THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974: A STUDY IN CONFLICTS

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INTRODUCTION

It is no exaggeration to state that there are hundreds of millions of pages of federal government records which contain personal information about great numbers of American citizens. These records – far more than the government needs or can effectively use – very often include information which is completely innocuous by any rational standard. However, in many instances the material in these records document the most intimate and personal details of an individual's life. This information is of the sort that can literally destroy careers, reputations and lives.

The abuses in the collection of this material have now been well-documented,[1] and the present administration has begun to examine the ways in which such abuses can be avoided in the future.[2] In addition to the abuses that have occurred with regard to the collection of information, troubling questions arise in defining the proper use for the material already acquired and in formulating a policy to regulate the public's access to this information. The decisions in these areas must involve the accomodation of two of contemporary America's shibboleths: openness in government and protection of personal privacy. The dilemma faced by government officials is that these two concepts often pull in exactly opposite directions. When government opens its internal processes to the public, it might, by this same action, be revealing information which invades the personal privacy of one member of this public. Consequently, government's responsibility is to seek a compromise. The task, as explained by then-Senator Sam Ervin of North Carolina, who was the Senate's floor manager for privacy legislation, is to strike an acceptable

> . . . balance between the public's right to know about the conduct of their government and their equally important right to have information which is

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The author wishes to express his gratitude to Richard M. Rogers and Abbe David Lowell of the Department of Justice for their assistance in connection with this article.

Editor's Note: Mr. Flaherty was Deputy Attorney General of the United States when he wrote this article.

1. *Report of the Privacy Protection Study Commission, Personal Privacy in an Information Society* (1977); *cf.* Project, *Government Information and the Rights of Citizens,* 73 Mich. L. Rev. 971 (May-June 1975) [hereinafter referred to as *Michigan Project*].
2. The Department of Justice, for example, has organized a task force composed of representatives from throughout the department to present to the Attorney General a comprehensive position paper on restricting the collection of information, regulating the retention of this material and providing the public access to government records.

personal to them maintained with the greatest degree of confidence by Federal agencies.[3]

In the area of access to government records, the tools which federal agencies now have to strike this necessary balance are the Freedom of Information Act[4] (FOIA) and the Privacy Act of 1974[5] (Privacy Act). Unfortunately, however, these two statutes, rather than embodying the compromise that Congress sought to achieve,[6] instead reflect the tug-of-war that exists between openness and privacy. Unless their opposite pulls are accommodated, a proper balance can never be achieved.

This article identifies some of the apparent contradictions which exist between these two statutes, points out some of the administrative problems these differences have caused, explains how the Department of Justice has resolved these problems and offers some suggestions for the future.

THE CLASH BETWEEN THE FREEDOM OF INFORMATION AND PRIVACY ACTS

Differing Underlying Policies

One does not have to go beyond their underlying purposes and policies to see the conflict which exists between the FOIA and the Privacy Act.

The guiding principle of the FOIA is that the interests of the American public are best served by maximum disclosure of government records. In the 1955 letter first authorizing a Congressional subcommittee to formulate freedom of information legislation, this policy was stated:

> An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.[7]

The Privacy Act, however, is the result of different concerns. Its legislative history[8] is replete with statements which describe privacy[9] as the fundamental

3. *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act,* 120 Cong. Rec. S. 21,817 (daily ed. Dec. 17, 1974). This task is not simple. In his address to the Federal Bar Association Conference, Douglas W. Metz explained how difficult this process can be:
   > Our challenge remains, therefore, the hard one of striking a fair balance between competing interests. And the thoughtful public servant rarely has the luxury of balancing good and evil. Most often the competing interests confronting him are one good versus another good. *Michigan Project,* 73 Mich. L. Rev. 971 (May-June 1975).
4. After its original passage in 1966 as the Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, the Freedom of Information Act underwent many changes. *See generally* Note, *The Freedom of Information Act Amendments of 1974: An Analysis,* 26 Syracuse L. Rev. 951 (1975). The act is presently codified as 5 U.S.C. §552 (Supp. 1976).
5. 5 U.S.C. §552a (Supp. 1976).
6. In order to assure that some privacy legislation was enacted, consideration of the two bills in the conference process was expedited. This speed may be responsible for the inconsistencies that this article adresses. For a discussion of the compromise process, *see* Senator Ervin's remarks, 120 Cong. Rec. S. 21,810 (daily ed. Dec. 17, 1974).
7. Letter from Rep. William L. Dawson, Chairman, Government Operations Committee, to Rep. John E. Moss, Chairman, Subcommittee on Access to Government Records, 1974 U.S. Code Cong. & Ad. News 6268 (93rd Cong., 2d Sess.).
8. The entire legislative history of the Privacy Act has been compiled by the House and Senate Committtees on Government Operations. Joint Committee Report, *Legislative History of the Privacy Act of 1974, S. 3148 (Public Law 93-579)* (Sept. 1976).
9. One significant difficulty with both the FOIA and the Privacy Act is their failure to define the term "privacy." The two statutes seem to assume that the term is self-defining. An adequate definition of the term has, however, not emerged in the law that has developed. *See generally* W. Prosser, Handbook of the Law of Torts §117 (4th ed. 1971); Michigan Project, 73 Mich. L. Rev. 971, 1231-42 (1975); United States v. Miller, 425 U.S. 435 (1976). As a consequence of the statutes' silence, it is difficult to ascertain what "privacy interest" is supposed to be weighed against the release of any particular document.

concept in American democracy. For example, as part of his remarks in support of privacy legislation, Senator Edmund S. Muskie of Maine declared:

> Of all the rights of citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection from personal assault, but exemption of his private affairs, books and papers *from the scrutiny of others.*[10]

A policy seeking to protect a person's affairs from the "scrutiny of others" is a policy which pulls in the opposite direction of maximum disclosure.

Conflicting Frameworks and Provisions in the Statutes

The general frameworks of the two acts mirror their underlying concerns. From its very first sentence to its last, the FOIA promotes maximum disclosure. The statute, which draws no facial distinction between the request of a person seeking his own records and one seeking the records of another,[11] opens by stating that "[e]ach agency *shall* make available to the public"[12] the information which is then described in detail. The thrust of the act is entirely affirmative – towards disclosure.

An individual's right of privacy is recognized in the FOIA by two of its nine exemptions to the release of records,[13] but this protection of privacy is made subordinate to the overall policy of disclosure. First, whatever protection given by the FOIA is given in a narrowly drawn, narrowly interpreted[14] exception to its genernal design of releasing records. Second, only "clearly unwarranted"[15] invasions of personal privacy are prohibited. Consequently, the FOIA recognizes and approves of numerous invasions of privacy as long as there is a strong enough policy to justify them.[16] Third, as with all of the exceptions, withholding information for privacy reasons is to be determined on a document-by-document basis. The FOIA does not authorize the exemption

10. 120 Cong. Rec. S. 19,828 (daily ed. Nov. 21, 1974) (emphasis added).
11. Section (a)(3) of the FOIA states in part that " . . . each agency, upon any request for records . . . shall make the records promptly available to *any person.*" 5 U.S.C. §552 (a)(3) (Supp. 1976) (emphasis added).
12. 5 U.S.C. §552 (a) (Supp. 1976) (emphasis added).
13. Subsection (b)(6) states that the disclosure requirements of the FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552 (b)(6) (Supp. 1976). Subsection (b)(7)(C) of the act provides an exception to disclosure to those "investigatory records compiled for law enforcement purposes" which, if released, would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C) (Supp. 1976). The omission in (b)(7)(C) of the word "clearly" was intentional; its purpose and effect is to make the government's burden for withholding information somewhat lighter in the investigatory records context than it is when (b)(6) is used. 120 Cong. Rec. H. 10003 (daily ed. Oct. 7, 1974). Consequently, when this article speaks of the "privacy exception" in the FOIA, it is referring to (b)(6), since anything that would be withheld under this exception, with its higher burden, would be exempt from from disclosure under (b)(7)(C). *See* U.S. Department of Justice, Attorney General's Memorandum on the 1974 Amendments of the Freedom of Information Act, at 9 (Feb. 1975). Of course, in order for (b)(7)(C) to be applicable, the information in question must be the subject of investigatory files. All but a very few requests sent to the Department of Justice concern such files.
14. *See, e.g.,* Department of the Air Force v. Rose, 425 U.S. 352 (1976); Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975).
15. 5 U.S.C. §552(b)(6) (Supp. 1976). The lesser standard of "unwarranted" is contained in the exception (b)(7)(C) of the FOIA. *See* note 13 *supra.*
16. If a release of information would constitute an invasion of privacy, the foreseeable harm must be balanced against the benefits that would accrue to the public. *See* Tennessean Newspapers, Inc. v. Levi, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975). The policies of exposing election fraud and revealing more of the story of Watergate prompted one court to order the release of information that would reveal possible illegal campaign contributions by named individuals. The invasion of their privacy was deemed to be subordinate to the benefits of release. Congressional News Syndicate v. Department of Justice, No. 77-882 (D.D.C. Oct. 13, 1977).

from release of an entire system of records because they are generally of the type that invade personal privacy (or cause another type of harm recognized by the FOIA's other exemptions).[17] Finally, even if some material on a specific document falls into one of the act's exemptions and cannot be disclosed, it is to be deleted and "any reasonably segregable portion of [the] record is still to be released."[18]

The Privacy Act is set up quite differently. It divides the requests of individuals for their own records from those which seek information about others.[19] While the act seems to provide liberal access to the former category of records,[20] it very clearly seeks to limit access to the latter. When a request for a record is not made by the subject of that record, or is made without that subject's consent, the Privacy Act states that "[n]o agency shall disclose any record" unless one of 11 exceptions to non-disclosure is met.[21] Consequently, while the FOIA is in the affirmative, the Privacy Act is written in the negative.

Further restrictions on disclosure are provided by the exemptions relating to record systems contained in the Privacy Act.[22] Even if it meets one of the 11 exceptions for disclosure, a document may be withheld if it is part of a system of records for which the agency involved has promulgated a blanket exemption from disclosure. Its legislative history demonstrated that the drafters of the Privacy Act saw unchecked disclosure of government records as a threat to the personal privacy of citizens. It is clear that the Privacy Act was designed to restrict that flow of information.

The pull between disclosure and privacy in these two statutes can be further demonstrated by reference to their procedural provisions.[23] The FOIA, for example, provides that all requests must be processed within 10 days.[24] A related provision states that a requester does not have to exhaust his administrative remedies, generally a requirement before an agency's action can be

17. The exceptions in the FOIA represent the areas in which Congress has determined that valid reasons may exist for withholding records which would outweigh the benefits that would follow their release. Congress has, for example, decided that, in addition to privacy protection, the advantages of disclosure may be outweighed by other competing interests such as commerical confidentiality, 5 U.S.C. §552(b)(4) (Supp. 1976), and by the need of an agency to protect its internal processes, 5 U.S.C. §552(b)(2), (5) and (8) (Supp. 1976).
18. 5 U.S.C. §552(b) (Supp. 1976).
19. The disclosure section of the Privacy Act states:
    > No agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by . . . the individual to whom the record pertains . . .

    5 U.S.C. §552a(b) (Supp. 1976).
20. The preamble, statement of purpose and section on disclosure of the Privacy Act all state that an individual is to be given access to his own records. 5 U.S.C. §552a (Supp. 1976); *see* note 19 *supra*. Other sections of the act, however, work in the opposite direction and restrict the information that can be given to an individual to a far greater degree than does the FOIA. 5 U.S.C. §552a(j),(k) (Supp. 1976). *See* text accompanying notes 29-32 *infra*.
21. 5 U.S.C. §552a(b) (Supp. 1976).
22. Expressing different concerns (e.g., a system maintained by the CIA and a system of investigatory records in a law enforcement agency), both sections (j) and (k) of the Privacy Act allow "[t]he head of an agency [to] promulgate rules . . . which exempt any system of records within the agency from any part of" the act's disclosure requirements. 5 U.S.C. §552a(j),(k) (Supp. 1976).
23. The provisions chosen are those which can most easily be shown to affect the balance between openness and privacy. There are certainly other procedural differences between these two acts. For example, while the FOIA contains an elaborate scheme for administrative appeals, 5 U.S.C. §552(a)(6)(A)(i) (Supp. 1976), the Privacy Act has none. In addition, the Privacy Act provides for a two-year statute of limitations, 5 U.S.C. §552a(g)(5) (Supp. 1976), but the FOIA has no internal statute of limitations.
24. 5 U.S.C. §552(a)(6)(A)(i) (Supp. 1976).

appealed,[25] if an agency fails to process a request within the time periods provided and act upon an appeal taken.[26] The effect of these two parts of the FOIA is to prevent administrative delays from becoming the means by which information is denied.

The Privacy Act, however, does not have any similar provisions. Presumably, the effect of the act's silence is that the regular procedural rules of administrative law would apply to requests made under the Privacy Act. Such rules provide for exhaustion of remedies, with the result that processing of requests for government records could be delayed considerably.[27]

THE APPLICATION OF TWO CONFLICTING STATUTES: PROBLEMS AND SOLUTIONS

Because of the divergent directions in which these two statutes pull, an agency, forced to decide which law to apply in a particular situation, is presented with a significant problem. Since the Privacy Act generally favors restricting the flow of personal information, and the FOIA generally favors disclosure, choosing which is applicable to a particular request is more than a procedural question; the choice can determine which of the countervailing policies – openness or privacy – will prevail.

Requesting One's Own Records

When an individual is seeking access to his own records (a first-party request), it would appear that the Privacy Act should apply. It was passed more recently than the FOIA, and contains one set of rules for first-party requests (favoring disclosure) and another set of rules – applying more stringent standards – for third-party requests.[28] The Privacy Act, therefore, could be read to amend the FOIA, at least with regard to disclosures to first-party requesters. It would be anomolous, however, to allow the Privacy Act alone to govern first-party requests. If it did, a first-party requester, who obviously does not need privacy protection against the release to him of his *own* records,[29] might be denied his files because of the restrictions in an act designed

25. *See, e.g.,* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938) (the requirement of exhaustion is a longstanding rule of judicial administration).
26. 5 U.S.C. §552(a)(6)(C) (Supp. 1976).
27. The absence of time limits in the Privacy Act has not had a significant impact within the Department of Justice because of the administrative backlog which affects all requests. This backlog – caused by the miscalculation by the drafters of the number of requests that would be made, and by the unreasonableness of the ten-day processing period – whether from individuals seeking their own records or those of others, whether labelled FOIA or Privacy Act – chronologically from the date of receipt. No preference is given to the FOIA requests because the time limits in that statute cannot be met. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) (explains history of the administrative backlog and the practice being followed by the Department of Justice). The Department of Justice is now engaged in an effort to have each of its components "current" by January 1, 1978, or as soon thereafter as possible. When this occurs, it is the intent of the department to continue treating FOIA and Privacy Act requests in the same way. It is the department's position, however, that the ten-day period prescribed by the FOIA will never be met. Many of those suggesting changes in the law have agreed with the Justice Department's position that 30 days is a more reasonable and attainable period. *See: Report of the Privacy Protection Study Commission, Personal Privacy in an Information Society,* ch. 13 (1977).
28. *See* note 19 and accompanying text *supra.*
29. Some privacy concerns, however, do arise in the area of first-party requests. It is quite common for a person to be only one of a number of subjects in a multi-subject file. In such circumstances, if a background investigation conducted for a federal job applicant reveals that a relative has an arrest record, or that a requester's spouse is having an extra-marital affair, the privacy interests of those individuals merit consideration.

to protect personal privacy. As previously stated, the Privacy Act, as part of its protective scheme, allows an agency to exempt from disclosure entire record systems.[30] Should a document fall into one of these systems, a first-party request could be denied. If, on the other hand, the same request were processed under the FOIA – which allows an agency to withhold information only on a document-by-document basis and even then provides for the release of portions of pertinent documents[31] – the same information might be released.

It does not seem likely that Congress wanted the restrictive design of the Privacy Act to be used to deny an individual records about himself which he could have obtained through the FOIA. The major reason for the Privacy Act's restrictions is to protect personal privacy, but it has already been shown that a first-party requester does not need that protection.

Conversely, it does not seem likely that Congress, which had painstakingly drawn the narrow-exemption approach in the FOIA, wanted it repealed, at least with respect to first-party requests, by the Privacy Act. The benefits which flow from openness and maximum disclosure are as great when an individual requests his own records as when he requests the files of another.

Finally, it does not appear that Congress would have wanted the first-party requester to lose the advantages of administrative procedures and time limits in the FOIA by having him proceed through the Privacy Act, which has none of these same provisions.[32]

One of the principles of statutory construction is that every effort should be made to reconcile apparently contradictory statutes.[33] In order to accomplish this, the Department of Justice formulated regulations which, with respect to first-party requests, combine the provisions of the two acts.[34] According to these regulations, the department follows the intent of the Privacy Act by making it the exclusive vehicle for individuals to gain access to records about themselves.

The department then gives the first-party requester the same information as would be made available to him under the FOIA. This is accomplished by

30. *See* note 22 and accompanying text *supra*.
31. *See* note 18 and accompanying text *supra*.
32. *See* notes 23-27 and accompanying text *supra*.
33. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551 (1973); United States v. Borden Co., 308 U.S. 188, 198 (1939).
34. These regulations provide:

> (a) Issuance of this section and actions considered or taken pursuant hereto are not to be deemed a waiver of the Government's position that the materials in question are subject to all of the exemptions contained in the Privacy Act. By providing for exemptions in the Act, Congress conferred upon each agency the option, at the discretion of the agency, to grant or deny access to exempt materials unless prohibited from doing so by any other provision of law. Releases of records under this section, beyond those mandated by the Privacy Act, are at the sole discretion of the Deputy Attorney General and of those persons to whom authority hereunder may be delegated. Authority to effect such discretionary releases of records and to deny requests for those records as an initial matter is hereby delegated to the appropriate system managers as per the Notices of Systems of Records published in 40 FEDERAL REGISTER 167, pages 38703-38801 (August 27, 1975).
>
> (b) Any request by an individual for information pertaining to himself shall be processed solely pursuant to this Subpart D. To the extent that the individual seeks access to records from systems of records which have been exempted from the provisions of the Privacy Act, the individual shall receive in addition to access to those records he is entitled to receive under the Privacy Act and as a matter of discretion as set forth in paragraph (a) of this section, access to all records within the scope of his request to which he would have been entitled under the Freedom of Information Act, 5 U.S.C. 552, but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto . . . . 28 C.F.R. §16.57 (1976).

making that material, which is covered by the blanket exemptions of the Privacy Act but which would not be withheld under the narrower approach of the FOIA, the subject of a discretionary release. To bring the statutes further into harmony, the department applies the same procedures for handling and the same time framework to both FOIA and Privacy Act requests. Consequently, individuals requesting their own records are not penalized by the procedural differences between the two acts.[35]

Seeking the Records of Others

The differences between the FOIA and Privacy Act might have caused the most difficulty in the processing of a request of an individual for the records of another (a third-party request). On the one hand, the FOIA would release any portion of any of these records which did not constitute a "clearly unwarranted invasion of personal privacy."[36] The Privacy Act, however, was to be designed so that any release of a record without the consent of the subject of that record would constitute a prohibited invasion of privacy without regard to any countervailing reason justifying its disclosure. The difficulty that this conflict could have produced was partially avoided.

Through a series of compromises,[37] Congress resolved this conflict when, as one of the exceptions to the non-disclosure scheme of the Privacy Act, it provided that information would be released if its disclosure was required by the FOIA.[38] This arrangement seems odd because it leaves protection of personal privacy to a statute which is concerned with maximum disclosure and which, as previously stated, generally gives privacy a subordinate role. Nevertheless, this is the result that Congress intended.[39]

This provision of the Privacy Act which incorporates part of the FOIA, however, does not resolve all of an agency's difficulties in processing third-party requests. Since the provision is just one intersection between two otherwise parallel lines, it is difficult to imagine that all of the concerns for protecting privacy which had inspired the Privacy Act were to be read out of the act

35. *See* note 27 *supra.*
36. *See* note 13 *supra.*
37. *See* note 6 *supra.*
38. Section (b) of the Privacy Act provides:
    > No agency shall disclose any record which is contained [in its systems], except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, *unless disclosure of the record would be . . . (2) required under Section 552 of this title;* 5 U.S.C. §552a (b)(2) (Supp. 1976) (emphasis added).
39. The FOIA exemption in the Privacy Act was the result of a compromise between the House and Senate. The original House bill contained no reference whatsoever to the FOIA. H. 16373, 93rd Cong., 2d Sess. (1974), 120 Cong. Rec. H. 10,894 (daily ed. Nov. 20, 1974). The committee report which accompanied the bill explained that it was the intent of this omission to alter the privacy exception contained in the FOIA by substituting for the "clearly unwarranted" test a standard that would be far more restrictive. H.R. Rep. No. 1416, 93rd Cong., 2d Sess. 13 (1974). In effect, the Privacy Act would have become a statute which specifically exempted all retrievable personal information, and would have been made applicable to FOIA requests through exemption (b)(3), 5 U.S.C. §552(b)(3) (Supp. 1976). The Senate's version of the Privacy Act contained an FOIA disclosure exemption. 120 Cong. Rec. S19,829 (daily ed. Nov. 21, 1974) (detailing the provisions of the Senate's bill, S. 3418). The Senate prevailed in the compromise process, and a memorandum placed in the Congressional Record which describes the compromise states that "[t]his compromise is designed to preserve the status quo as interpreted by courts regarding the disclosure of personal information under the FOIA's privacy exemption." *Anaylsis of House and Senate Compromise Amendments to the Federal Privacy Act,* 120 Cong. Rec. S. 21,817 (daily ed. Dec. 17, 1974).

because of a single reference to the FOIA. If this were the desired result, what purposes would be served by the other provisions in the Privacy Act? If, for example, reference to the FOIA was intended to be determinitive of every issue, the Privacy Act's careful distinction between first-party and third-party requests would give way to the absence of any differentiation in the FOIA.[40]

The Department of Justice has rejected an interpretation that would totally emasculate the Privacy Act. One important aspect of the department's approach is that it does not treat first-party requests and third-party requests in the same way. This position can be supported logically and textually. First, it has already been stated that the privacy of an individual is not usually invaded by releasing to him a document about himself,[41] but the release of the same document to a third person might very well constitute an invasion of the first individual's privacy. Second, the Privacy Act unmistakably distinguishes between first-party and third-party requests.[42] Therefore, in the department's interpretation, when the Privacy Act's standard for disclosure is incorporated into the FOIA, the distinction the former makes between the kinds of requests is left intact, is combined with the FOIA's privacy exemption, and becomes a factor to be considered in deciding whether release of a document will constitute "a clearly unwarranted invasion of personal privacy." In other words, the FOIA's general framework of exceptions from disclosure is used, but the FOIA's specific exemptions[43] for privacy are reinforced to express the Privacy Act's greater concerns in this area. Consequently, a document will not *automatically* be released to a third party just because it has been or could have been released under the FOIA to the person it concerned. Despite some decisions to the contrary,[44] and articles suggesting other interpretations,[45] it is the Justice Department's practice in processing these third-party requests to consider the identity of the particular requester.

Numerous variations exist when the identity of a requester is considered. The first possibility is that a person who seeks information about another offers no information regarding his relationship with the subject of his request. In this context, the practice of the Department of Justice – resulting from the Privacy Act's greater concern for protecting an individual's privacy – is to refuse to confirm or deny the existence of any records about the subject.

The requester who lacks the consent of a record subject is informed that an admission of the existence of records would in itself constitute a "clearly unwarranted invasion of personal privacy." Despite the revelations in recent years which show how investigatory records are compiled and explain how innocent they might be, there is still a stigma that can attach to an individual when it is revealed that he is the subject of law enforcement records.

40. *See* note 11 and accompanying text *supra.*
41. *See* note 29 *supra.*
42. *See* notes 19 and 28 and accompanying text *supra.*
43. *See* note 13 *supra.*
44. *See, e.g.,* Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 790 n. 3 (6th Cir. 1972). *But see* Getman v. NLRB, 450 F.2d 670, 677 (D. C. Cir. 1971).
45. *See, e.g.,* Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974,* 11 Harv. Civ. Rts.-Civ. Lib. L. Rev. 596 (1976); Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 Colum. L. Rev. 895 (1974); Note, *Invasion of Privacy and the Freedom of Information Act: Getman* v. *NLRB,* 40 Geo. Wash. L. Rev. 527 (1972).

On the other extreme is the case where a requester has obtained the consent of the subject whose records are being sought. In this instance, the policy of the Justice Department is to provide the requester precisely what the subject would have received had he made the request himself.[46]

Between these two extremes, the variations are infinite. These are the situations in which applying the "clearly unwarranted" standard is most difficult, as no guidelines or tests are provided by either the acts themselves or their legislative histories.[47] This is the area that has provoked the most controversy in the courts and in legal journals. Some of the questions which influence disclosure decisions in this vast area and which are the subject of this controversy are: whether the intended use of a requester can be considered; whether the possibility of further publication after an initial release can affect the original disclosure decision; whether a person's status as a public official or public figure destroys his privacy interest with regard to freedom of information, and what kinds of public concern – measured by what devices – can outweigh invasions of personal privacy.

Each agency resolves these questions differently. Because of this, some have suggested that a more concrete definition of the test to be used in determining whether a release would constitute an invasion of privacy be placed in the applicable statutes. Before this is done, however, an in-depth study of present practices and procedures should be undertaken. Such a study may actually find that, in their implementation of the FOIA and the Privacy Act, various federal agencies have struck a fair balance between openness and privacy.

CONCLUSION

Ever since the FOIA and the Privacy Act were passed, there have been suggestions that they be amended. Some have claimed that they were not protective enough of a person's privacy; others have claimed that they did not provide enough access to government records; still others have sought their repeal because they have crippled the ability of federal agencies to operate.

The Privacy Act of 1974 established the Privacy Protection Study Commission to assess the effects of the act and to conduct a general study into the areas of personal privacy and access to government records. In July, 1977, the commission published its findings,[48] which are now being examined by all branches of the government.[49]

The Privacy Protection Study Commission's report, and the analysis and debate which the commission has stimulated, has already resulted in the introduction of legislation to modify the FOIA and the Privacy Act.[50] While such legislation may attempt to reconcile the apparent contradictions and

46. *But see* note 29 *supra.*
47. For a discussion of what little guidance is provided by the legislative history, *see* 11 Harv. Civ. Rts. - Civ. Lib. L. Rev. 596, 598-600 (1974).
48. *Report of the Privacy Protection Study Commission, Personal Privacy in an Information Society* (1977).
49. As previously stated, *see* note 2 *supra,* the Justice Department's task force on privacy has made the report of the Privacy Commission one of the subjects for consideration.
50. *See, e.g.,* H. R. 10076, 95th Cong., 1st Sess. (1977) (an omnibus bill which includes revision of the Privacy Act of 1974).

inconsistencies which exist between the two statutes, complete reconciliation may not be possible given the elusiveness of a precise definition for the term "privacy" and the difficulty of articulating in broad, prospective terms a proper balance between personal privacy and maximum disclosure. There may not be a single standard, a single test of whether a release would constitute a "clearly unwarranted invasion" of privacy, that can apply to all agencies at all times.

A case-by-case study of the decisions each agency has made under the existing legislation would probably reveal that, despite the absence of guidelines in the texts of the two statutes, a fair compromise has been achieved in their implementation. If this is the case, Congress may decide that there is no substitute in this complex and sensitive area for the good faith application of common sense.

Legislation may be necessary, however, to bring the general frameworks and the procedures of the two acts into harmony. The enactment of two different statutes – one for first-party requests and one for third-party requests – is a possibility, but it would lessen the chance for future confusion if only one statute occupied the field. In this way, Congress could insure, with the exception of a differing standard for privacy, that requests were treated the same whether they sought a requester's own records or the records of another. Such an integrated statute, furthermore, could set up one set of reasonable time limits and procedures. Finally, one approach concerning entire record-system exemptions or individual document exemptions would apply.

As a matter of practical effect, such an integrated statute would probably resemble the policy now being followed by the Department of Justice, but the fact that one agency has been able to create regulations which make the FOIA and the Privacy Act easier to apply is not a satisfactory way of resolving the problem. While it may be impossible to create legislative standards which can forecast whether a release will constitute an invasion of privacy, it is possible and necessary to insure that individuals get the same treatment, protections and information no matter which method of access they choose.