No. _____

IN THE

Supreme Court of the United States

ROBERT S. CARLBORG,

Petitioner,

—v.—

UNITED STATES DEPARTMENT OF NAVY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES W. GITTINS
Counsel of Record
139 Mallard Drive
Lake Frederick, Virginia 22630
(540) 327-2208
cgittins@aol.com

Counsel for Petitioner

QUESTION PRESENTED

Barring a general or specific exemption for a SOR claimed by an agency, does an individual making a first party request for his own record retrieved by his name or other personal identifier under the Privacy Act gain unrestricted access regardless of whether the requestor's record contains material that may have been authored by another individual that is not retrieved by the name of the individual within the requestor's record?

PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff in the district court and appellant in the Court of Appeals for the District of Columbia Circuit.

Respondent is the Department of the Navy, which was the agency defendant in the district court and appellee in the District of Columbia Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Robert Carlborg is a private citizen. There are no other real parties in interest represented by undersigned counsel. There are no corporations and/or publicly held companies for whom stock is owned or held by Petitioner.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Carlborg v. Department of the Navy, No. 18-1881 (D.D.C.) (order entering judgment in favor of defendant, filed August 10, 2020 (Appendix A);

Carlborg v. Department of the Navy, No. 20-5311 (D.C. Cir.) (opinion affirming judgment of the District Court, issued on March8, 2021 (Appendix B); and

Carlborg v. Department of the Navy, No. 20-5311 (D.C. Cir.) (opinion on reconsideration, affirming judgment of the District Court issued on May 11, 2021 (Appendix C).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This petition presents a clear circuit split on the meaning and effect of the Privacy Act and ability of a requester to obtain information concerning himself from an agency in order to determine whether the records pertaining to him are accurate and for procedures for individuals to challenge information in their records and to seek amendments to the record if appropriate, under the provisions of the Privacy Act.

The D.C. Circuit has reached a narrow application of the Privacy Act limiting a requester to documents unquestionably contained in his agency record based upon in incorrect interpretation of an OMB Circular. The Eighth Circuit, to the contrary, provides the correct interpretation of the Privacy Act reliant upon the plain meaning of the statute, allowing a requester to obtain those documents contained in his or her record despite the inclusion of a document about the requester authored by another person

This case provides the opportunity to resolve the tension between the clear unambiguous provision of statute versus the D.C. Circuit incorrect interpretation of the OMB Circular to limit a requestor's access to Privacy Act information.

OPINIONS BELOW

The District Court's decision denying judgment as a matter of law is unreported and was decided on March 8, 2021 and is found at Appendix A. The District of Columbia Circuit's Summary Affirmance was decided on March 8, 2021. Appendix B. The D.C. Circuit denied reconsideration on May 11, 2021. Appendix C.

JURISDICTION

The D.C. Circuit issued its decision on reconsideration on May 11, 2021. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari due or after that date to 150 days and was clarified on July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Privacy Act, 5 U.S.C. § 552a is found at Appendix D. Office of Management and Budget Circular No. A-108, Federal Register Volume 40, No. 132 (July 9, 1975) is found at Appendix E.

STATEMENT OF THE CASE

Beginning in March 2017, Carlborg made Privacy Act ("PA") requests to the Marine Corps seeking copies of any and all records maintained on him within the System of Records ("SOR") MJA00017, which includes Headquarters Marine Corps ("HQMC") Judge Advocate ("JA") Division, HQMC Correspondence Control Files, and any and all records maintained on him within the SOR MJA00018 Performance File,[1] which contains records of Marine Corps members "who, while on active duty or in a reserve status, become the subject of investigation, indictment, or criminal proceedings by military or civilian authorities."

Using Freedom of Information Act ("FOIA") online on January 5, 2018, Carlborg submitted two new *PA*

[1] The SOR MJA00018 documents retention period is 50 years.

requests for the same two SORs as HQMC had never released any material under the PA, only under the FOIA, nor had they ever addressed the reasons why the PA had been ignored. On January 12, 2018, HQMC provided 161 pages of material for both requests and were then closed out administratively as duplicate. The Department of the Navy did not claim any Privacy Act exemption for non-disclosure.

Carlborg filed his Complaint in the District Court for the District of Columbia on August 13, 2018. The Court granted Summary Judgment to the Department of the Navy by Order dated August 10, 2020. Petitioner appealed to the District of Columbia Circuit Court of Appeals by filing Notice of Appeal on October 13, 2020. The D.C. Circuit granted Summary Affirmance to the Department of the Navy on March 8, 2021. Carlborg submitted a timely request for reconsideration, which was denied by the D.C. Circuit on May 11, 2021.

REASONS FOR GRANTING THE PETITION

In its summary decision and order and in decision on reconsideration, the court below examining the meaning and effect of the Privacy Act, 5 U.S.C. § 552a, ignored critical provisions and critical regulatory rules cabining the disclosure of Carlborg's Privacy Act documents subject to disclosure. As demonstrated below, the facts and court's summary examination demonstrate that the Agency improperly withheld and improperly redacted Carlborg's Privacy Act documents. With respect to the Privacy Act, the D.C. Circuit concluded that:

> the district court correctly concluded that appellee correctly and properly withheld information pertaining to third parties who

> had not provided their consent to disclosure of that information.

Order at 1 Appendix B. This conclusion is simply inaccurate as no specific PA ground for exemption was ever claimed by the agency below.

Privacy Act Legal Standards.

The Privacy Act, 5 U.S.C. § 552a, "regulates the 'collection, maintenance, use, and dissemination of information' about individuals by federal agencies." *Doe v. Chao*, 540 U.S. 614, 618 (2004). The statute provides that, if any federal agency maintains a "system of records," it must "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him ... to review the record and have a copy made of all or any portion thereof in a form comprehensible to him." 5 U.S.C. § 552a(d)(1).

The statute defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular *assigned to the individual." Id.* § 552a(a)(5) (emphasis supplied). The Privacy Act provides statutory exemptions. *See* 5 U.S.C. § 552a(j)-(k). No Privacy Act statutory exemption was ever claimed by Respondent and none apply to Carlborg's request.[2] Most of the documents

---

[2] The Department of Defense Mandatory and Consent to use of e-mail provides that "communications using or data stored in . . . are not subject to routine monitoring, interception and search and may be disclosed for any U.S. Government purpose" https://cascom.army.mil/docs/dod-aup.pdf. The Privacy Act is a U.S. Government authorized purpose. Some or all the documents withheld from Carlborg included e-mails.

denied by Respondent are e-mails, for which there is no privacy provision in Government e-mail systems. *See* DoD Warning Banner:

> Communications using, or data stored on, this information system are not private, are subject to routine monitoring, interception, and search, and may be disclosed or used for any U.S. Government-authorized purpose.

See DoDCIO.defense.gov/Portals/0/Documents/DoDBanner.pdf.

Under the Privacy Act, Carlborg requested documents relating to himself contained in specified SORs (*i.e.*, a first party request), all of which were retrieved solely by his name or other personal identifier and not contained in another person's PA record. This is what is required of any Privacy Act requester. The D.C. Circuit in this case and in *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106 n.9 (D.C. Cir. 2007), upon which the court below relied upon for decision, the decision erroneously improperly narrowly construed the Privacy Act.

Unlike the FOIA,[3] the Privacy Act provides no statutory exemption for third party privacy protection. *Cf.* 5 U.S.C. § 552a(k)(5) (protecting only confidential source-identifying information in a case where person providing information was provided with an express promise of confidentiality) and 5 U.S.C. § 552a(j)(2) (exemption if, and only if, the agency provides a specific exemption for release relating to arrest, indictment through release from supervision under criminal laws).

---

[3] *See* FOIA, 5 U.S.C. § 552(b)(6), (7)(C).

Personal Access to Agency Documents Under Privacy Act

The purpose of this provision of the Privacy Act is to facilitate the access by informing requesters that the Government maintains "only such information about an individual as is necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). The only way that a requester may evaluate the agency record about him/her is to view it. 5 U.S.C. §§ 552a(d)(2)-(4) provide for procedures for individuals to challenge information in their records and to seek amendments to the record if appropriate, and actual review of the record is necessary for these proper purposes.

If Congress had intended to shield from disclosure information in one person's own record retrieved by his own name or personal identifier that contains collateral information about another person, such as an investigator who prepared a document contained in the requestor's record, it could have and presumably would have added an exemption to Sections 3(j) or 3(k) of the Privacy Act. Further Section 552a(k) may promulgate rules to exempt certain systems of records from the provisions of the Privacy Act. No such statutory exemption in the SORNs involved in Petitioner's case included such exemptions and none were claimed by the Department of the Navy at the agency administrative proceedings.

The Question is Important, and This Case Presents It Cleanly

In the D.C. Circuit, in Petitioner's case and previously, the Court has relied upon an OMB Guidance Circular dated July 1975. *See Sussman*,

494 F.3d at 1120. In that Circular, the OMB provides two examples illustrating the disclosure under the Privacy Act at page 28957:

> 1. A record on Joan Doe as an employee in a file of employee in a file of employees from which material is accessed by reference to her name (or some identifying number) This is the simplest case of a record in a system of records and Joan Doe would have a right to access.
>
> 2. A reference to Joan Doe *in a record about James Smith* in the same file. This is also a record within a system but Joan Doe would not have to be granted access unless the agency has devised and used an indexing capability to gain access to her record *in James Smith's file*.

The D.C. Circuit apparently failed to understand the example in the OMB Circular. In Carlborg's case, and many others reliant upon the D.C. Circuit's decision in *Sussman*, Carlborg was not seeking his information from *another's* record, which is example 2 under the OMB Circular. Rather, he was seeking a first party disclosure of information concerning himself contained in his own files identified in the SORNs relating to his own performance and Judge Advocate correspondence relating personally to him. There was no information sought to be accessed or obtained from any other person's record, and none was accessed from another's record. Moreover, none of the information was actually "retrieved by the name" or identifier of other individuals, which is necessary trigger the Privacy Act. *Henke v. U.S. Dep't of Commerce*, 83 F.3d at 1445, 1460 (D.C. Cir 1996) (agency obtained documents on express promises of

confidentiality). All Carlborg sought were documents contained in his own record, for which there no express or implied promises of confidentiality and to which he should have been granted full access.

The Eighth Circuit correctly interprets the Privacy Act. Pursuant to the Privacy Act statute, where the requested information is contained in a system of records and retrieved by the requester's name, therefore is "about" *the requester* within the meaning of subsection (a)(4)'s definition of "record" and such information is subject to the subsection (d)(1) access provision. *Voelker v. IRS*, 646 F.2d 332, 334 (8th Cir. 1981) provided that a requestor is entitled to full access to his PA file, despite the fact that other persons are collaterally named in the requester's file.

The clear contrary of interpretation of a federal statute; one that is routinely accessed by Americans, clears a plain and obvious circuit split requires review to assure stability and consistent interpretation of the access provisions of the Privacy Act. This case provides an excellent vehicle to review the circuit split because there were no express requests for confidentiality contained in Carlborg's file. The case was decided on summary judgment and summary affirmance as matters of law and the facts are undisputed.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

/s/ Charles W. Gittins
Charles W. Gittens
(D.C. Bar #439710)
139 Mallard Drive
Lake Frederick, VA 22630
540-327-2208
cgittins@aol.com

Counsel for Petitioner

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18-cv-1881 (DLF)

ROBERT S. CARLBORG,

Plaintiff,

—v.—

DEPARTMENT OF THE NAVY,

Defendant.

MEMORANDUM OPINION

Robert S. Carlborg brings this action against the Department of the Navy under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq*., and the Privacy Act, 5 U.S.C. § 552a, *et seq*., challenging the Navy's response to requests Carlborg made under both acts. Before the Court are Carlborg's Motion for Partial Summary Judgment, Dkt. 23, and the Navy's Cross-Motion for Summary Judgment, Dkt. 28. For the reasons that follow, the Court will grant the Navy's motion and deny Carlborg's motion.

I. BACKGROUND

In 2015, after an investigation into alleged misconduct, Robert Carlborg was involuntarily discharged from the United States Marine Corps.

Compl. ¶ 3, Dkt. 5. Following his separation from the Marine Corps, Carlborg submitted various FOIA and Privacy Act requests for records related to his time in the Marine Corps and the investigation that ultimately led to his involuntary discharge. *Id.* Carlborg filed this lawsuit against the Navy over its response to those requests on August 10, 2018. *See* Dkt. 1.

Carlborg's complaint alleges five counts. The first pertains to a Privacy Act request submitted on February 5, 2018 that sought "a copy of any and all documents maintained on [Carlborg]" in the Marine Corps Manpower Management Information System Records, which retains pay and personnel records for "active duty, reserve, and retired Marines." Hughes Decl. ¶¶ 5–8, Dkt. 28-4. The Navy searched this system of records but found no responsive material because the records of administratively separated service members are only retained in this system for "6 months beyond the date the separation was processed." *Id.* ¶ 8. The Navy then searched a related system of records, the Optical Digital Imaging Records Management System, and located Carlborg's "Official Military Personnel File," which totaled 281 pages. *Id.* ¶ 9. The Navy processed this file under the Privacy Act, withheld "personal identifying information pertaining to third parties," and provided a redacted version of the file to Carlborg on March 28, 2019. *Id.*

Carlborg's second count relates to a FOIA request submitted on August 9, 2017 that sought emails to or from a Marine Corps officer that mentioned "Carlborg" between March 1, 2015, and October 31, 2015, along with any responses to those emails. *See* Compl. ¶ 10; McMillan Decl. ¶ 6, Dkt. 28-5. The Navy collected the officer's .pst file, McMillan Decl. ¶ 7,

which stores "copies of messages, calendar events, and other items within Microsoft software, such as Microsoft Outlook," Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Mem.") at 7 n.1, Dkt. 28-2. The Navy searched the file as requested and found 244 pages of responsive email records. McMillan Decl. ¶ 7. After reviewing these records, the Navy withheld some information pursuant to FOIA Exemptions 5 and 6 and produced the remainder of the records to Carlborg on October 5, 2017. *Id.* ¶ 8. After Carlborg had administratively appealed, the Navy discovered "a series of email attachments that were not previously released or properly exempted," produced those attachments to Carlborg, and released some—but not all—of the material previously withheld under the FOIA exemptions that the Navy had previously invoked. *Id.* ¶ 8–11.

The third count concerns a Privacy Act request that Carlborg made on July 25, 2017, which sought an advisory opinion from the Staff Judge Advocate, Military, Policy Personnel Branch, about Carlborg's separation. Compl. ¶ 28. The Navy initially processed the advisory opinion under FOIA, "invoked exemptions [6] and [7(C)] to protect third parties' identities and information," and produced a redacted version of the opinion to Carlborg on August 4, 2017. Hughes Decl. ¶ 12. After Carlborg administratively appealed, the Navy reprocessed the advisory opinion under the Privacy Act and produced the opinion to Carlborg on July 20, 2018, withholding only a third party's signature at the end of the opinion. *Id.* ¶¶ 14–15.

Carlborg's fourth count is based on two Privacy Act requests for records "maintained on" Carlborg. Compl. ¶¶ 40–42. The first request sought Carlborg's records from the HQMC Correspondence Control Files

System, which maintains records relating to "Marines or former Marines who have been the subject of correspondence from a member of Congress." *Id.* ¶ 40. The second request sought records from the Performance File, which contains the records of those "who, while on active duty or in a reserve status, become the subject of investigation, indictment, or criminal proceedings by military or civilian authorities." *Id.* ¶ 42. In response to Carlborg's request, the Navy searched each system twice using the keyword "Carlborg." Hughes Decl. ¶¶ 31, 36. In addition, all individuals "who might reasonably have been expected to handle" Carlborg's case searched their own emails, .pst files, desktop, and shared drives for any potentially responsive records. *Id.* ¶¶ 18, 31. On January 12, 2018, the Navy produced 161 pages of records in response to Carlborg's requests. Compl. ¶ 65. After a series of administrative appeals, on July 20, 2018 the Navy produced additional records that had been created after the Navy's previous search. Hughes Decl. ¶ 33.

Carlborg's fifth count concerns two FOIA requests for email records regarding the disciplinary action that led to his separation from the Marine Corps. Compl. ¶¶ 73–76. The first request was made on February 21, 2016, and sought any email sent or received by nine named Marines regarding Carlborg's disciplinary action from June 30, 2014 to October 9, 2015. Pl's Ex. 20, Dkt. 23-2; McMillan Decl. ¶ 15. Carlborg's other request was submitted on April 12, 2016 and sought all emails sent or received by three named Marine Corps officers regarding their assignment to Carlborg's Board of Inquiry or their handling of Carlborg's case from February 5, 2015 to October 9, 2015. Pl's Ex. 19, Dkt. 23-2. In response to the first request, the Navy searched the emails of the

requested individuals for the keyword "Carlborg" and provided the responsive material onto a compact disc. McMillan Decl. ¶ 15 & Ex. C. In response to Carlborg's second request, the Navy searched the emails of the three specified individuals for the keywords "Carlborg" and "Board of Inquiry." McMillan Decl., Ex. D at 2. Carlborg received the results from both requests on August 4 and August 5, 2016. McMillan Decl. ¶ 16.

On January 13, 2020, Carlborg filed a motion for partial summary judgment. Dkt. 23. On May 15, 2020, the Navy filed a cross-motion for summary judgment on all counts. Dkt. 28.

II. LEGAL STANDARDS

Rule 56 of the Federal Rules of Civil Procedure mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Paige v. Drug Enf't Admin.*, 665 F.3d 1355, 1358 (D.C. Cir. 2012). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Privacy Act mandates that "[e]ach agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him." 5 U.S.C. § 552a(d)(1). The Privacy Act also allows individuals to request notice that an agency's system of records contains

information about them. *See* 5 U.S.C. §§ 552a(e)(4)(G), (f)(1). FOIA provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

The Privacy Act and FOIA are structurally similar. *Londrigan v. FBI*, 670 F.2d 1164, 1169 (D.C. Cir. 1981). Both provide a requester with access to federal agency records about the requester and create a private cause of action when an agency fails to comply with a valid request. *See* 5 U.S.C. §§ 552a(d)(1), (g)(1) (Privacy Act); 5 U.S.C. §§ 552(a)(3)(A), (a)(4)(B) (FOIA). Unlike FOIA, however, the Privacy Act "does not have disclosure as its primary goal. Rather, the main purpose of the Privacy Act's disclosure requirement is to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the agency correct any inaccuracies." *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1456–57 (D.C. Cir. 1996).

Under both the Privacy Act and FOIA, an agency must conduct an adequate and reasonable search for relevant records. *See Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (stating that "the Privacy Act, like FOIA, requires" that a search "be reasonably calculated to uncover all relevant documents" (internal quotation marks omitted)). In this Circuit, courts apply the same standard under both statutes to determine the adequacy of a search. *See id.*; *Hill v. U.S. Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986) (per curiam) (affirming search's adequacy under Privacy Act for the same reasons the search was affirmed under FOIA). Thus, "[i]n a suit seeking agency documents—

whether under the Privacy Act or the FOIA—at the summary judgment stage, where the agency has the burden to show that it acted in accordance with the statute, the court may rely on a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Chambers*, 568 F.3d at 1003 (internal alteration and quotation marks omitted). The agency's affidavit is "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted).

If agency searches reveal records responsive to a Privacy Act or FOIA request, an agency may withhold access to the records if the statutes exempt them from disclosure. *See* 5 U.S.C. §§ 552a(j)(2), (k)(2), 552(b). Although the Privacy Act and FOIA "substantially overlap," the statutes "are not completely coextensive; each provides or limits access to material not opened or closed by the other." *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 78 (D.C. Cir. 1982). The Privacy Act and FOIA "seek[] in different ways to respond to the potential excesses of government," and "[e]ach, therefore, has its own functions and limitations." *Id.* at 76. Accordingly, "[t]he two acts explicitly state that access to records under each is available without regard to exemptions under the other." *Id.* This means that, when both statutes are at play, an agency seeking to withhold records must "demonstrate that the documents fall within some exemption under *each* Act." *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (emphasis in

original). "If a FOIA exemption covers the documents, but a Privacy Act exemption does not, the documents must be released under the Privacy Act; if a Privacy Act exemption but not a FOIA exemption applies, the documents mustbe released under FOIA." *Id.*

III. ANALYSIS

A. Adequacy of the Searches

To secure summary judgment, the Navy "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 402 (D.C. Cir. 2017) (internal quotation marks omitted). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original). "The adequacy of the search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Id.* The central question is whether the Navy's search was "reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *SafeCard*, 926 F.2d at 1201.

Carlborg challenges the adequacy of the Navy's search with respect to Counts IV and V.[1]

---

[1] When Carlborg filed his complaint, the Navy had not yet responded to his request in Count I, Defs.' Mem. at 1; *see also* Compl. ¶¶ 5–9, but did so on March 18, 2019 when it produced a redacted version of Carlborg's "Official Military Personnel File," *see* Hughes Decl. ¶¶ 8–9. Carlborg did not move for summary

1. *Count IV*

Carlborg's Privacy Act requests in Count IV sought records "maintained on" Carlborg in two specified systems of records: the HQMC Correspondence Control Files and the Performance File. Compl. ¶¶ 40–42. In responding to these requests, the Navy twice searched each specified system for records that included the term "Carlborg." Hughes Decl. ¶¶ 31, 36. The Navy also searched the "email accounts, .pst folders, desktops and shared drive" of individual staff members who "might reasonably" have been expected to have been involved in Carlborg's administrative separation. *Id.* ¶ 18.

The Navy conducted an adequate search for the records specified in these requests. Judged by a "standard of reasonableness," *Mobley v. C.I.A.*, 924 F. Supp. 2d 24, 36 (D.D.C. 2013) (quoting *Weisberg*, 745 F.2d at 1485), the Navy's search for Carlborg's name in the systems Carlborg specified—and in other locations likely to yield responsive material—constituted "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Reporters Comm. for Freedom of Press*,

---

judgment with respect to this claim, *see* Pl.'s Mem. at 22, nor does he appear to dispute the Navy's argument that it conducted an adequate search in response to Count I, *see* Defs.' Reply Mem. in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Reply") at 1, Dkt. 32. Regardless, however, the record shows that the Navy satisfied its burden to show it conducted a search "reasonably calculated to uncover all relevant documents" responsive to Carlborg's request in Count I. *SafeCard*, 926 F.2d at 1201. Not only did the Navy search the system Carlborg specified using his social security number, *see* Hughes Decl. ¶ 6, 8, it also "searched[ed] the Optical Digital Imaging Records Management System," *id.* ¶ 9.

877 F.3d at 402. Carlborg points to "an unexplained 9-page gap in page numbering of emails that were produced" in response to one of the requests as a basis for finding the Navy's search inadequate.[2] Pl.'s Reply Mem. in Supp. of Pl.'s Partial Mot. for Summ. J. ("Pl.'s Reply") at 5, Dkt. 31. The Navy speculated that the gap was caused by an officer removing duplicate emails before sending the Navy's response to Carlborg, *see* Hughes Decl. ¶ 35, but the Navy's inability to definitively explain the origin of this gap does not render the methods it used unreasonable. This is especially true given that the Navy conducted another search after this gap was identified and found "no records that ha[d] not already been released to" Carlborg. Hughes Decl. ¶ 36.

Finally, the reasonableness of the Navy's search is buttressed by the fact that Carlborg has offered "no suggestion as to where else" the Navy "might have looked for his records or what other search criteria should have been used." *Peavey v. Holder*, 657 F. Supp. 2d 180, 190 (D.D.C. 2009). Carlborg does point to representations made by the Navy during the processing of his requests indicating there were 1,750 pages of responsive records and argues that the Navy has failed to adequately explain how only 161 pages of material were ultimately produced. Pl.'s Mem. at 19. But, as detailed in the Navy's affidavits, although

---

[2] Carlborg suggests that the Navy's response was not clearly separated by each request. Pl.'s Mem. in Supp. of Pl.'s Partial Mot. for Summ. J. ("Pl.'s Mem.") at 18, Dkt. 23-1. To the extent he also argues that the Navy's response was not reasonably segregated, *see* Defs.' Mem. at 18–19, the Navy satisfied its segregability obligations by describing the efforts it made to segregate non-exempt portions of the responsive records. *See* McMillan Decl. ¶ 12–14; *see also Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 207 (D.D.C. 2013).

there were 1,750 pages of hard copy files identified as responsive to Carlborg's requests, most of those records were duplicative or had already been produced to Carlborg in response to earlier FOIA requests. *See* Hughes Decl. ¶¶ 22–27. Carlborg also suggests the Navy's search cannot be adequate because it "has never identified any files or personnel produced from [the Office of Legislative Affairs]." Pl.'s Reply at 5–6. But "speculation that as yet uncovered documents may exist" is insufficient to rebut the "presumption of good faith" afforded to the Navy after searching for Carlborg's records in the systems he specified. *SafeCard*, 926 F.2d at 1200–01 (internal quotation marks omitted). Consequently, the Court finds the Navy has established its search was "reasonably calculated to uncover all relevant documents" responsive to Carlborg's requests in Count IV. *See id.* at 1201.

2. *Count V*

Carlborg's two FOIA requests in Count V sought emails relating to his administrative separation from the Navy. The first request sought all emails "sent or received" from June 30, 2014 to October 9, 2015 by nine named Marine Corps officers regarding Carlborg's disciplinary case. Pl.'s Ex. 20. Carlborg's second request sought all emails sent or received by three named Marine Corps officers from February 5, 2015 to October 9, 2015 regarding their assignment to Carlborg's Board of Inquiry or their handling of Carlborg's case. Pl's Ex. 19. In response, the Navy searched the emails of all individuals named in either request for the keyword "Carlborg." The Navy also searched the emails of the three individuals named in Carlborg's second request for the keyword "Board of Inquiry." McMillan Decl. ¶ 15 & Ex. D at 2. By searching the emails Carlborg specified by his name,

the Navy satisfied its burden to show it conducted a search that was reasonably calculated to produce the emails Carlborg sought about the handling of his disciplinary case.

Carlborg attempts to satisfy his burden to "provide countervailing evidence as to the adequacy of the [Navy]'s search," *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C.Cir. 2003) (internal quotation marks omitted), by pointing to certain emails he expected the Navy to produce, including three emails in Carlborg's possession that he claims were responsive to his request. *See* Pl.'s Mem. at 20–21. But after Carlborg brought these emails to the Navy's attention, the Navy conducted a review of the relevant .pst files and found nine pages of responsive records that had not previously been produced, including one of the emails Carlborg referenced. *See* Pl.'s Mem. at 11; McMillan Decl. ¶ 19. The Navy then conducted another search as part of a "completely renewed" response to his request, but ultimately found "no additional responsive emails." *Id*. ¶¶ 20–21. In assessing the adequacy of a search, "[t]he issue is not whether any further documents might conceivably exist but rather whether the [Navy]'s search for responsive documents was adequate[,]" *Defs. of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004), and "the adequacy of a search is determined not by the fruits of the search, but by the appropriateness of its methods," *Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) (alterations and internal quotation marks omitted); *see also Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("[T]he agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the

requested records."). The Navy's failure to produce particular emails does not suggest the inadequacy of its search. *See Barouch v. U.S. Dep't of Justice*, 87 F. Supp. 3d 10, 24 (D.D.C. 2015) ("Defendants' failure to find and release these particular records to plaintiff is not, therefore, evidence of agency bad faith.").

Carlborg also speculates that, because the compact disc of files the Navy used to process Carlborg's request was a copy of the potentially responsive material the Navy initially identified, someone could have "manipulated, redacted and eliminate[d] files or documents unfavorable" to the Navy before the material was processed under FOIA. Pl.'s Reply at 7–8; *see also* Pl.'s Mem. at 10–11. But the record contains no evidence to support these claims, and the Navy is afforded "a presumption of good faith, which cannot be rebutted by purely speculative claims." *SafeCard*, 926 F.2d at 1200 (internal quotation marks omitted); *see also* Pl.'s Ex. 20; McMillan Decl. ¶ 22 (attesting the file was not modified or manipulated).

For these same reasons, Carlborg's request for an *in camera* review of the original compact disc, *see* Pl.'s Reply at 10, is denied. *See Am. Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 627 (D.C. Cir. 2011) (finding *in camera* review was "not necessary" where the agency's affidavit was "sufficiently detailed" and there was "no evidence of bad faith"); *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009) ("If the agency's affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.") (internal quotation marks omitted). In sum, the Navy's search was "reasonably calculated

to uncover all relevant documents" responsive to Carlborg's requests in Count V. *SafeCard*, 926 F.2d at 1201.

B. Privacy Act

1. *Applicability of Privacy Act to Count IV*

As part of the Navy's response to Carlborg's Privacy Act requests in Count IV, the Navy searched individual staff members'.pst files. *See* McMillan Decl. ¶ 7; Defs.' Reply at 5. It then processed responsive emails produced from this search under FOIA and withheld material under FOIA Exemptions 5, 6, and 7(C). Hughes Decl. ¶¶ 18, 31, 34; Defs.' Mem. at 16 n.3. Carlborg challenges these withholdings on the ground that the responsive emails were actually retrieved from a system of records, and consequently, should have been processed under the Privacy Act rather than FOIA, but he does not otherwise contest the Navy's reliance on Exemptions 5, 6, and7(C). *See* Pl.'s Reply 15–16.

"Determining that a system of records exists from which the record at issue was retrieved is a prerequisite to a substantive Privacy Act claim." *Mulhern v. Gates*, 525 F. Supp. 2d 174, 181 n.10 (D.D.C. 2007). A "system of records" is defined by the Privacy Act as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). For information to fall within that definition: "(1) the "information must be 'about' an individual, and (2) it must actually be retrieved by the name or identifier of an individual." *Kearns v. Fed. Aviation Admin.*, 312 F. Supp. 3d 97, 108 (D.D.C. 2018) (internal citations and quotation

marks omitted). "The Circuit has held . . . that records containing an individual's name are not necessarily *about* that individual, and that the *capability* to retrieve records based on individual identifiers is not tantamount to *actually* retrieving them based on such markers." *Id.* (internal citations omitted) (emphasis in original). Instead, "in determining whether an agency maintains a system of records keyed to individuals, the court should view the entirety of the situation, including the agency's function, the purpose for which the information was gathered, and the agency's actual retrieval practice and policies." *Henke*, 83 F.3d at 1461. Importantly, the Privacy Act does "not apply to every document created by an agency employee but only to those records considered sufficiently important to the agency's operations or mission to become part of the agency's system of records." *York v. McHugh*, 850 F. Supp. 2d 305, 314 (D.D.C. 2012).

The emails the Navy collected in response to Carlborg's requests were not retrieved from a system of records as defined by the Privacy Act because the email messages and calendar entries stored on the .pst files that the Navy searched are not "sufficiently important to the agency's operations or mission to become part of the agency's system of records." *Id.* Although Carlborg stresses that the Navy was able to search these files for Carlborg's name, Pl.'s Reply at 15–16, "*capability* to retrieve records based on individual identifiers is not tantamount to *actually* retrieving them based on such markers." *Kearns*, 312 F. Supp. 3d at 108 (emphasis in original). And Carlborg has not shown that the Navy regularly retrieves information from .pst files using names or personal identifiers, or that it created these files in order to do so. *See York*, 850 F. Supp. 2d at 311–15

("The fact that some documents were labeled with [plaintiff's] name does not convert the shared J drive into a system of records, particularly where there is no evidence that the agency used the shared drive to retrieve information by personal identifiers and the drive was not created for employees to do so."). The Privacy Act therefore does not apply to the requests referenced by Carlborg in Count IV and the searches that the Navy conducted in response to those requests.

2. *Privacy Act Withholdings*

When the Navy processed Carlborg's records under the Privacy Act, it withheld "personal identifying information pertaining to third parties" such as "names, signatures and social security numbers." Hughes Decl. ¶¶ 9, 15. Carlborg claims there is no basis for withholding that information under the Privacy Act. Pl.'s Reply at 11.

Although the Privacy Act requires the Navy to provide Carlborg with "his record", 5 U.S.C. § 552a(d)(1), it also provides that, unless authorized by the Act, "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Carlborg argues that because these records are "about" him, they cannot "pertain" to someone else, and thus the Privacy Act's prohibition on disclosure without written consent does not apply. Pl.'s Reply at 11–13. In support of this argument, Carlborg cites to one case, *Topuridze v. U.S. Info. Agency*, 772 F. Supp. 662 (D.D.C. 1991), which held that individuals are entitled to records under the Privacy Act that are "about" them, even if

information in that record also pertains to another individual. But *Topuridze* is no longer good law. In this Circuit, "when materials pertain to both a Privacy Act requester and other individuals from whom the agency has received no written consent permitting disclosure, the Privacy Act's prohibition on disclosing information without written consent 'must take precedence,' and the portions of the record pertaining to those third parties must be withheld." *Mobley*, 924 F. Supp. 2d at 57 (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1121 n.9 (D.C. Cir. 2007)). The Court thus concludes that the Navy properly withheld personal identifying information pertaining to third parties who had not provided their consent to disclose that information pursuant to 5 U.S.C. § 552a(b).

As a final argument, Carlborg invokes a separate statute, 10 U.S.C. § 1556(a), to support his claim that he was entitled to an unredacted copy of the advisory opinion that the Navy produced in response to the Privacy Act request in Count III. Pl.'s Reply at 3–4. This too fails because § 1556(a) applies to the release of information in connection with proceedings involving the correction of military records. *See* 10 U.S.C. § 1556(a). And Carlborg has provided no authority that suggests that this provision may be enforced as part of an action brought under FOIA or the Privacy Act, or that this Court has jurisdiction to consider a claim seeking to enforce10 U.S.C. § 1556(a).

C. FOIA Withholdings

Finally, the Navy argues it properly invoked FOIA Exemptions 5 and 6 to withhold certain material in its response to Carlborg's FOIA requests in Count II. Defs.' Mem. at 11–14. Carlborg failed to respond to this argument. As a result, the Court may treat it as

conceded. *See Sykes v. Dudas*, 573 F. Supp. 2d 191, 202 (D.D.C. 2008) ("In this district, when a party responds to some but not all arguments raised on a Motion for Summary Judgment, a court may fairly view the unacknowledged arguments as conceded."). Nevertheless, the Court finds the Navy's withholdings in response to Carlborg's FOIA requests in Count II were justified under FOIA.

The Navy invoked the deliberative process privilege under FOIA Exemption 5 to withhold emails from a Special Agent to legal counsel "concerning the status of an ongoing investigation of an alleged sexual assault not involving the Plaintiff that identified both the alleged victim and the alleged suspect." Dowling Decl. ¶ 5, Dkt. 28-6. Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This includes all documents that would normally be privileged in the civil discovery context. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The deliberative process privilege allows agencies to withhold "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (internal quotation and citation omitted). To invoke the deliberative process privilege, an agency must show that the information withheld is both "predecisional" and "deliberative." *Id.* at 1434. Predecisional material is "prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made." *Id.* (internal quotation marks omitted). Deliberative material

"reflects the give-and-take of the consultative process." *Id.* (internal quotation marks omitted).

Here, the emails withheld under Exemption 5 were predecisional because they relayed "the opinions, recommendations, and assessments of the special agent about the investigation in anticipation of a court-martial or additional administrative action." Dowling Decl. ¶ 5. And they are deliberative because they "reflect the internal give and take among Navy personnel about that investigation." Defs.' Mem. at 14; *see also Citizens for Responsibility & Ethics in Washington v. DOJ*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (noting that courts "give deference to an agency's predictive judgment of the harm that will result from disclosure of information"). Because these emails were both "predecisional" and "deliberative," the Navy properly invoked FOIA Exemption 5 to withhold them. *See Petroleum Info. Corp.*, 976 F.2d at 1434.

FOIA Exemption 6 employs a balancing test and allows agencies to withhold certain information when disclosing it would result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). If disclosure would implicate only a de minimis privacy interest, the information must be disclosed; if the privacy interest at stake is greater than de minimis, the court must balance that privacy interest against the public interest in disclosure. *See Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006).

The Navy properly invoked FOIA Exemption 6 to redact the "personal and identifying information" of "DoD and non-DoD personnel" who were not general officers or in director-level positions. Dowling Decl. ¶ 4; McMillan Decl. ¶ 7. These individuals have more

than a de minimis privacy interest in keeping their names and personal identifying information from being disclosed. And the general public's interest in disclosing the personal and identifying information of these individuals is minimal. *See, e.g.*, *Davidson v. Dep't of State*, 206 F. Supp. 3d 178, 200 (D.D.C. 2016) (finding there was "no public interest" in knowing "the names and contact information" of State Department employees because it would reveal "little or nothing more about the Department's conduct"); *Kearns*, 312 F. Supp. 3d at 112 (finding the public interest in disclosing "the names, other identifying information, and personal data" of third parties "involved in the FAA's internal investigations" was "nil" because the information would not "shed light on the FAA's performance of its statutory duties"). Accordingly, the Navy properly invoked FOIA Exemption 6 to withhold this information.

CONCLUSION

For the foregoing reasons, the Court grants the Navy's cross-motion for summary judgment and denies Carlborg's partial motion for summary judgment. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

August 10, 2020

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20-5311

September Term, 2020
1:18-cv-01881-DLF

Filed On: May 11, 2021

ROBERT S. CARLBORG,
Appellant

—v.—

UNITED STATES DEPARTMENT OF THE NAVY,
Appellee

BEFORE: Rogers, Wilkins, and Rao, Circuit Judges

ORDER

Upon consideration of the petition for rehearing and remand, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20-5311

September Term, 2020
1:18-cv-01881-DLF

Filed On: March 8, 2021

ROBERT S. CARLBORG,
Appellant

—v.—

UNITED STATES DEPARTMENT OF THE NAVY,
Appellee

BEFORE: Rogers, Wilkins, and Rao, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties'

positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court's August 10, 2020 decision correctly concluded that appellee conducted an adequate search in response to the Freedom of Information Act ("FOIA") requests at issue in Count V of the complaint. See Mobley v. CIA, 806 F.3d 568, 580-81 (D.C. Cir. 2015). Appellee submitted a "reasonably detailed" declaration "setting forth the search terms and the type of search performed" that showed "that all files likely to contain responsive materials (if such records exist) were searched," id. at 581, and appellant's "countervailing evidence" failed to raise a "substantial doubt" as to the adequacy of that search, Iturralde v. Comptroller of Currency, 315 F.3d 311, 314 (D.C. Cir. 2003). The presumption of good faith accorded to an agency's declaration cannot be overcome by "purely speculative claims about the existence and discoverability of other documents." SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted); see also Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004).

With respect to the records released to appellant under the Privacy Act, 5 U.S.C. § 552a, the district court correctly concluded that appellee properly withheld information pertaining to third parties who had not provided their consent to disclosure of that information. See 5 U.S.C. § 552a(b); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1121 & n.9 (D.C. Cir. 2007).

Finally, appellant challenges appellee's application of FOIA Exemption 6 to withhold certain materials responsive to the requests at issue in Counts II and

IV of his complaint. Appellant, however, failed to raise that argument in the district court and has not shown that exceptional circumstances justify its consideration for the first time on appeal. See Salazar ex rel. Salazar v. D.C., 602 F.3d 431, 436-37 (D.C. Cir. 2010). Appellant has also forfeited any challenge to the remaining aspects of the district court's decision. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

Appendix D

5 U.S. Code § 552a – Records Maintained on Individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

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

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(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, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches—

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counter-intelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(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 and Records Administration 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 Archivist of the United States or the designee of the Archivist 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 Government Accountability Office;

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

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to

the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the

procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register

upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary

to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience,

or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure

to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)

(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to

the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) 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 on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)

(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)

(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of

any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an

individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) RIGHTS OF LEGAL GUARDIANS.—
For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)

(1) CRIMINAL PENALTIES.—
Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, 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) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the

criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United

States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the

statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)

(1) ARCHIVAL RECORDS.—
Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred 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, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred 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, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)

(1) GOVERNMENT CONTRACTORS.—
When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) MAILING LISTS.—
An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) MATCHING AGREEMENTS.—

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement

between the source agency and the recipient agency or non-Federal agency specifying—

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a

recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)

(A) A copy of each agreement entered into pursuant to paragraph (1) shall—

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) VERIFICATION AND OPPORTUNITY TO CONTEST FINDINGS.—

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until—

(A)

(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that—

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)

(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual

that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of—

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) SANCTIONS.—

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless—

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) REPORT ON NEW SYSTEMS AND MATCHING PROGRAMS.—

Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) BIENNIAL REPORT.—The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)

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

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

(u) DATA INTEGRITY BOARDS.—

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board—

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year,

either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including—

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)

(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)

(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) OFFICE OF MANAGEMENT AND BUDGET RESPONSIBILITIES.—The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) APPLICABILITY TO BUREAU OF CONSUMER FINANCIAL PROTECTION.—
Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

Appendix E

FEDERAL REGISTER

WEDNESDAY, JULY 9, 1975

WASHINGTON, D.C.

Volume 40 ● Number 132

PART III

OFFICE OF MANAGEMENT AND BUDGET

PRIVACY ACT IMPLEMENTATION

Guidelines and Responsibilities

---

pertaining to him, (2) permit an individual to review any record pertaining to him which is contained in a system of records, (3) permit the individual to be accompanied for the purpose by a person of his choosing, and (4) permit the individual to obtain a copy of any such record in a form comprehensible to him at a reasonable cost. This provision it should be noted, gives an individual the right of access only to

records which are contained in a system of records. See (a) (5) , above.

This language further suggests that the Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular. See subsection (a)(5). If an individual is named in a record about someone else (or some other type of entity) and the agency only retrieves the portion pertaining to him by reference to the other person's name, (or some organization/ subject identifier), the agency is not required to grant him access. Indeed, if this were not the case, it would be necessary to establish elaborate cross-references among records, thereby increasing the potential for privacy abuses. The following examples illustrate some applications of this standard.

1. A record on Joan Doe as an employee in a file of employees from which material is accessed by reference to her name (or some identifying number). This is the simplest case of a record in a system of records and Joan Doe would have a right of access.

2. A reference to Joan Doe in a record about James Smith in the same file. This is also a record within a system but Joan Doe would not have to be granted access unless the agency had devised and used an indexing capability to gain access to her record in James Smith's file.

3. A record about Joan Doe in a contract source evaluation file about her employer, Corporation X, which is not accessed by reference to individuals' names, or other identifying particulars. This is a record which is not in a system of records and, therefore, Joan Doe would not have a right of access to it. If, as in 2, above, an indexing capability were

developed and used, however, such a system would become a system of records to which Joan Doe would have a right of access.

Agencies may establish fees for making copies of an individual's record but not for the cost of searching for a record or reviewing it (subsection (f)(5)). When the agency makes a copy of a record as a necessary part of its process of making the record available for review (as distinguished from responding to a request by an individual for a copy of a record), no fee may be charged. It should be noted that this provision differs from the access and fees provisions of the Freedom of Information Act

The granting of access may not be conditioned upon any requirement to state or otherwise justify the need to gain access.

Agencies shall establish requirements to verify the identity of the requester. Such requirements shall be kept to a minimum. They shall only be established when necessary reasonably to assure that an individual is not improperly granted access to records pertaining to another individual and shall not unduly impede the individual's right of access. Procedures for verifying identity will vary depending upon the nature of the records to which access is sought. For example, no verification of identity will be required of individuals seeking access to records which are otherwise available to any member of the public under 5 U.S.C. 552, the Freedom of Information Act. However, far more stringent measures should be utilized when the records sought to be accessed are medical or other sensitive records.

For individuals who seek access in person, requirements for verification of identity should be limited to information or documents which an

individual is likely to have readily available (e.g., a driver's license, employee identification card, Medicare card). However, if the individual can provide no other suitable documentation, the agency should request a signed statement from the individual asserting his or her identity and stipulating that the individual understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is punishable by a fine of up to $5,000. (Subsection (i) (3).)

For systems to which access is granted by mail (by virtue of their location) verification of identity may consist of the providing of certain minimum identifying data; e.g., name, date of birth, or system personal identifier (if known to the individual). Where the sensitivity of the data warrants it; (i.e., unauthorized access could cause harm or embarrassment to the individual), a signed notarized statement may be required or other reasonable means of verifying identity which the agency may determine to be necessary, depending on the degree of sensitivity of the data involved.

NOTE: That section 7 of the Act forbids an agency to deny an individual any right (including access to a record) for refusing to disclose a Social Security Number unless disclosure is required by Federal statute or by other laws or regulations adopted prior to January 1, 1975.

Agencies are also permitted to require that an individual who wishes to be accompanied by another person when reviewing a record furnish a written statement authorizing discussion of his or her record in the presence of the accompanying person. This provision may not be used to require that individuals

who request access and wish to authorize other persons to accompany them provide any reasons for the access or for the accompanying person's presence. It is designed to avoid disputes over whether the individual granted permission for disclosure of information to the accompanying person.

Agency procedures for complying with the individual access provisions will necessarily vary depending upon the size and nature of the system of records. Large computer-based systems of records clearly require a different approach than do small, regionally dispersed, manually maintained systems. Nevertheless the basic requirements are constant, namely the right of the individual to have access to a record pertaining to him and to have a copy made of all or any portion of such records in a form which is comprehensible to him. Putting information into a comprehensible form suggests converting computer codes to their literal meaning but not necessarily an extensive tutorial in the agency's procedures in which the record is used.

Neither the requirements to grant access nor to provide copies necessarily require that the physical record itself be made available. The form in which the record is kept (e.g., on magnetic tape) or the context of the record (e.g., access to a document may disclose records about other individuals which are not relevant to the request) may require that a record be extracted or translated in some manner; e.g., to expunge the identity of a confidential source. Whenever possible, however, the requested record should be made available in the form in which it is maintained by the agency and the extraction or translation process may not be used to withhold information in a record about the individual who requests it unless the denial of access is specifically

provided for under rules issued pursuant to one of the exemption provisions (subsections (j) and (k)).

Subsection (f)(3) provides that agencies may establish "a special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him." In addressing this provision the House committee said:

If, in the judgment of the agency, the transmission of medical information directly to a requesting individual could have an adverse effect upon such individual, the rules which the agency promulgates should provide means whereby an individual who would be adversely affected by receipt of such data may be apprised of it in a manner which would not cause such adverse effects. An example of a rule serving such purpose would be transmission to a doctor named by the requesting individual. (House Report 93–1416, pp. 16–17)

Thus, while the right of individuals to have access to medical and psychological records pertaining to them is clear, the nature and circumstances of the disclosure may warrant special procedures.

While the Act provides no specific guidance on this subject, agencies should acknowledge requests for access to records within 10 days of receipt of the request (excluding Saturdays, Sundays, and legal public holidays). Wherever practicable, that acknowledgement should indicate whether or not access can be granted and, if so, when. When access is to be granted, agencies will normally provide access to a record within 30 days (excluding Saturdays,