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 CONFIDENTIAL 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