaks of "any information pertaining to [the individual] which is contained in the system."²³ "Any" and "personal" are of clearly differing scope, and it may be presumed that, if access were to be granted only to personal information, the bill would have so stated, rather than using the much broader term "any."²⁴

The terms of the statute do not suggest that the protections provided by the Act should be withdrawn solely because the information gathered concerns an individual's "business" activities.²⁵ Congress has drawn a line, not between the personal and business capacities of an individual, but between individuals and enterprises which have an existence independent of the individual. Since Congress has not limited the rights granted to personal information only, a serious problem arises. The need for a right of access and challenge to a file may be exactly the same for both the unincorporated business and the incorporated one.²⁶ Both may need to challenge government collection of information.²⁷ Yet

21. H.R. 16,373, 93d Cong., 2d Sess. (1974); 120 CONG. REC. 10,971 (daily ed. Nov. 21, 1974) (passed by House).

22. Compare Privacy Act §§ 2(a)(1)-(2) with *id.* §§ 3(a)(4), 3(d)(1), (4)-(5), 3(e)(1)-(3), 5 U.S.C.A. §§ 3(a)(4), 3(d)(1), 3(d)(4)-(5), 3(e)(1)-(3) (Supp. 1976).

23. Privacy Act § 3(d)(1), 5 U.S.C.A. § 552a(d)(1) (Supp. 1976) (emphasis added).

24. The Act thus does not indicate the distinction between "entrepreneurial" and "personal" information concerning the individual, which was suggested in the *OMB Guidelines*. See text accompanying note 18 *supra*.

25. There is a reference in the House hearings which suggests a recognition of the need to grant corporations access to certain of their records, which would by their nature strictly be "business" materials. *Hearings on Access to Records Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 110-11, 113 (1974). It is arguable that small businesses need more protection than do large corporations.

26. A differentiation for purposes of the Privacy Act, though an unlikely one, could thus be made between access to and amendment of tax records of a sole proprietorship and those of a small, wholly owned corporation. The same would be true of records maintained by the Federal Trade Commission and other agencies. This differentiation would largely be a matter of the agency's discretion. Those who are subject to administrative regulation would also be able to enforce the requirement that the information maintained be "necessary," see notes 38-40 *infra* and accompanying text, so long as they are unincorporated. The corporation would be thrown back upon the vague relevance requirements exemplified in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). See note 27 *infra*.

27. Cases in the Supreme Court, while not drawing any decisive line, recognize that there is a limit to demands which the government can make of corporations for the release of information. See, e.g., *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924).

the one has forfeited any rights under the Privacy Act solely because, by virtue of its incorporation, its file will no longer be maintained under an individual's name.

Since the Act is federal legislation, this problem must be resolved in terms of fifth amendment due process.²⁸ A statutory distinction may be arbitrary enough to offend the fifth amendment; while that amendment contains no explicit equal protection clause, it embodies the principles behind such a clause.²⁹ The Privacy Act draws a line between incorporated and unincorporated; the rational basis for distinction in the information area lies elsewhere—perhaps between “personal” and “entrepreneurial.”³⁰ The distinction drawn appears so arbitrary that the rights granted by the Act cannot be limited to individual ones.³¹

This limit is an extreme one, owing to the nature of corporations and their relationship to society and government:

While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . .

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

This language is cited with approval in *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 65-66 (1974), where the Court upheld the reporting requirements of the Bank Secrecy Act of 1970, Pub. L. No. 91-506, 84 Stat. 1114 (codified in scattered sections of 12, 31 U.S.C.). From these cases may be distilled a corporate right to privacy in the context of government information gathering and use, even though the governmental action necessary to activate the right may be extremely drastic. For a discussion of one interesting example of a corporate need for privacy, see Note, *The FTC's Line-of-Business Reporting Program*, 1975 DUKE L.J. 389.

28. The equal protection clause of the fourteenth amendment is inapplicable since it is a restriction upon states. See *Southern Ry. Co. v. Green*, 216 U.S. 400 (1910) (application to corporate rights).

29. See *Bolling v. Sharpe*, 347 U.S. 497 (1954):

[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. *Id.* at 499.

See also *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

30. This is not to suggest that there are no privacy interests arising from entrepreneurial activities. The Freedom of Information Act exempts trade secrets and other confidential business data from mandatory disclosure, 5 U.S.C.A. § 552(b)(4) (Supp. 1976), and corporate entities have filed “reverse FOIA” suits to prohibit disclosure of business information by federal agencies. See, e.g., *Charles River Park “A,” Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975). See generally Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330; note 27 *supra*.

31. It may be possible to avoid this constitutional problem entirely if the OMB's distinction between personal and entrepreneurial information, see note 18 *supra* and

In acquiring their information, agencies are to rely primarily on the individual concerned "when the information may result in adverse determinations about an individual's rights."⁴¹ Since virtually all information collected may have such an effect, this language could be construed as a mandate to collect all information directly from the individual concerned where possible. The agency need not do everything in its power to obtain information from the individual; the statute requires that it do so only to the "greatest extent practicable."⁴² For example, it would clearly not be regarded as practicable to collect information directly from the individual who is the object of a criminal investigation when the government does not wish to "tip off" that individual. Other factors, such as the amount of time available to collect the information, ability to locate the individual, and the probability and magnitude of any harm which could possibly result to the individual from the maintenance of the information, should be taken into account in making the decision.⁴³ However, it is the agency itself which will balance the factors, and the flexibility inherent in a "practicability" test may make it extremely difficult to obtain review of agency action.

At the time the agency requests information, it must supply certain data to the individual to whom it makes the request.⁴⁴ The agency must inform the individual of the authority by which it is collecting the information,⁴⁵ whether or not the individual must answer the questions asked of him,⁴⁶ the purposes for which the information is to be used,⁴⁷ any routine uses to be made of the information,⁴⁸ and the effect on the individual of a refusal to give the requested information.⁴⁹ The *OMB Guidelines* suggest that this requirement applies only when the individual could be adversely affected by the information,⁵⁰ but this view appears incorrect for two reasons. First, the mandate to collect information directly from the subject individual is independent of the requirement to furnish information: the latter requirement instructs the agency

41. Privacy Act § 3(e)(2), 5 U.S.C.A. § 552a(e)(2) (Supp. 1976). There is no definition of "determination." See note 82 *infra*.

42. *Id.*

43. S. REP. NO. 1183, 93d Cong., 2d Sess. 47 (1974). See also *OMB Guidelines* 28,961 (suggests consideration of nature of program, cost, risk of inaccuracy resulting from third-party sources, and need for use of third party to verify information held).

44. Privacy Act § 3(e)(3), 5 U.S.C.A. § 552a(e)(3) (Supp. 1976).

45. Privacy Act § 3(e)(3)(A), 5 U.S.C.A. § 552a(e)(3)(A) (Supp. 1976).

46. *Id.*

47. Privacy Act § 3(e)(3)(B), 5 U.S.C.A. § 552a(e)(3)(B) (Supp. 1976).

48. Privacy Act § 3(e)(3)(C), 5 U.S.C.A. § 552a(e)(3)(C) (Supp. 1976).

49. Privacy Act § 3(e)(3)(D), 5 U.S.C.A. § 552a(e)(3)(D) (Supp. 1976).

50. *OMB Guidelines* 28,961.

to "inform *each* individual whom it asks to supply information."⁵¹ Second, by requiring disclosure of the effects of a refusal to supply the requested information,⁵² the statute implies that the agency should inform the individual not only of possible adverse effects, but also, where applicable, that no adverse effects will result.

As a result of agency fears that certain information could not be obtained unless the individual providing it felt that he could speak frankly without fear of retribution,⁵³ provision is made in the Act for express pledges of confidentiality.⁵⁴ Unfortunately, there are no rules set forth in the statute to govern agency use of these pledges.⁵⁵ A provision which will exert substantial influence on the application of the Act through the exemption sections⁵⁶ should have received greater congressional attention rather than being left largely to agency discretion. The mere statement on an information form that a pledge is available will often result in a request for it whether a pledge is actually needed or not. This could create an unnecessary obstacle for the individual who seeks to review information concerning himself. Pledges under the Act will not, however, result in absolute confidentiality. The material will be exempt only to the extent that its disclosure would reveal a source.⁵⁷ If none of it can be revealed without disclosing a source, the agency must nevertheless inform the individual concerned that the material exists and furnish a general characterization of it.⁵⁸ It

51. Privacy Act § 3(e)(3), 5 U.S.C.A. § 552a(e)(3) (Supp. 1976) (emphasis added).

52. Privacy Act § 3(e)(3)(D), 5 U.S.C.A. § 552a(e)(3)(D) (Supp. 1976).

53. See *Hearings on H.R. 12206 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 149 (1974) (statement of Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); *id.* at 185-86 (statement of Thomas S. McFee, Deputy Assistant Secretary for Management, Planning, and Technology, Department of Health, Education and Welfare). The HEW statement is somewhat unique in its opposition to blanket exemptions in this area. See, e.g., *id.* at 212-13 (statement of Edward C. Schmults, General Counsel, Department of the Treasury); *id.* at 240 (statement of David O. Cooke, Deputy Assistant Secretary of Defense).

54. Privacy Act §§ 3(k)(2), (5), (7), 5 U.S.C.A. §§ 552a(k)(2), (5), (7) (Supp. 1976). These exemptions, which agencies may use to withhold information from individuals, focus upon the existence of express pledges of confidentiality. Implied pledges are no longer recognized, unless given before the effective date of the Act.

55. Congress did indicate a desire that these pledges should be given sparingly and that the Office of Management and Budget should exert influence over agencies to see that this power is not abused. *Privacy Act Compromise Analysis* 12,244, 21,816. See *OMB Guidelines* 28,973.

56. See note 54 *supra* and text accompanying notes 131, 140-41 *infra*.

57. Privacy Act §§ 3(k)(2), (5), (7), 5 U.S.C.A. §§ 552a(k)(2), (5), (7) (Supp. 1976).

58. *Privacy Act Compromise Analysis* 12,244, 21,816.

is unclear how general a characterization will satisfy Congress; it must be recognized that the source of certain information will be disclosed by any characterization of the material, as in the case when only one person besides the individual concerned possessed the knowledge.

MAINTENANCE AND USE

Once the agency has collected information, its uses of it are not unrestricted. Except in certain circumstances, no information may be disclosed without the consent of the individual.⁵⁹ The listed circumstances are broad enough to allow disclosure in almost all situations where there is a legitimate need for disclosure.⁶⁰ Indeed, one may question whether the consent provision provides a real limitation upon agency activity. In addition to the consent provisions, the agency must maintain an accounting of disclosures under this section,⁶¹ except for

59. Privacy Act § 3(b), 5 U.S.C.A. § 552a(b) (Supp. 1976).

60. Privacy Act § 3(b), 5 U.S.C.A. § 552a(b) (Supp. 1976), provides the following exceptions to the consent requirement:

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

See text accompanying notes 73-81 *infra* for a discussion of the routine use exception.

61. Privacy Act § 3(c)(1), 5 U.S.C.A. § 552a(c)(1) (Supp. 1976). The accounting must be made available to the individual at his request, except for disclosures made for a law enforcement activity. Privacy Act § 3(c)(3), 5 U.S.C.A. § 552a(c)(3) (Supp. 1976). This provides a trail for the individual so that he may learn who has had access to his record, and more importantly, why. The accounting must contain the date,

disclosures made within the agency to those officers and employees who have a need to know⁶² and those disclosures required under the Freedom of Information Act (FOIA).⁶³ The provision which exempts disclosures under the FOIA from the accounting requirement is one of the bridges between the two statutes. Consent for such disclosures need not be obtained⁶⁴ and the agency need not review the record before disseminating it pursuant to an FOIA request.⁶⁵ The Privacy Act also provides that agencies may not use the FOIA exemptions to deny an individual access to his file if he is otherwise entitled to access under the provisions of the Privacy Act.⁶⁶

The Privacy Act and the FOIA

Congress clearly intended that the Privacy Act have no effect on the operation of the FOIA; public access is to remain as before.⁶⁷ The Acts are intended to work together so that the individual can employ the provisions of the Privacy Act to gain access to information denied him as an unidentified member of the public under the FOIA.

A major problem may arise from the FOIA exemption for information "specifically exempted from disclosure by statute."⁶⁸ If a Privacy Act exemption is construed as being broader than a companion exemption under the FOIA, an agency might attempt to use the Privacy Act to justify nondisclosure under the statutory exemption, even though in the absence of the Privacy Act's broad disclosure provisions, the

nature, and purpose of the disclosure and the name and address of the person to whom the disclosure was made. Privacy Act § 3(c)(1), 5 U.S.C.A. § 552a(c)(1) (Supp. 1976).

62. Privacy Act § 3(c)(1), 5 U.S.C.A. § 552a(c)(1) (Supp. 1976), creates the exception for disclosures made under Privacy Act § 3(b)(1), 5 U.S.C.A. § 552a(b)(1) (Supp. 1976).

63. Privacy Act § 3(c)(1), 5 U.S.C.A. § 552a(c)(1) (Supp. 1976), again creates the exception for disclosures under Privacy Act § 3(b)(2), 5 U.S.C.A. § 552a(b)(2) (Supp. 1976).

64. Privacy Act § 3(b)(2), 5 U.S.C.A. § 552a(b)(2) (Supp. 1976).

65. Privacy Act § 3(e)(6), 5 U.S.C.A. § 552a(e)(6) (Supp. 1976). Lack of review here may cause problems. The government is relinquishing all control of the information to someone who intends to use it for his own purposes. It would therefore seem appropriate that the information be as accurate as possible. See text accompanying note 84 *infra*. The provision is apparently a concession to the number of FOIA requests and the administrative burden which would result from review of such records before release.

66. Privacy Act § 3(q), 5 U.S.C.A. § 552a(q) (Supp. 1976).

67. *Privacy Act Compromise Analysis* 12,244, 21,817. The statute "is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section [FOIA]." *Id.* For a discussion of the interaction between the two statutes, see Project, *supra* note 3, at 1336-40.

68. 5 U.S.C. § 552(b)(3) (1970).

individual could have obtained the information. Such a construction was clearly not the intent of Congress.⁶⁹

Under a technical construction of the Privacy Act, nothing is "specifically required" to be exempted. Each agency is vested with a great deal of discretion. But this discretion is not in itself sufficient to overcome the Supreme Court's construction of the exemption in *FAA Administrator v. Robertson*.⁷⁰ Relying heavily on legislative history, the Court found that Congress, in passing the FOIA, left undisturbed those statutes which gave agencies discretionary authority to withhold information. Documents withheld under such a statute therefore fit the requirements of the statutory exemption. Since the Court's decision turns on legislative history, the history of the Privacy Act could be employed to show that Congress clearly intended that it would not be a statute which could be invoked to justify nondisclosure under exemption (b)(3) of the FOIA. If the courts and agencies nevertheless insist upon following *Robertson*, amendment of either the Privacy Act or the FOIA would be necessary.

In order to effectuate fully an alternate policy of giving the individual control over information concerning him which is in government files, the agency could justifiably resolve any doubt as to the applicability of an exemption under the FOIA, such as the exemption for disclosures which would be a "clearly unwarranted invasion of personal privacy,"⁷¹ by invoking the exemption and then attempting to obtain the consent of the individual concerned for the disclosure. This procedure would allow the individual to control the dissemination of information about himself which is arguably private and for which the requesting party under the FOIA has not been required to show any need.⁷²

Routine Uses

Agencies may establish "routine uses" for records by publication in the *Federal Register*,⁷³ and disclosure pursuant to such uses does not

69. See note 67 *supra* and accompanying text.

70. 422 U.S. 255 (1975). The FAA Administrator had invoked his authority under a statute which authorized nondisclosure upon a party's objection to public disclosure and the administrator's determination that the objecting party would be adversely affected and the public interest did not require disclosure. 49 U.S.C. § 1504 (1970).

71. 5 U.S.C. § 552(b)(6) (1970).

72. See Freedom of Information Act, 5 U.S.C.A. § 552(a)(3) (Supp. 1976) (upon request for information, agency "shall make the records promptly available to any person"). See also *EPA v. Mink*, 410 U.S. 73, 86 (1973); cf. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975).

73. Privacy Act §§ 3(e)(4)(D), 3(e)(11), 5 U.S.C.A. § 552a(e)(4)(D), (e)(11) (Supp. 1976). The Act defines this use as a "use of such record for a purpose which is

require the consent of the individual.⁷⁴ In the House debate, routine uses were referred to as "all of the proper and necessary uses *even if any such use occurs infrequently*."⁷⁵ Within this definition are such exchanges as reference of a file from one agency to another for possible civil or criminal prosecution and the transfer of tax return information from the Internal Revenue Service to state and local taxing authorities.⁷⁶ The agency must publish the intended use of information in the *Federal Register* at least thirty days prior to its institution.⁷⁷ In the interim, any exchanges must be pursuant to some other provision of the disclosure section or with the consent of the individual concerned.⁷⁸

The routine use provision carries with it the potential for serious abuse. Congressional oversight is presently the major check against wholesale agency publication designed to establish routine uses which cover situations where, in keeping with the spirit and the letter of the Act, disclosure would require the consent of the individual concerned. Individual actions against agencies provide a partial solution to this potential problem,⁷⁹ but the overwhelming volume of material recently published by agencies⁸⁰ suggests that the availability of such actions may not be sufficient to deter agency abuse.⁸¹

Information Quality

If the agency makes any determination about an individual, the records used must be in such a condition of "accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness

compatible with the purpose for which it was collected." Privacy Act § 3(a)(7), 5 U.S.C.A. § 552a(a)(7) (Supp. 1976).

74. Privacy Act § 3(b)(3), 5 U.S.C.A. § 552a(b)(3) (Supp. 1976).

75. 120 CONG. REC. 10,962 (daily ed. Nov. 21, 1974) (remarks of Rep. Moorhead) (emphasis added).

76. *Privacy Act Compromise Analysis* 12,244, 21,816. See also 120 CONG. REC. 21,815 (daily ed. Dec. 17, 1974) (remarks of Sen. Ervin); *id.* at 12,246-47 (daily ed. Dec. 18, 1974) (remarks of Rep. Moorhead).

77. Privacy Act § 3(e)(11), 5 U.S.C.A. § 552a(e)(11) (Supp. 1976).

78. Disclosure is possible by the agency only under some provision of section 3(b). Privacy Act § 3(b), 5 U.S.C.A. § 552a(b) (Supp. 1976).

79. See notes 147-62 *infra* and accompanying text.

80. See OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, PROTECTING YOUR RIGHT TO PRIVACY—DIGEST OF SYSTEMS OF RECORDS, AGENCY RULES, RESEARCH AIDS (1976).

81. Supervision needed here would have been within the province of a Federal Privacy Board or Commission, had one been created as proposed in several bills. See H.R. Nos. 12,207, 13,304, 13,872, 14,493, 93d Cong., 2d Sess. (1974); S. Nos. 2542, 3416, 93d Cong., 2d Sess. (1974). The Privacy Protection Study Commission set up by the Act lacks authority in this area. See text accompanying notes 163-67 *infra*.

to the individual in the determination."⁸² When one agency transfers a record to another, the record need not meet these standards; however, the receiving agency must bring the record up to standard before using it.⁸³ In contrast, the standards must be complied with when the agency releases the records to a person not affiliated with another agency,⁸⁴ since in this situation the federal government is relinquishing control of the information.

While the previously discussed standards of relevance and necessity⁸⁵ govern general information maintenance of systems, these more detailed standards govern the quality of information which is maintained in each individual file. Both sets of standards, however, leave a great deal to agency judgment and discretion. If courts interpret these standards loosely, little will have been gained through passage of the statute. A stricter definition of these standards, though, could have destroyed the flexibility needed for the application of the Act to diverse federal agencies while greatly increasing the general cost of administration.⁸⁶

ACCESS AND AMENDMENT

When an individual learns that a system of records contains information pertaining to him, he has a right of access to that information under the Act.⁸⁷ Having gained access to and reviewed the record, he

82. Privacy Act § 3(e)(5), 5 U.S.C.A. § 552a(e)(5) (Supp. 1976). "Determination" is undefined in the Act. A possible interpretation would be any decision bearing directly on the individual as an individual and not as a member of a vague class (when individual records should be relatively unimportant).

83. *Id.* Any agency which makes a determination must meet the standards. There is no exception provided solely because the information came from another agency. See *OMB Guidelines* 28,964-65.

84. Privacy Act § 3(e)(6), 5 U.S.C.A. § 552a(e)(6) (Supp. 1976). An example of such a transfer would be release of tax information by the Internal Revenue Service to a state agency. As noted earlier, releases under the Freedom of Information Act are exempt from this requirement. See note 65 *supra* and accompanying text.

85. See text accompanying notes 33-40 *supra*.

86. The statute also prohibits maintenance of records which describe how an individual exercises his first amendment rights, unless such maintenance is authorized by statute or unless the record is "pertinent to and within the scope of an authorized law enforcement activity." Privacy Act § 3(e)(7), 5 U.S.C.A. § 552a(e)(7) (Supp. 1976). The breadth of the second exception—law enforcement activity—can be determined only through experience. In debate in the House, this provision was said to be aimed at subversive groups and not at interference with first amendment rights of individual citizens. 120 CONG. REC. 10,952 (daily ed. Nov. 21, 1974). The vague terminology, however, raises serious doubts about the viability of the section as a whole.

87. Privacy Act § 3(d), 5 U.S.C.A. § 552a(d) (Supp. 1976). The individual is entitled to review the record itself in a form which is comprehensible to him, thus ensuring that the individual receives something more than an unintelligible computer print-out. Privacy Act § 3(d)(1), 5 U.S.C.A. § 552a(d)(1) (Supp. 1976). The

may attempt to amend what he believes to be erroneous information contained therein.⁸⁸ The agency is to take "prompt" action⁸⁹ upon a request for amendment, and if the request is refused, review is available.⁹⁰

It is unclear whether "amendment" simply means change or whether it also includes deletion, which in some cases could extend to the expungement of an entire file. "Amendment" seems to carry the implication that there will be something left when the procedure is finished, but the right to correct a portion of a record which an individual deems irrelevant would imply that such information can be deleted. If the process does not include deletion, the individual would be forced to wait until some adverse action had been taken on the basis of the irrelevant information before he could bring an action under the available civil remedies.⁹¹ Clearly the intent of Congress was that files should be maintained with the highest quality reasonably possible. To deny the inclusion of deletion within the amendment process would frustrate that intent and make injury a prerequisite to remedy when the major thrust of the Act is preventive.⁹²

individual may also obtain a copy of the record. *Id.* The fee for the copy is not to include the cost to the agency of searching for and reviewing the record. Privacy Act § 3(f)(5), 5 U.S.C.A. § 552a(f)(5) (Supp. 1976). Thus the expense of inspecting one's records is not to be made prohibitive and should ordinarily be nominal.

Agencies will find it necessary to require some kind of identification from persons who desire access to their records under the Privacy Act. This is not discussed in the statute itself, but is needed to protect the agency from unauthorized disclosures. OMB suggests that these procedures be kept at a minimum. *OMB Guidelines* 28,957. It should be recalled that these guidelines are not binding so that the amount of identification required is left to the discretion of each agency. For a general discussion of rights of access and challenge under the Act, see Project, *supra* note 3, at 1315-24.

88. Privacy Act § 3(d)(2), 5 U.S.C.A. § 552a(d)(2) (Supp. 1976).

89. Privacy Act § 3(d)(2)(B), 5 U.S.C.A. § 552a(d)(2)(B) (Supp. 1976).

90. The individual has a right to a review within the agency, which is generally to be completed within thirty days. Privacy Act § 3(d)(3), 5 U.S.C.A. § 552a(d)(3) (Supp. 1976). If the agency still denies amendment, he may file with the agency a statement which explains his disagreement with the record and his reasons for such disagreement. *Id.* This statement becomes essentially a part of his record. Privacy Act § 3(d)(4), 5 U.S.C.A. § 552a(d)(4) (Supp. 1976). The individual then has a right to file an action in federal district court. Privacy Act § 3(g)(1)(A), 5 U.S.C.A. § 552a(g)(1)(A) (Supp. 1976).

91. Suit would be brought under subsection C or D of section 3(g)(1) of the Act. Privacy Act §§ 3(g)(1)(C)-(D), 5 U.S.C.A. §§ 552a(g)(1)(C)-(D) (Supp. 1976). See text accompanying notes 154-56 *infra*.

92. There has been some recognition of a right, independent of statute, to expungement of files. See *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967). The greatest problem seems

EXEMPTIONS

The exemption provisions are perhaps the most important sections of the Act, for their application will determine whether the Act really grants any rights of value to individuals. Many of the records which are covered by the exemptions will be the very records individuals will most wish to inspect, and broad denials of access under the exemptions could make mere platitudes of the principles upon which the Act is constructed.⁹³

General Exemptions

The Act provides for two types of exemption, general⁹⁴ and specific.⁹⁵ The general exemptions, as the name suggests, are extremely broad. If an agency employed every general exemption to which it is entitled, it would be governed only by the following provisions: consent for disclosure except in listed instances,⁹⁶ maintenance of an accounting (but without being required to disclose it to the individual),⁹⁷ publication of an abbreviated notice about its system of records,⁹⁸ assurance that records are accurate, complete, timely, and relevant—but only

to be one of standing. It is difficult to show concrete injury from the “mere” maintenance of a file.

The most celebrated recent case in this area is *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975). A high school student working on a school project wrote to the Socialist Labor Party, inadvertently addressed her letter to the Socialist Workers Party, and ended up the subject of an FBI file. The FBI determined that she was not involved in subversive matters, but nevertheless retained the file. She obtained standing largely on the threat of future injury. *Id.* The case well illustrates the problems individuals face outside a statutory framework such as that established by the Privacy Act. For the lower court's opinion, see 382 F. Supp. 1118 (D.N.J. 1974).

In the absence of a clear expression of intent that Congress wished to leave individuals to pursue elusive remedies in deleting material from their files before actual injury befalls them, “amendment” should include “deletion.”

93. An important point when considering the exemptions, therefore, is that they are permissive and not mandatory. The head of an agency must adopt rules under these sections to take advantage of their provisions and thus is given an opportunity to tailor the exemptions to fit his agency by adopting only such as are needed. *See* H.R. REP. NO. 1416, 93d Cong., 2d Sess. 19 (1974). When adopting rules, the agency must state its reasons for employing an exemption for a system of records. Privacy Act §§ 3(j)-(k), 5 U.S.C.A. §§ 552a(j)-(k) (Supp. 1976); *see* S. REP. NO. 1183, 93d Cong., 2d Sess. 74 (1974). This should promote a thoughtful application of these sections, and avoid any automatic denial of access to files.

94. Privacy Act § 3(j), 5 U.S.C.A. § 552a(j) (Supp. 1976).

95. Privacy Act § 3(k), 5 U.S.C.A. § 552a(k) (Supp. 1976).

96. Privacy Act § 3(b), 5 U.S.C.A. § 552a(b) (Supp. 1976).

97. Privacy Act §§ 3(c)(1)-(2), 5 U.S.C.A. §§ 552a(c)(1)-(2) (Supp. 1976).

98. Privacy Act §§ 3(e)(4)(A)-(F), 5 U.S.C.A. §§ 552a(e)(4)(A)-(F) (Supp. 1976).

when releasing the record to a person other than an agency—,⁹⁹ first amendment restrictions,¹⁰⁰ establishment of rules of conduct for agency employees and safeguards for the system,¹⁰¹ publication of notice of uses of the system,¹⁰² and criminal penalties for violation of the Act.¹⁰³ While the list may appear extensive, it pales in comparison to the provisions which need not be complied with. The exemption would permit an agency¹⁰⁴ to deny an individual access to his records,¹⁰⁵ the right to know where his records have been and who has seen them,¹⁰⁶ the right to amend his records,¹⁰⁷ and even the right to bring a civil action for damages for violation of the statute.¹⁰⁸ Furthermore, the agency need not satisfy the requirement that it maintain only relevant and necessary information within the system generally¹⁰⁹ and need not make any effort to see that the records are accurate, relevant, timely, and complete when the agency makes a determination about the individual.¹¹⁰ The individual may bring a civil action to challenge the validity of the exemption itself,¹¹¹ but once the exemption is found to have been properly taken by the agency, there is no further remedy for harm caused to the individual.

The general exemptions reflect the complexity and difficulty of problems which stem from concerns for national security¹¹² and criminal justice. There are valid reasons for the denial of access and a right to amend that must be recognized in these areas. But to allow agencies to make decisions which affect individuals on the basis of inaccurate, irrelevant, or incomplete information raises once again the fundamental questions which this Act was designed to answer. If collection and maintenance of material bear on the right to privacy, and if agency use of information is governed by some standard of due process, then the

99. Privacy Act § 3(e)(6), 5 U.S.C.A. § 552a(e)(6) (Supp. 1976).

100. Privacy Act § 3(e)(7), 5 U.S.C.A. § 552a(e)(7) (Supp. 1976).

101. Privacy Act §§ 3(e)(9)-(10), 5 U.S.C.A. §§ 552a(e)(9)-(10) (Supp. 1976).

102. Privacy Act § 3(e)(11), 5 U.S.C.A. § 552a(e)(11) (Supp. 1976).

103. Privacy Act § 3(i), 5 U.S.C.A. § 552a(i) (Supp. 1976).

104. The general exemption section of the statute provides that "[t]he head of [a qualifying] agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i)" Privacy Act § 3(j), 5 U.S.C.A. § 552a(j) (Supp. 1976).

105. Privacy Act § 3(d)(1), 5 U.S.C.A. § 552a(d)(1) (Supp. 1976).

106. Privacy Act § 3(c)(3), 5 U.S.C.A. § 552a(c)(3) (Supp. 1976).

107. Privacy Act § 3(d)(2), 5 U.S.C.A. § 552a(d)(2) (Supp. 1976).

108. Privacy Act § 3(g), 5 U.S.C.A. § 552a(g) (Supp. 1976).

109. Privacy Act § 3(e)(1), 5 U.S.C.A. § 552a(e)(1) (Supp. 1976).

110. Privacy Act § 3(e)(6), 5 U.S.C.A. § 552a(e)(6) (Supp. 1976).

111. Privacy Act § 3(g)(1), 5 U.S.C.A. § 552a(g)(1) (Supp. 1976).

112. For a discussion of national security and the Freedom of Information Act, see Warnke, *National Security and the Public's Right to Know*, 34 *FED. B.J.* 301 (1975).

judiciary must still deal with the existence of a constitutional floor beneath which agencies cannot fall.¹¹³ Courts have thus far failed to develop any law in this area, but the enactment of the Privacy Act should not prevent such development.¹¹⁴

In deference to its key national security role, the Central Intelligence Agency is given a blanket option to employ the general exemption provisions.¹¹⁵ However, to grant exemptions for a system of records solely because it is maintained by the CIA places a premium on location of the system and ignores the more important question of the type of record involved and the reasons why it should be withheld from the individual concerned. If the CIA has a need for a broader exemption than the specific exemption for classified documents provided by the Act,¹¹⁶ some mechanism in addition to the "national security and foreign policy exemption" should have been provided under which the CIA would be required to justify its action before obtaining an exemption. The exemption as it stands is unsupportable. The recent debate within and between Congress and the executive branch over the CIA¹¹⁷ will perhaps create an attitude of less unreasoning deference on the part of Congress.

113. See note 27 *supra*. No Supreme Court decision has yet directly confronted the issue of privacy and due process in the context of data collection and maintenance. Mr. Justice Douglas, dissenting from a denial of certiorari, did discuss the question to some extent in *Tarver v. Smith*, 402 U.S. 1000 (1971). He found that the case raised questions of due process, as well as more general questions concerning the "privacy and dignity of individuals." *Id.* In *Tarver*, a caseworker had prepared a report recommending that Mrs. Tarver be deprived of the custody of her children. A hearing was held in which she was exonerated of the charges in the report, but the document itself remained in the files of the Department of Social and Health Services of the State of Washington. Mrs. Tarver sought in this suit to correct the report so that future decisions by the department concerning her could not be based on erroneous information which she had already once proven false. Her inability to obtain a hearing to correct the information raised the due process point for Justice Douglas.

114. The "constitutional floor" concept in this context relates closely to the use of equitable powers to order expungement of files. See note 92 *supra*.

115. Privacy Act § 3(j)(1), 5 U.S.C.A. § 552a(j)(1) (Supp. 1976). The Agency has not employed all of its power under this subsection. Most notably, no system of records is exempt from the requirement of maintaining only relevant and necessary information throughout the system or from the requirements concerning the quality of individual records. Rules and Regulations to Implement the Privacy Act of 1974, §§ 1901.61, 1901.71, 40 Fed. Reg. 45,324 (Oct. 1, 1975).

116. Privacy Act § 3(k)(1), 5 U.S.C.A. § 552a(k)(1) (Supp. 1976). See notes 124-26 *infra* and accompanying text.

117. See INTERIM REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 465, 94th Cong., 1st Sess. (1975); N.Y. Times, Feb. 18, 1976, at 1, col. 8; *id.*, Jan. 31, 1976, at 1, col. 1; *id.*, Jan. 30, 1976, at 1, col. 8; *id.*, Jan. 27, 1976, at 1, col. 6, 7; *id.*, Jan. 26, 1976, at 1, col. 6; *id.*, Jan. 20, 1976, at 1, col. 5; *id.*, Jan. 15, 1976, at 1, col. 8.

Criminal law enforcement systems may also employ the general exemptions.¹¹⁸ This provision is subject to the same objection of overbreadth as the CIA exemption. The criminal exemption will not allow the opening of records after prosecution¹¹⁹ and will not provide access to an individual's arrest record so that he may make corrections or additions.¹²⁰ At the time this provision was adopted, Congress was considering special criminal justice legislation which could have alleviated these problems.¹²¹ However, the legislation has not yet been enacted, and absent this assistance, the current Privacy Act exemption for criminal law enforcement systems should be redrafted more narrowly.¹²²

Specific Exemptions

The specific exemptions are more limited and allow exemption only from certain provisions. An agency entitled to employ these exemptions for a system of records under its control may be exempt from the statutory mandates of disclosure of the accounting it must keep, access and amendment, maintenance of only relevant and necessary information, notice of procedures by which the individual may learn of the existence of a record and gain access to it, the statement of categories of sources of records in the system, and promulgation of rules for access and amendment procedures.¹²³

There are seven types of systems which may employ these exemptions. The first is one which contains records covered by the "foreign policy and national defense" provision of the FOIA.¹²⁴ This allows

118. Privacy Act § 3(j)(2), 5 U.S.C.A. § 552a(j)(2) (Supp. 1976).

119. Privacy Act §§ 3(j)(2)(B)-(C), 5 U.S.C.A. §§ 552a(j)(2)(B)-(C) (Supp. 1976).

120. Privacy Act § 3(j)(2)(A), 5 U.S.C.A. § 552a(j)(2)(A) (Supp. 1976).

121. H.R. 12,574, 12,575, 93d Cong., 2d Sess. (1974); S. 2963, 2964, 93d Cong., 2d Sess. (1974).

122. Privacy Act § 3(k)(2), 5 U.S.C.A. § 552a(k)(2) (Supp. 1976), provides a second law enforcement exemption, in the same manner as the "national security and foreign policy" exemption provides a backstop for the CIA general exemption. See note 116 *supra* and accompanying text. The application of the special exemption will be largely civil, since the general criminal exemption virtually preempts the field.

123. Privacy Act § 3(k), 5 U.S.C.A. § 552a(k) (Supp. 1976).

124. "This section [Freedom of Information Act] does not apply to matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order . . ." 5 U.S.C.A. § 552(b)(1) (Supp. 1976). This section of the FOIA was amended in 1974 to overcome the impact of *EPA v. Mink*, 401 U.S. 73 (1973), which required federal courts to accept the fact of executive classification of a document and prohibited an *in camera* inspection to see if it was in fact properly classified.

exemption of classified material and again ties the two acts together. The FOIA exemption provides for a court determination, if necessary, that executive documents are properly classified;¹²⁵ the Privacy Act incorporates the same procedure.¹²⁶

The second system which may be exempted is one which contains "investigatory material compiled for law enforcement purposes,"¹²⁷ and is designed for material not covered by the earlier general exemption for criminal records.¹²⁸ The term adopted here apparently refers back to the law enforcement exemption of the FOIA as it stood before amendment in 1974.¹²⁹ The exemption applies only up to the point at which the maintenance of the material results in the "denial of any right, privilege, or benefit" to which the individual would "otherwise be entitled by federal law, or for which he would otherwise be eligible."¹³⁰ This may be construed broadly enough to imply that any time a federal agency makes an adverse determination concerning an individual which is based even in part upon law enforcement material, the individual would be entitled to gain access to the information. The agency, however, must continue to protect the sources of its information.¹³¹

A further exemption is provided for the Secret Service.¹³² This provision, like the CIA general exemption, provides an exemption for records based upon their location rather than their substance.¹³³ This

125. 5 U.S.C.A. § 552(b)(1)(B) (Supp. 1976). See 120 CONG. REC. 10,964 (daily ed. Nov. 21, 1974) (remarks of Rep. Drinan).

126. The *in camera* inspection should be the last action to which the court will resort in making its decision. If possible, the court should make its determination of the propriety of a classification by reference to agency testimony and affidavits. See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 1-4 (Feb. 1975).

127. Privacy Act § 3(k)(2), 5 U.S.C.A. § 552a(k)(2) (Supp. 1976).

128. *Id.* See note 122 *supra*.

129. The 1974 changes made the provision considerably more detailed. Prior to amendment the exemption, 5 U.S.C. § 552(b)(7) (1970), withheld from the public "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Construction of this clause had resulted in a test which in general asked only if the files were properly designated as investigatory files. Exemption would be permitted if the files were compiled in relation to any occurrence which could be described as an enforcement proceeding. See *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *Bristol-Myers Co. v. United States*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

130. Privacy Act § 3(k)(2), 5 U.S.C.A. § 552a(k)(2) (Supp. 1976).

131. *Id.*

132. Privacy Act § 3(k)(3), 5 U.S.C.A. § 552a(k)(3) (Supp. 1976).

133. The exemption applies if the system is "maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18" *Id.*

emphasis on location, as discussed above in the CIA context,¹³⁴ is misguided in that it ignores the type of record involved. The exemption is thus open to abuse, although to a lesser degree than is possible under the CIA exemption, since the Secret Service can only exempt itself from certain specifically enumerated¹³⁵ provisions. A narrower exemption which focused upon records of individuals as they bear directly upon the Secret Service's protective function should have been sufficient.¹³⁶

Statistical records are exempted,¹³⁷ as is federal "testing or examination material used solely to determine individual qualifications for appointment and promotion . . ." ¹³⁸ The testing exemption is designed to protect the integrity of the examination process, for if such material were released, the value of that examination for future use would be hopelessly compromised.¹³⁹

Investigatory material used to determine "suitability, eligibility, or qualifications" for federal employment, contracts, or access to classified material¹⁴⁰ and "evaluation material used solely to determine potential for promotion" in the military¹⁴¹ are the last two exempted systems.

The specific exemptions are, of course, more narrowly drawn than the general provisions. Exemption from the requirement that the agency maintain only relevant and necessary material is to a large extent overcome by the retained requirement that the agency must make an effort to see that the information is accurate, relevant, timely, and complete before a determination which affects an individual is made. The agency, however, may maintain irrelevant and unnecessary information so long as it does not use it in making a determination about an individual.¹⁴² The agency is nevertheless more accountable for its

134. See text following note 115 *supra*.

135. See Privacy Act § 3(k), 5 U.S.C.A. § 552a(k) (Supp. 1976).

136. The present exemption provides only that records be "maintained in connection with providing protective services," Privacy Act § 3(k)(3), 5 U.S.C.A. § 552a(k)(3) (Supp. 1976), a phrase broad enough to cover even those records which would not affect the security of the guarded individuals, such as travel and budget records. See note 133 *supra*.

137. Privacy Act § 3(k)(4), 5 U.S.C.A. § 552a(k)(4) (Supp. 1976).

138. Privacy Act § 3(k)(6), 5 U.S.C.A. § 552a(k)(6) (Supp. 1976).

139. The apparent congressional feeling was that release of such information is of little assistance to the individual, particularly as balanced against the harm caused to the testing agency. H.R. REP. No. 1416, 93d Cong., 2d Sess. 42 (1974) (additional views of committee members); 120 CONG. REC. 10,897 (daily ed. Nov. 20, 1974) (remarks of Rep. Erlenborn).

140. Privacy Act § 3(k)(5), 5 U.S.C.A. § 552a(k)(5) (Supp. 1976).

141. Privacy Act § 3(k)(7), 5 U.S.C.A. § 552a(k)(7) (Supp. 1976). These are applicable "only to the extent that the disclosure would reveal the identity of the source" who provided the information under conditions of confidentiality.

142. If the agency could not use the information, presumably it would not have any

administration of the rest of the provisions of the Act than it might be under the general exemptions because the specific exemptions do not allow for the deprivation of civil remedies under the Act.¹⁴³

A "hidden" exemption is contained in the section of the Act which grants access to records. "[A]ny information compiled in reasonable anticipation of a civil action or proceeding" may be withheld from the individual to whom it may pertain.¹⁴⁴ This does not appear to be limited to protection of sources as is the specific law enforcement exemption,¹⁴⁵ and thus could be used by the agency to withhold the entire file and not just the source. The *OMB Guidelines* suggest that the purpose for which the information was gathered, and not the fact that it is the subject of litigation, should be the determining factor in this section.¹⁴⁶

CIVIL REMEDIES

There are two types of civil actions under the Act.¹⁴⁷ One allows an individual to sue the agency in federal district court upon a denial of individual access or refusal or failure to properly honor a request for amendment.¹⁴⁸ The individual is not required to allege or prove any

reason to maintain it. But there is no guarantee that this would be the case. The Census Bureau, which occasionally handles questionnaires for other agencies, has been particularly subject to the criticism that certain of its requests for information are unwarranted and result in the collection of much unneeded information. See *Privacy, The Census and Federal Questionnaires, Hearings on S. 1791 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 91st Cong., 2d Sess. 3-8 (1970)* (statement of Sen. Ervin).

143. The list of provisions from which the agency may exempt itself under the Act, Privacy Act § 3(k), 5 U.S.C.A. § 552a(k) (Supp. 1976), does not include the civil remedies provision. Privacy Act § 3(g), 5 U.S.C.A. § 552a(g) (Supp. 1976).

144. Privacy Act § 3(d)(5), 5 U.S.C.A. § 552a(d)(5) (Supp. 1976).

145. Privacy Act § 3(k)(2), 5 U.S.C.A. § 552a(k)(2) (Supp. 1976).

146. *OMB Guidelines* 28,960. Agencies are not required to resort to formal rulemaking for the use of this section. OMB also suggests that the agency use this exemption only when nothing else is applicable. *Id.* This does not alter its availability or restrict agency use in any way.

147. The individual may bring suit under this section in the district court in the district where he resides or has his principal place of business, in the district where the records are located, or in the District of Columbia. Privacy Act § 3(g)(5), 5 U.S.C.A. § 552a(g)(5) (Supp. 1976). If an individual is injured, the statute of limitations is two years. *Id.* No action may be maintained under the Act for injury which results from disclosure prior to September 27, 1975, the effective date of these sections of the Privacy Act. *Id.*

148. Privacy Act, §§ 3(g)(1)(A)-(B), 5 U.S.C.A. §§ 552a(g)(1)(A)-(B) (Supp. 1976).

injury resulting from the government's maintenance of the information.¹⁴⁹

Suit brought for access is the major means of challenging exemptions which agencies attempt to employ. It is here that the court may examine documents *in camera* to determine if they may properly be withheld from the individual.¹⁵⁰ The controversy will be determined *de novo* and the agency bears the burden of justifying its action in employing an exemption.¹⁵¹ Because the agency is the party with access to the material, the individual would have an almost insurmountable problem in showing, for example, that information is improperly classified when he does not know exactly what the information is.

However, if an individual wishes to amend his record and brings suit, the burden will be on him to show that his record should be amended.¹⁵² Here the situation is the converse of the access suit since the individual is generally in a better position than the agency to produce information showing that the material contained in his record is erroneous.¹⁵³

The other civil action which may be brought under the Privacy Act is predicated upon injury to the individual. The individual has an action if an agency makes a determination adverse to him on the basis of a record which has not been maintained with proper accuracy, relevance, timeliness, and completeness.¹⁵⁴ An action also lies whenever an agency "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect

149. This overcomes any problems of standing which otherwise exist. See note 92 *supra*.

150. Determination of the propriety of withholding documents is provided to escape the restrictions imposed in *EPA v. Mink*, 410 U.S. 73 (1973). See note 124 *supra*.

151. Privacy Act § 3(g)(3)(A), 5 U.S.C. § 552a(g)(3)(A) (Supp. 1976). This scheme substantially departs from ordinary judicial review of administrative action, in which an agency determination will be overturned only if the record shows that it was arbitrary or capricious or in violation of constitutional or statutory substantive or procedural provisions. 5 U.S.C. § 706 (1970).

152. This is implied. The party bringing suit normally carries the burden of demonstrating the impropriety of administrative action. See, e.g., *Udall v. Washington, Va. & Md. Coach Co.*, 398 F.2d 765, 769 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). Congress indicated no contrary intent in the Privacy Act.

153. In either of these nondamage suits, the individual may recover reasonable attorney's fees and other costs if, in the court's opinion, the individual has "substantially prevailed." Privacy Act § 3(g)(2)(B), 5 U.S.C.A. § 552a(g)(2)(B) (Supp. 1976). In these actions, the agency's conduct in refusing access or amendment is irrelevant in determining whether or not access or amendment is warranted. However, it may bear upon the issue of an award of attorney's fees.

154. Privacy Act § 3(g)(1)(C), 5 U.S.C.A. § 552a(g)(1)(C) (Supp. 1976).

on an individual.”¹⁵⁵ Breach of this “catch-all” provision must be causally related to an adverse determination which has in fact been made, and the individual must show that the agency “acted in a manner which was *intentional* or *willful*.”¹⁵⁶

This “intentional or willful” standard, the result of a compromise between the House and Senate bills, has been explained as “only somewhat greater than gross negligence.”¹⁵⁷ The House provided for no recovery unless agency action was arbitrary;¹⁵⁸ the Senate wished to use a standard of simple negligence.¹⁵⁹ While the compromise standard enlarges the difficulty faced by those attempting to recover damages under this section, it is preferable to the House proposal which, if adopted, would have sanctioned broad exercise of discretion by agencies and made the civil remedies virtually useless.

The individual need not prove the actual amount of damages. It will of course be in his best interest to do so if the damage is substantial, but the Act provides that, in all cases where the individual is entitled to recover, he is to receive at least \$1,000,¹⁶⁰ in addition to reasonable attorney’s fees and costs.¹⁶¹

The largest deterrent to actions under the damage section is the requisite proof of “intentional or willful” behavior by the agency. If the individual’s injury is either small or difficult to prove, it may not be worthwhile to seek redress for a clear injury and violation of the Act if it is not clear that something more than gross negligence can be shown. The stakes will simply not be high enough. This deterrent to litigation might be less crucial if other means of enforcement of the Act were readily available. Unfortunately, present enforcement clearly depends on agency cooperation, continuing congressional oversight, and the civil actions outlined above.¹⁶²

155. Privacy Act § 3(g)(1)(D), 5 U.S.C.A. § 552a(g)(1)(D) (Supp. 1976).

156. Privacy Act § 3(g)(4), 5 U.S.C.A. § 552a(g)(4) (Supp. 1976). (emphasis added).

157. *Privacy Act Compromise Analysis* 12,245, 21,817.

158. H.R. 16,373 § 2(g)(3), 93d Cong., 2d Sess. (1974), 120 CONG. REC. 10,893, 10,895 (daily ed. Nov. 20, 1974); *id.* at 10,971 (daily ed. Nov. 21, 1974) (passed by House).

159. S. 3418 § 303(c), 93d Cong., 2d Sess. (1974), 120 CONG. REC. 19,858, 19,862 (daily ed. Nov. 21, 1974); *id.* at 19,858 (passed by Senate).

160. Privacy Act § 3(g)(4)(A), 5 U.S.C.A. § 552a(g)(4)(A) (Supp. 1976).

161. Privacy Act § 3(g)(4)(B), 5 U.S.C.A. § 552a(g)(4)(B) (Supp. 1976). The court does not seem to have any discretion; fees *are* to be awarded. This should be distinguished from the earlier attorney’s fees provision which used the language “may.” See note 153 *supra*.

162. “Realistically, therefore, the implementation of the Act rests, finally, with the departments and agencies of the executive branch and the good faith, ethical conduct and

PRIVACY PROTECTION STUDY COMMISSION

The Privacy Protection Study Commission has been established to conduct a broad study of the problems encountered by individuals in the areas of privacy and the gathering and use of information throughout the public and private sector.¹⁶³ The Commission is to make reports at least annually to the President and to the Congress concerning its activities and to make recommendations for future action.¹⁶⁴ It is authorized to give assistance to state and local agencies, if requested,¹⁶⁵ and to give advice and assistance to federal agencies in carrying out the present law, if requested.¹⁶⁶ The Commission has no power to take the initiative in these areas or to compel an agency to take any action in carrying out the mandates of the Privacy Act. It has no rulemaking authority, other than that needed to govern itself,¹⁶⁷ and cannot go into court seeking enforcement of the statute.

Congressional reluctance to create a body with power and authority to enforce the Privacy Act stems largely from a disinclination to add yet another agency to the federal bureaucracy.¹⁶⁸ As a result, enforcement is at the moment largely a function of agency goodwill and good faith, congressional oversight, and individual action in pursuit of the rights granted to citizens by the Act. A decision has thus been postponed as to whether some central, independent body with authority over other federal agencies is essential to any coherent and effective protection of

integrity of the Federal employees who serve in them." S. REP. NO. 1183, 93d Cong., 2d Sess. 28 (1974). This statement was made in light of the Senate bill which provided for a Privacy Protection Commission with some power, an enforcement mechanism lacking in the final bill. Cf. Cohen, *Agencies Prepare Regulations for Implementing New Privacy Law*, 7 NAT'L J. REP. 774 (1975). For suggested alternatives, see text accompanying notes 174-75 *infra*.

163. Privacy Act § 5(a)-(e). The Commission is the result of a compromise. The Senate bill provided for a commission with some power. S. 3418, 93d Cong., 2d Sess., title I (1974); 120 CONG. REC. 19,858 (daily ed. Nov. 21, 1974) (passed by Senate). The House provided for no commission or board of any sort. See Metz, *Privacy Legislation: Yesterday, Today and Tomorrow*, 34 FED. BAR. J. 311, 314 (1975).

The Commission's executive director has indicated that the group will concentrate first on commercial privacy issues, followed by studies of intergovernmental questions with a privacy impact, such as public assistance and social services, housing, school record and employment data. Cohen, *Privacy: Alive, But Barely*, 8 NAT'L J. REP. 185 (1976).

164. Privacy Act § 5(g).

165. *Id.* § 5(d)(4).

166. *Id.* § 5(d)(2).

167. *Id.* § 5(e)(4)(A).

168. See S. REP. NO. 1183, 93d Cong., 2d Sess. 24-26 (1974); H.R. REP. NO. 1416, 93d Cong., 2d Sess. 38 (1974) (additional views of committee members); 120 CONG. REC. 10,959 (daily ed. Nov. 21, 1975) (remarks of Rep. Moorhead).

the rights of privacy and due process. The experience gained in administration of the Act during the life of the Study Commission should be crucial to this determination.

To rely upon agencies to police the Act is, at best, to invite problems. Agency interest in efficiency, budgetary restrictions, and need for information could all too often conflict with the individual's desires and rights under this statute. Agencies cannot reasonably be expected to promote zealously that which is felt to be in conflict with their own interests.¹⁶⁹

As discussed above, the individual right of action contains a built-in deterrent.¹⁷⁰ In addition to facing the cost of a lawsuit, the potential plaintiff must also consider the desirability of threading through a maze of regulations and systems notices. There is no coordination among these rules and no authority anywhere to direct coordination. The *OMB Guidelines* have no binding force.¹⁷¹ Therefore, decisions implementing the Act will essentially be judgmental for each agency involved; ambiguous and vague phrasing in the Act clearly lends itself to more than one interpretation and to the exercise of agency discretion. Further, rules promulgated by the agencies will become prima facie valid, subject to a finding of arbitrariness.¹⁷² It will thus be possible for valid and varying interpretations of the same section to be applied to the individual, depending upon which agency he turns to in his quest for information. Each agency will admittedly have unique problems with which it must deal under the Act, but it seems unrealistic and unfair to expect the individual to shoulder the entire burden of finding a way through the bureaucratic puzzle which may confront him. While congressional oversight can produce remedial legislation to correct problems and can correct individual instances of abuse, it does not seem to offer an overall solution to the practical everyday administrative problems presented by the Act.

Perhaps the enforcement method which Congress has chosen for the moment will bring better results than expected, but experience under

169. See Cohen, *supra* note 163.

170. See text accompanying note 162 *supra*.

171. In future litigation, the *OMB Guidelines* may provide a standard against which to measure the agency's action in interpreting the Act. If the agency interpretation strays too far from the OMB suggestions, that in itself may indicate that the agency has enforced the Act erroneously in an "intentional or willful" manner, thus opening the door for an individual recovery when harm has resulted from the agency interpretation.

172. Regulations under the Privacy Act are promulgated under 5 U.S.C. § 553 (1970). Privacy Act § 3(f), 5 U.S.C.A. § 552a(f) (Supp. 1976). They are thus subject to review as are other federal regulations. See *OMB Guidelines* 28,967.

the FOIA in its early years does not bring much hope.¹⁷³ However, the reluctance to adopt a new level of bureaucracy is understandable, and the congressional attitude of "wait-and-see" may well be the lesser of two evils.

Congress may ultimately be forced to take some action to provide enforcement mechanisms if administration of the Act becomes chaotic. An independent commission, with power to enforce the Privacy Act and perhaps the FOIA, would probably be the most effective route. Other possibilities would be to lodge enforcement power with the Attorney General and the Justice Department, thus sharing the individual's burden.¹⁷⁴ Consideration should also be given to relaxing the civil standard of proof to simple negligence, thus promoting individual enforcement. A further change could be the addition of a punitive damage section, an alternative considered and rejected in 1974.¹⁷⁵ Whatever the future, the present scheme does not appear to offer the effective enforcement necessary to live up to the promises of the Privacy Act.¹⁷⁶

CONCLUSION

The Privacy Act of 1974 is a milestone. It marks a recognition of the dangers inherent in the unbridled collection and maintenance of information and the fundamental unfairness of denying an individual access to material relating to him. This recognition alone provides the basis for restoring a balance between rights to privacy and due process and governmental need for information.

Since the scope of the exemption provisions will determine the ultimate value of the Act for many, they should be re-examined and drawn more tightly. The rationale behind each exemption should be articulated and examined with a critical and sometimes skeptical eye. Enforcement mechanisms need to be upgraded and perhaps even added. Discretionary power for agencies is manifest throughout the provisions of the Act. If the terms themselves cannot be stated more precisely, then perhaps principles of construction need to be added so that courts

173. See generally Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969).

174. See text accompanying notes 170-72 *supra*.

175. 120 CONG. REC. 10,900-02 (daily ed. Nov. 20, 1974).

176. Some concern about the Ford Administration's commitment to furthering privacy protections has been created by elimination from the fiscal 1976 budget of all funding for the Domestic Council Committee on the Right to Privacy. Cohen, *supra* note 163.

will not readily defer to agency determinations as much as they have in the past.

Whatever its drawbacks, the Act is a beginning. Experience may show present fears to be minor irritations, while unforeseen complications may arise. If the Congress fulfills its function as watchdog, the foundation for further protection of the individual found here may be a turning point in the continuing relationship of government to the governed.