

# PA/FOIA INTERFACE

- FREEDOM OF INFORMATION ACT (FOIA)
  - ANY PERSON FOR ANY REASON
  - AGENCY RECORDS
- PRIVACY ACT (PA)
  - US CITIZENS/ LEGALLY ADMITTED ALIENS
  - FIRST PARTY REQUEST FOR ACCESS TO RECORDS CONTAINED IN A PA SYSTEM OF RECORDS

# TIME LIMITS

- FOIA
  - 20 WORKING DAYS
  - SOME AGENCIES ISSUE ACKNOWLEDGEMENTS
- PRIVACY
  - STATUTE DOES NOT SPECIFY TIME FRAME
  - RESPOND WITHIN 20 WORKING DAYS IF POSSIBLE

# FEES

- FOIA
  - OFFICE OF MANAGEMENT AND BUDGET (OMB) SETS UNIFORM FEE GUIDELINES FOR SEARCH, REVIEW, AND DUPLICATION
  - CATEGORY OF REQUESTER DETERMINES KINDS OF FEES CHARGED
- PRIVACY
  - DUPLICATION FEES ONLY
  - FEES USUALLY WAIVED

# IS IT PRIVACY? OR FOIA?

- DEPARTMENT OF JUSTICE SAYS TO PROCESS UNDER BOTH ACTS – NO MATTER WHICH ACT IS CITED
- MANY REQUESTERS DO NOT UNDERSTAND THE DIFFERENCE AND CITE ONE OR BOTH ACTS

# THINGS TO CONSIDER

- DOES IT CITE AN ACT?
- DOES THE REQUEST REASONABLY DESCRIBE THE RECORDS BEING SOUGHT?
- HOW ARE THE RECORDS FILED?
- IS THIS A FIRST-PARTY OR THIRD-PARTY REQUEST?

# PRIVACY ACT SYSTEMS OF RECORDS

- THE SYSTEMS NOTICE IDENTIFIES ANY EXEMPTION RULE
- EXCEPTION: (d)(5) – COMPILED IN ANTICIPATION OF LITIGATION
- MUST BE A FIRST-PARTY REQUEST
- IF THE SYSTEM IS EXEMPT, THEN APPROPRIATE DENIAL MADE UNDER PA AND FILE IS THEN PROCESSED UNDER FOIA
- APPEAL RIGHTS GIVEN

# FOIA PROCESSING

- REVIEW DOCUMENT TO DETERMINE IF ANY INFORMATION REQUIRES WITHHOLDING UNDER ANY OF THE FOIA EXEMPTIONS
- RESPONSE LETTER SHOULD ADDRESS WHICH INFORMATION WAS WITHHELD AND GIVE APPEAL RIGHTS

# PRIVACY ACT SYSTEMS OF RECORDS NOTICE

- BLUEPRINT FOR THE KINDS OF RECORDS KEPT ON INDIVIDUALS
- RULEMAKING ESTABLISHES WHICH RECORDS ARE KEPT AND WHICH RECORDS QUALIFY FOR WITHHOLDING
- IDENTIFIES THE TIME FRAME RECORDS ARE KEPT AND HOW THEY ARE RETRIEVED
- IDENTIFIES WHERE INFORMATION IS TAKEN TO COMPILE FILE

# FOIA REQUESTS

- MUST REASONABLY IDENTIFY RECORDS BEING SOUGHT SO A KNOWLEDGEABLE OFFICIAL OF AGENCY CAN LOCATE RECORDS
- CAN INCLUDE RECORDS CONTAINED IN A PA SYSTEM OF RECORDS

# WHO RESPONDS?

- FOIA
  - RELEASE AUTHORITY/  
INITIAL DENIAL AUTHORITY
- PRIVACY ACT
  - SYSTEMS MANAGER  
OR PA OFFICIAL

# EXEMPTIONS

- FOIA

- REVIEW DOCUMENT AND APPLY EXEMPTIONS
- (b)(1) – CURRENTLY AND PROPERLY CLASSIFIED BY EXECUTIVE ORDER
- (I.E., 12958)

- PRIVACY

- EXEMPTIONS ARE ADDRESSED IN PA SYSTEMS NOTICE
- SPECIFIC EXEMPTIONS
  - (k)(1) – SAME AS FOIA (b)(1)

# EXEMPTIONS

- FOIA

- (b)(2): PERSONNEL RULES AND PRACTICES
  - HIGH (b)(2) – CIRCUMVENTION OF AN AGENCY RULE, ETC.
  - TRIVIAL MATTERS

- PRIVACY

- SIMILAR EXEMPTION IS (k)(6): PROTECTS TESTING OR EVALUATION MATERIALS

# EXEMPTIONS

- FOIA
  - EXEMPTION (b)(3):  
PERTAINS TO  
INFORMATION  
PROTECTED BY A  
STATUTE
- PRIVACY ACT
  - EXEMPTION (k)(3) –  
MAINTAINED IN  
CONNECTION WITH  
PROVIDING  
PROTECTIVE  
SERVICES TO THE  
PRESIDENT OF THE  
UNITED STATES

# EXEMPTIONS

- FOIA

- EXEMPTION (b)(4):  
PERTAINS TO  
COMMERCIAL/  
TRADE SECRET  
INFORMATION

- PRIVACY

- THERE IS NO  
SIMILAR EXEMPTION
- EXEMPTION (k)(4)  
PROTECTS  
STATISTICAL  
INFORMATION USED  
SOLELY AS  
STATISTICAL  
RECORDS

# EXEMPTIONS

- FOIA

- (b)(5):  
INTERAGENCY OR  
INTRAAGENCY  
MEMOS OR  
LETTERS THAT  
WOULD NOT BE  
MADE AVAILABLE BY  
LAW TO A PARTY IN  
LITIGATION WITH  
THE AGENCY

- PRIVACY

- (d)(5): DOES NOT  
HAVE THE FULL  
BREADTH OF  
EXEMPTION (b)(5)  
SINCE IT ONLY  
PERTAINS TO  
INFORMATION  
COMPILED IN  
ANTICIPATION OF  
LITIGATION

# EXEMPTIONS

- FOIA

- (b)(6) – PROTECTS THE PERSONAL PRIVACY OF OTHERS

- PRIVACY

- THERE IS NO PRIVACY EXEMPTION UNDER THE PA
- FILES SHOULD NOT COMMINGLE PERSONAL INFORMATION
- RELY ON CASE LAW TO WITHHOLD INFORMATION THAT IS NOT ABOUT THE INDIVIDUAL

# EXEMPTIONS

- FOIA

- (b)(7): PERTAINS TO RECORDS OR INFORMATION COMPILED FOR LAW ENFORCEMENT PURPOSES

- PRIVACY

- THERE ARE SEVERAL PRIVACY EXEMPTIONS THAT APPLY
- (k)(2): PERTAINS TO INVESTIGATORY MATERIAL COMPILED FOR LAW ENFORCEMENT PURPOSES (OTHER THAN EXEMPTION (j)(2))

# EXEMPTIONS

- (k)(5): INVESTIGATORY INFORMATION COMPILED SOLELY FOR THE PURPOSE OF DETERMINING SUITABILITY, ETC., FOR FEDERAL CIVILIAN EMPLOYMENT THAT WOULD REVEAL A CONFIDENTAL SOURCE
- (j)(2) – THIS IS A GENERAL PA EXEMPTION THAT PROTECTS INFORMATION MAINTAINED BY AGENCY OR COMPONENT WHOSE PRINCIPAL FUNCTION IS THE ENFORCEMENT OF CRIMINAL LAWS

# EXEMPTIONS

- FOIA
  - (b)(8): FINANCIAL/  
BANKING
  - (b)(9) OIL WELLS
- PA
  - NO SIMILAR  
EXEMPTIONS

# OTHER PRIVACY ACT GENERAL EXEMPTION

- (j)(1): MAINTAINED  
BY CIA

# APPEALS/AMENDMENTS

- FOIA
  - Requesters can appeal the adequacy of search, no record responses, fees, denial of information
- PRIVACY
  - Requesters can appeal adverse determinations
  - Can seek amendment of “factual” information (not opinions)

# PENALTIES

- FOIA

- ATTORNEY FEES AND LITIGATION COSTS

- PRIVACY

- CIVIL AND CRIMINAL PENALTIES FOR MAINTAINING ILLEGAL PA SYSTEM OF RECORDS; WILLFULLY REQUESTING A RECORD UNDER FALSE PRETENSES; OR WILLFULLY DISCLOSING TO UNAUTHORIZED ENTITY

# PLAYING THE FOIA/PA GAME

- IDENTIFY THE REQUESTER
- REVIEW WHAT THE REQUEST IS FOR: AGENCY RECORDS? PA SYSTEM OF RECORDS?
- IF REQUEST IS FOR AGENCY RECORDS, PROCESS USING FOIA EXEMPTIONS
- IF REQUEST IS FOR RECORDS IN A PA SYSTEM OF RECORDS, REVIEW THE SYSTEMS NOTICE

# ADMINISTRATIVE RECORD

- MAKE SURE YOU ADVISE THE REQUESTER UNDER WHICH ACT(S) YOU ARE PROCESSING HIS/HER REQUEST
- DELINEATE ANY EXEMPTIONS CLAIMED
- GIVE APPEAL RIGHTS
- DELINEATE FEES/FEE WAIVER

# IN SUMMARY

- WHILE BOTH STATUTES ALLOW ACCESS TO INFORMATION, ENSURE YOU FOLLOW THEIR RULEMAKING
- MAKE SURE YOUR SEARCHES ARE COMPLETE
- DON'T HESITATE TO CONTACT THE REQUESTER FOR CLARIFICATION OF HIS/HER REQUEST

# IN SUMMARY (CON'T)

- MAKE SURE YOUR RESPONSE IS ACCURATE, TIMELY, AND COMPLETE
- THOROUGH EXPLANATIONS OF EXEMPTION(S) CLAIMED MANY TIMES ELIMINATE APPEALS

# FINALLY

- BE A FRIEND FOR FOIA
- REMEMBER: YOUR RECORDS DISPOSAL RULES DEFINE HOW LONG RECORDS ARE MAINTAINED
- DEVELOP A PASSION FOR PRIVACY
- REMEMBER: THE PA SYSTEMS NOTICE DRIVES THE TRAIN