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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This responds to your request of March 17, 1981, requesting our views on S. 586, a bill to amend the Privacy Act of 1974, 5 U.S.C. §552a.

The bill adds several new provisions to the Privacy Act that would (1) place limits on the kinds of information agencies provide to requestors; (2) limit the number of Privacy Act requests an individual may make to an agency each year; (3) establish a minimum charge of $10.00 for materials provided to individuals under the Privacy Act; (4) redefine the law enforcement exemption; and (5) standardize the format for responding to requests for law enforcement records.

Requests for Public Record Information

S. 586 would add a new section (r) to the Privacy Act to eliminate the need for agencies to provide requestors with copies of public record material. Instead of providing copies of newspaper clippings, court records, and magazine articles, proposed section (r) would authorize agencies to identify such public record material by date and source. While this procedure may reduce agency costs for copying records, the savings that could result are not likely to be substantial. Our study of the Privacy Act and Freedom of Information Act at 13 Federal law enforcement agencies (LCD-78-119, June 16, 1978) indicated that 80 percent of the agencies' costs were spent on salaries while only 20 percent went for overhead items, including office supplies, printing, and reproduction.

If this section of the bill is retained, we recommend the types of records it covers be clarified. As presently drafted, the section covers newspaper clippings, magazine articles, court records, or any other item that is "public record or otherwise available." Although the bill provides examples of what constitutes "public record" material, we believe the agencies may encounter difficulty in determining what other records might fall into the undefined "otherwise available" category.

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Request History

Proposed section (s) of the Privacy Act would require requestors to state the number and date of any prior requests, and limit individuals to one request per year per agency on any general subject. In addition, where an individual makes more than one request of an agency in consecutive years, the agency would be authorized to simply provide the material added to the file since the last request.

Although the stated purpose of S. 586 is to enhance the ability of law enforcement agencies to protect the public security, proposed section (s) is likely to have its greatest impact on areas unrelated to law enforcement. This is so because under other sections of the bill agencies are prohibited from disclosing law enforcement investigative records for a minimum period of 10 years, or, when this ban expires or otherwise does not apply, agencies may decline to release the information under a proposed amendment to the Privacy Act's exemption for law enforcement records. Our comments on proposed section (s) are framed with this in mind.

We endorse the proposed section (s) requirement for the provision of updated material in an individual's file. This should minimize the cost of responding to Privacy Act requests without unduly limiting access. In view of this authorization, however, we question the need for a ceiling on the number of Privacy Act requests that may be made during a given year. As presently drafted, this latter requirement could prove difficult to administer, and, on balance, may unduly limit an individual's right of access.

The limitation on the number of requests per year is waivable, but the bill contains no safeguards to ensure that waivers are applied in an even-handed and equitable manner. In addition, the limitation is keyed to one request on the same "general subject," a term left undefined by the bill. The "general subject" of most Privacy Act requests is the individual requestor, but in the context of proposed section (s) an apparently different connotation is intended. We believe the term "general subject" is open to a wide variety of interpretations, and should be clarified if it is retained.

Although the "one request per year" limitation could encourage requestors to make broad and sweeping Privacy Act inquiries, it could also unduly limit access. For example, an individual may file a request in January of a given year, and be advised that the agency lacks any information relevant to his or her request. Later in the same year the agency may have acquired the information, but a request filed at that time could be routinely denied on grounds that only one request per year is authorized.

We recommend the Committee consider whether the abuses proposed section (s) is designed to address could be handled without imposing a ceiling on the number of authorized inquiries. Alternatives would include appropriate application of the Privacy Act's cost recovery provisions, and retention of the proposed section (s) authorization for providing only the non-exempt material that is added to an individual's file subsequent to the first request.

As for the requirement that individuals state the number of prior Privacy Act inquiries and the date of each, we understand the agencies already maintain files containing this information. They will continue to do so if the proposed requirement is to be enforced. Although the requirement for stating the number and date of prior requests is essentially technical and is waivable, noncompliance clearly can serve as a basis for denying a new request apart from the latter's substantive merit. To account for situations where individuals are not aware of the notification requirement and failed to maintain sufficiently detailed records of their prior requests, we believe the Committee should provide specific guidance on the general circumstances where waiver would be appropriate.

Information from Other Agencies

Proposed section (t) of the Privacy Act would cover situations where the records requested contain information that was received from another agency. Agencies could notify the requestor that the information is available with the originating agency, and that the originating agency has disclosure responsibility under the Privacy Act. Under current procedures, the agency to whom a request is made does not normally release information originating with another agency. The request is referred to the originating agency. Proposed section (t) would

give agencies the option of following current procedures, or returning the inquiry to the requestor with an appropriate notification that the request be directed to the originating agency.

Law Enforcement Exemption

Section 2 of S. 586 would significantly expand on those provisions of existing law that govern an individual's access to law enforcement records.

Under present law, agencies that perform criminal law enforcement as their principal function may exempt from disclosure an individual's criminal history record, information compiled incident to a criminal investigation, and reports identifiable to an individual compiled at any stage of the enforcement process. See 5 U.S.C. §552a(i)(2)(A)-(C). Under another exemption, see 5 U.S.C. §552a(k)(2), all agencies, including those principally engaged in criminal law enforcement, may exempt, with certain exceptions, any investigatory material compiled for law enforcement purposes.

It is this latter exemption that would be amended by S. 586. Under the amendment, all law enforcement records, not simply investigatory material, could be exempt if disclosure would tend to, among other matters, reveal confidential sources, confidential information, investigative techniques or procedures, or information about organized crime and racketeering investigations. The bill goes on to provide that any records maintained, collected, or used for law enforcement and relevant to an investigation are not to be disclosed until 10 years after an investigation terminates or, if the individual involved was incarcerated, 10 years after the expiration of the term of imprisonment. This provision is cast in terms of a nonwaivable prohibition against disclosure.

We recommend the Committee consider whether in the context of a given case this prohibition could unduly tie the hands of the Attorney General or the heads of other enforcement agencies. For example, there may be occasions where, in the judgment of the Attorney General, release of an investigative file would be appropriate to clear an individual's name or, alternatively, to correct erroneous information contained in a presentence report

that served as the basis for an extended period of incarceration. As presently drafted, however, the prohibition against disclosure is categorical, and no provision is made for waiver.

We might also point out that, if read literally, the prohibition against disclosure is not limited to release of information to the public or the individual who is the subject of the file. We assume the provision is not intended to prohibit disclosure or exchanges of information with the courts, with the enforcement community, or with other governmental entities in appropriate circumstances. To avoid confusion on this point, we recommend the Committee limit the scope of the prohibition to disclosures to the general public and the individual about whom the record pertains.

Cost recovery requirements

Section 3 of the bill would amend the Privacy Act to require a fee of $10 plus duplicating costs for each Privacy Act request. The fee could be waived or assessed at a reduced rate in financial hardship cases. Present law provides for the charging of duplicating fees, but, unlike the Freedom of Information Act, does not explicitly cover costs incurred to perform a documents search.

In our study of the FBI's Privacy and Freedom of Information Act activities (GGD-78-51, April 10, 1978), we found that the Department of Justice policy was to charge only where duplication fees were over $3.00. The FBI wanted to raise this to $25.00 because its administrative costs for fee collection could exceed the amount of the fee itself. While we agree with the proposal to assess search and duplicating fees in appropriate cases, we do not believe a fixed fee is desirable. Administrative costs will vary among agencies, and, depending upon the nature of the request, may be less than or exceed a statutorily established fee. In addition to a general authorization to collect search and duplication fees, we would suggest that each agency be directed to prepare a cost schedule to assure that fees are charged only when the amount to be recovered exceeds the cost of collecting the applicable fee.

Form of response of Privacy Act requests

Section 4 of the bill would require law enforcement agencies to prepare the same general standardized written response in situations where the agency does not have the records requested and where the records sought are exempt from disclosure. This would correct a situation encountered under existing law where agencies denying requests on the basis of an exemption, in effect, alert requestors to the fact that they are under investigation.

We hope this information and expression of views will be of assistance to the Committee's deliberations on S. 586.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States