DOBROVIR & GEBHARDT

SUITE 1105

1225 VERMONT AVENUE, N. W.

WASHINGTON, D. C. 20005

WILLIAM A. DOBROVIR
JOSEPH D. GEBHARDT *
DAVID LANE SOBEL †

AREA CODE 202
347-8118

*ALSO ADMITTED IN MARYLAND
†ALSO ADMITTED IN FLORIDA

April 6, 1984

James H. Lesar, Esq.
Suite 900
1000 Wilson Boulevard
Arlington, VA 22209

Dear Jim:

I enjoyed talking with you yesterday and appreciated your insights on the National Student Association litigation. Per your request, I am enclosing a copy of the Dube deposition transcript. Any thoughts you might have would be of interest.

I am also enclosing copies of correspondence to the House Intelligence Committee staff concerning the "operational files" exemption. While it appears unlikely that the Committee will adopt a "U.S. persons" exception, Chairman Boland has represented that the Committee report will seek to clarify the problem.

I hope this is useful.

Regards,

David L. Sobel

P.S. In case you haven't seen it, I thought you'd be interested in the recent OMB guidelines designating the Privacy Act as a b(3) statute.

jk

DOBROVIR & GEBHARDT

SUITE 1105

1025 VERMONT AVENUE, N. W.

WASHINGTON, D. C. 20005

AREA CODE 202
347-8..8

WILLIAM A. DOBROVIR
JOSEPH D. GEBHARDT*
DAVID LANE SOBEL*

*ALSO ADMITTED IN MARYLAND
*ALSO ADMITTED IN FLORIDA

March 19, 1984

Mr. Michael O'Neil
Chief Counsel
House Intelligence Committee
H-405
U.S. Capitol Building
Washington, D.C. 20515

Dear Mr. O'Neil:

I am writing in reference to H.R. 5164, the Freedom of Information legislation currently pending before the Committee. I understand this bill is scheduled for mark-up on April 11. As counsel to the plaintiff in United States Student Association v. Central Intelligence Agency, Civ. No. 82-1686 (D.D.C.), I would like to address a problem I perceive in this legislation. In so doing, I note that the pending legislation (or that approved by the Senate) will not affect my client's case, pursuant to a stipulation signed by the parties and approved by the court.

As you will recall, the CIA secretly funded the National Student Association (NSA) for at least fifteen years. That covert relationship purportedly ended in 1967 with the execution of a separation agreement between the Agency and NSA. Needless to say, the student association has had a long-standing desire to learn its own history and to finally "clear the air" concerning its clandestine relationship to the CIA. To accomplish that end, NSA filed an FOIA request with the Agency in 1977, seeking records maintained under its name. The request languished for five years, during which time NSA merged with another organization and became known as the United States Student Association.

The association filed suit in U.S. District Court in June 1982, and began to receive Vaughn indexes from the Agency describing the 1500 responsive documents maintained by the Agency. The completed index is approximately 1000 pages in length and revealed, among other things, that the CIA maintains records concerning my client dated as recently as 1979. This came as a great surprise, given the 1967 separation agreement, the recommendations of the Katzenbach Commission (adopted by President Johnson), and the Church Committee's finding that the relationship terminated in 1967.

While we can only speculate as to the significance of this revelation (as the documents themselves have not been released), I believe that the acknowledgment of these records illustrates a problem posed by the bill. Since all of the documents indexed by the CIA originated in the Directorate of Operations and would, presumably, be characterized as "operational," the pending legislation would relieve the Agency of its obligation to search for, and acknowledge, such documents in the future. While it may be true that such operational files are rarely, if ever, released to FOIA requesters, it is disingenuous to claim, the Agency has, that enactment of this legislation would not result in "any meaningful loss of information now released under the Act." Such a contention ignores the fact that information of public interest is occasionally contained in the Vaughn justifications the Agency is currently obligated to submit in litigation. To illustrate the point, I am enclosing an article that appeared in the Washington Post and was based upon the Vaughn indexes released in our case.

In raising this point, I note that the CIA, under current law, is permitted to forego the Vaughn indexing requirements in certain instances. If the mere acknowledgment of the existence of records concerning NSA/USSA subsequent to 1967 would harm national security, the Agency would be permitted to refuse to confirm or deny the existence of such records under so-called "Glomarizing" procedures. See, e.g., Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). I can only conclude that the Agency felt that it could not make the requisite showing of harm to justify such a procedure in my client's case, yet the pending legislation would remove the Agency's obligation to acknowledge such material.

The problem I have raised could apparently be cured by providing an exception to H.R. 5164's provisions for "proper requests by United States persons," rather than the "United States citizens" language currently contained in the bill. Expanding the exception to domestic organizations would retain the search and indexing requirements for requests such as my client's and would protect against the possibility of personal records being secreted in files maintained under organizational names. It would seem odd not to afford an organization comprised of individuals the same protection afforded the individuals themselves.

I appreciate your consideration of my views on this matter. I would be happy to provide additional information on our pending litigation to you or members of your staff.

Sincerely,

David L. Sobel

Enclosure

cc: Bernard Raimo, Jr.

jk

CIA Admits Study Of Domestic Group Despite 1975 Ban

By Angus Mackenzie
Pacific News Service

A CIA court statement has revealed that the agency maintained an active intelligence project through January, 1979, aimed at the U.S. Student Association, which represents 3 million American students at 360 institutions.

The CIA action will be addressed by a special panel at the association's annual convention in Atlanta starting next Thursday.

The intelligence disclosures came in a "document disposition index" filed by the agency with the U.S. District Court. Targeting of domestic organizations was supposed to have been halted in 1975.

President Reagan ordered the CIA back into domestic operations on Dec. 4, 1981, sparking protests from many civil liberties organizations.

The student group, which until 1978 was called the National Student Association (NSA), sued in June, 1982, for access to its CIA file. In a widely publicized 1967 controversy, the NSA had been exposed as a CIA front.

The CIA document index was submitted to the court in an effort to keep the student group's file secret. Under normal court procedures, when a government agency wants to keep records closed, it must acknowledge what documents it possesses and explain why they should be hidden from the public.

The student association is now trying to convince U.S. District Court Judge June L. Green to order the release of the 1,500 CIA documents accumulated through 1979 and listed in the index.

In a surprise move June 21, Green ordered the agency to produce for her inspection "an unexpurgated copy of every 25th document it has indexed in this action," according to CIA attorney Molly Jean Tasker. Those documents were submitted to the judge July 8.

The step was unusual for two reasons, said the students' attorney, David Sobel: the judge asked for the documents instead of waiting for the student association to request her inspection, and she refused a CIA request, usually granted, to supply affidavits describing the secret documents.

According to the document index, the CIA accumulated more than 372 pages on the student group after February, 1969, including 28 pages in 1978. All CIA-originated materials regarding the organization from 1978 on, and most from other recent years, are being withheld by the agency.

These materials are classified "Secret" because, according to the index, they reveal "intelligence methods" and contain CIA employe names as well as "intelligence sources" and "cryptonyms and pseudonyms."

The index, which was obtained by this reporter from Sobel, notes that one document, dated Aug. 4, 1978, "consists of brief statements which would identify a method used to support intelligence activities." Another, dated July 27, 1978, "states in precise detail, step by step, a method used to support intelligence activities."

DOBROVIR & GEBHARDT

SUITE 1105

1025 VERMONT AVENUE, N. W.

WASHINGTON, D. C. 20005

AREA CODE 202
347-8118

WILLIAM A. DOBROVIR
JOSEPH D. GEBHARDT*
DAVID LANE SOBEL*

*ALSO ADMITTED IN MARYLAND
*ALSO ADMITTED IN FLORIDA

March 27, 1984

Mr. Bernard Raimo, Jr.
House Intelligence Committee
Room H-405
U.S. Capitol Building
Washington, D.C. 20515

Dear Mr. Raimo:

I am writing to follow-up on our conversation of last week concerning H.R. 5164, the "Central Intelligence Agency Information Act." I appreciate your interest in the legislation's potential impact upon organizational FOIA requestors such as my client, the United States Student Association. I am enclosing several documents which illustrate the problem I have previously cited.

The enclosed documents were obtained through litigation seeking the release of information "indexed or maintained under 'United States National Student Association.'" As you see, these responsive documents focus upon the activities of individual officials of the Association. Some of the documents make reference to other documents maintained under the name of the individual concerned (see, e.g., No. 108). Others cite the organizational affiliations of individuals and seek further information concerning the organizations (see, e.g., No. 109: "Appreciate any MHCHAOS-related info ... re identities/activities these groups.").

I am, unfortunately, unable to ascertain whether the documents retrieved through a search for information concerning the National Student Association would also be retrievable through the first-person requests of cited individuals. I do believe, however, that the enclosed documents suggest that first-person files and those maintained under organizational names are interrelated within the Agency's system of records. Frankly, I am confused as to the effect of the legislation on this type of situation, and have never seen it explained to my satisfaction. The Senate Report's language on this issue certainly does not

provide enlightenment: "Since individual officers and members of domestic organizations have the right to request information from designated files about themselves, and that information sometimes refers to the organization, the committee believes the bill strikes the proper balance in this area." S. Rep. No. 98-305, 98th Cong., 1st Sess. 28 (1983). What of designated files about organizations that "sometimes refer[]" to individuals?

In the absence of a clear understanding on this question, I find the pending legislation to be ill-advised and an invitation to a new generation of extensive and costly FOIA litigation. I would urge the Committee to alleviate the problem, either through an exception for "United States persons" or legislative history that delineates the contemplated procedure.

Your consideration of my views is appreciated. I would be most interested in hearing your response to these concerns.

Sincerely,

David L. Sobel

Enclosures : 108, 109, 116, 235

jk

Procurement Policy, Office of Management and Budget (202) 395-6810.

David A. Stockman,
Director.

Right of First Refusal

The following clause shall be inserted in all contracts which result from conversion to contract under OMB Circular No. A-76:

Right of First Refusal

1. Consistent with the Government post-employment conflict of interest regulations, the Contractor shall give adversely affected Federal employees the right of first refusal for all employment openings under this contract for which they are qualified.

2. *Definitions:* (a) An "adversely affected Federal employee" is: (1) any Federal employee who is assigned to the Government commercial activity, or (2) any employee identified for release from his or her competitive level or separated as a result of the contract.

(b) "Employment openings" are position vacancies created by this contract which the Contractor is unable to fill with personnel in the Contractor's employ at the time of the contract award, including positions within a fifty mile radius of the commercial activity which indirectly arise in the Contractor's organization as a result of the Contractor's reassignment of employees due to the award of this contract.

(c) The "contract start date" is the first day of Contractor performance.

3. *Filling Employment Openings:* (a) For a period beginning with contract award and ending 90 days after the contract start date, no person other than an adversely affected Federal employee on the current listing provided by the Contracting Officer shall be offered an employment opening until all adversely affected and qualified Federal employees identified by the Contracting Officer have been offered the job and refused it.

(b) The Contractor may select any person for an employment opening when there are no qualified, adversely affected Federal employees on the latest, current listing provided by the Contracting Officer.

4. *Contractor Reporting Requirements:* (a) No later than 5 working days after contract award, the Contractor shall furnish the Contracting Officer with the following:

(i) A list of employment openings;

(ii) Sufficient job application forms for adversely affected Federal employees.

(b) By the contract start date the Contractor shall provide the Contracting Officer with the following:

(i) The names of adversely affected Federal employees offered an employment opening;

(ii) The date the offer was made;

(iii) A brief description of the position;

(iv) The date of acceptance of the offer and the effective date of employment;

(v) The date of rejection of the offer, if applicable; the salary and benefits contained in the rejected offer; and,

(vi) The names of any adversely affected Federal employees who applied but were not offered employment and the reason(s) for withholding an offer.

(c) For the first 90 days after the contract start date, the Contractor shall provide the Contracting Officer with the names of all persons hired or terminated under the contract, within 5 working days of such hiring or termination.

5. *Information Provided to the Contractor:* (a) No later than 10 working days after contract award, the Contracting Officer shall furnish the Contractor a current list of adversely affected Federal employees exercising the right of first refusal, along with their completed job application forms.

(b) Between the contract award and start dates, the Contracting Officer shall inform the Contractor of any reassignment or transfer of adversely affected employees to other Federal positions.

(c) For a period up to 90 days after contract start date, the Contracting Officer will periodically provide the Contractor with an updated listing of adversely affected Federal employees, reflecting employees recently released from their competitive level or separated as a resulted of the contract award.

6. *Qualifications Determinations:* The Contractor has the right under this clause to determine the adequacy of the qualifications of adversely affected Federal employees for any employment openings. However, an adversely affected Federal employee who held a job in the Government commercial activity which directly corresponds to an employment opening shall be considered qualified for that job. Questions concerning the qualifications of adversely affected Federal employees for specific employment openings shall be referred to the Contracting Officer for determination. The Contracting Officer's determination shall be final and binding on all parties.

7. *Relation to Other Statutes, Regulations and Employment Policies:* The requirements of this clause shall not modify or alter the Contractor's responsibilities under statutes, regulations or other contract clauses pertaining to the hiring of veterans, minorities or handicapped persons.

8. *Penalty for Non-compliance:* Failure of the Contractor to comply with any provision of this clause may be grounds for termination for default.

[FR Doc. 84-8389 Filed 3-28-84; 8:45 am]
BILLING CODE 3110-01-M

Privacy Act of 1974: Revised Supplemental Guidance on Implementation of the Privacy Act of 1974

March 21, 1984.

AGENCY: Office of Management and Budget.

ACTION: Revision of guidance on the relationship between the Privacy Act of 1974 and the Freedom of Information Act.

SUMMARY: This document issues in final form a revision to OMB's Privacy Act Implementing Guidelines proposed on August 10, 1983 at 48 FR 36359. The revision is intended to clarify the relationship between the Privacy Act and the Freedom of Information Act (FOIA) and improve agency implementation of both Acts. Under the revised Guidelines, agency records exempt from disclosure under provisions of the Privacy Act are, to that extent, also exempt from disclosure under FOIA, by virtue of the Section (b)(3) exemption of FOIA. Therefore, agencies may deny access to records in exempt systems of records when access is sought under FOIA to the same extent they may do so when access is sought under the Privacy Act. However, both the Privacy Act and FOIA provide for universal venue in the District of Columbia, and the Court of Appeals for the District of Columbia Circuit, along with the Court of Appeals for the Third Circuit, have held that the Privacy Act is not a permissible FOIA (b)(3) exemption statute. Consequently, pending a dispositive ruling on this issue by the Supreme Court, agencies should not rely exclusively on this guidance unless a FOIA matter proceeds to litigation within a judicial circuit other than the D.C. or Third Circuits.

FOR FURTHER INFORMATION CONTACT: Robert N. Veeder, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3235, New Executive Office Building, Washington, D.C. 20503; telephone 202-395-4814.

SUPPLEMENTARY INFORMATION: Under section 6 of the Privacy Act of 1974 (Pub. L. 93-579, December 31, 1974; 5 U.S.C. 552a note), the Office of Management and Budget is responsible for developing guidelines and regulations for the use of

Federal agencies in implementing the Act's key provisions codified at 5 U.S.C. 552a. OMB's Privacy Act Guidelines were first issued in 1975 at 40 FR 28948 (July 9, 1975), and supplemental at 40 FR 56741 (December 4, 1975).

On August 10, 1983, OMB proposed to revise its Privacy Act Guidelines to provide that agency records exempt from disclosure under the Privacy Act were, to that extent, also exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552). 48 FR 36359 (August 10, 1983). OMB's earlier guidance had been that "* * * the Privacy Act should not be used to deny access to information about an individual which would otherwise have been required to be disclosed to that individual under the Freedom of Information Act." 40 FR 56741, 56742.

The Privacy Act's most important provisions relevant to this issue are as follows. First, Federal agencies must publish public notices describing the nature and uses of their "systems of records" on individuals (5 U.S.C. 552a(e)). Second, individuals may control some (though not all) disclosures of their own government records contained in systems of records (5 U.S.C. 552a(b)). Third, individuals may have direct access to their own records contained in systems of records, and may seek amendment to their records according to specified procedures (5 U.S.C. 552a(d)).

The Act also contains exemption provisions applicable to Central Intelligence Agency records and to records pertaining to criminal law enforcement, civil law enforcement, personnel, statistical, and a few other matters (5 U.S.C. 552a (j), (k)). These sections describe the types of matters covered, and permit agency heads, through specified public-notice procedures, to exempt such records from the Act's section (d) first-party access requirements (552a(d)) and from other of the Act's requirements. The exemption provisions do not permit agencies to exempt records from the Act's section (b) requirements giving individuals qualified control over the uses of their government records (552a(b)).

OMB received a total of thirty-four comments on its August 10, 1983 proposal. Twenty-six comments were submitted by Federal agencies; of these, thirteen supported the proposal, eleven were neutral, and two (from the Department of the Interior and the Federal Energy Regulatory Commission) opposed the proposal. Three Members of Congress, Representatives Glenn English, Thomas N. Kindness, and John N. Erlenborn, submitted comments, all in opposition to the proposed change. Five private groups also submitted comments, all in opposition—the Section of Administrative Law of the American Bar Association, the American Society of Newspaper Editors and the American Newspaper Publishers Association (a joint submission), the Center for National Security Studies (on behalf of the American Civil Liberties Union), the National Newspaper Association, and the Reporters Committee for Freedom of the Press.

OMB has studied all of these comments carefully, and has also studied the opinions of the United States Courts of Appeals on both sides of the issue, the most extensive of which are *Shapiro* v. *Drug Enforcement Administration*, 721 F.2d 215 (7th Cir. 1983); *Porter* v. *U.S. Department of Justice*, 717 F.2d 787 (3rd Cir. 1983); and *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982). In addition, we have reviewed scholarly commentary on the issue (*see* Anthony T. Kronman, "The Privacy Exemption to the Freedom of Information Act," IX *Journal of Legal Studies* 727 (1980), and authorities cited at notes 5 and 14), and have consulted with Federal agencies concerning current practices under the Privacy and Freedom of Information Acts. We have concluded that our proposal is correct as a matter of law and policy, and are revising the OMB Privacy Act Guidelines accordingly.

In our view, the two statutes provide in straightforward and unambiguous language that agency records exempt from mandatory disclosure under the Privacy Act are, to that extent, also exempt from mandatory disclosure under FOIA. FOIA requires Federal agencies to make their records "promptly available to any person" upon appropriate request (5 U.S.C. 552(a)(3)). This requirement, however, is subject to several specified exemptions, one of which applies to matters—

> *Specifically exempted from disclosure by statute* (other than section 552b of this title), *provided that such statute* (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) *establishes particular criteria for withholding or refers to particular types of matters to be withheld.*

5 U.S.C. 552(b)(3) (emphasis supplied).

The Privacy Act unmistakably fits the FOIA (b)(3)(B) exemption. Sections (j) and (k) of the Act specifically exempt certain files from disclosure, establish particular criteria for withholding, and refer to particular types of matters to be withheld. Thus, by the terms of FOIA's (b)(3) exemption, the Privacy Act's nondisclosure provisions are recognized by FOIA and are not overridden by FOIA's own mandatory-disclosure requirements.

Some of the record comments and court opinions argue that the FOIA (b)(3) exemption does not apply to sections (j) and (k) of the Privacy Act, since these sections exempt records from the disclosure requirements of "this section"—*i.e.*, from the disclosure requirements of the Privacy Act itself, rather than the requirements of other statutes. But FOIA (b)(3) does not require that other statutes establish blanket nondisclosure requirements—only that certain matters be "*exempted*" from disclosure. Other statutes, standing alone, could, of course, exempt matters from FOIA disclosure without benefit of FOIA (b)(3) itself. Where other statutes provide exemptions from disclosure, and meet FOIA (b)(3)'s standards of specificity and particularity regarding the matters to be withheld, these exemptions must be applied to FOIA as well if the FOIA (b)(3) exemption (in particular that established by (b)(3)(B) is to be given its natural meaning.

Sections (j) and (k) of the Privacy Act provide their own demonstration of the logic of the FOIA (b)(3) exemption. The provisions of these sections make it unmistakably clear that the Congress, while wishing to assure citizens ready access to their government files and the means of correcting significant errors, realized that there were circumstances where such disclosures could be harmful. One is where first-party access could lead to physical or other retaliation against those who provided the information in the records (*e.g.*, criminal and civil investigative files). Another is where first-party access could compromise the government's ability to gather needed information in the first place by reducing the candor of that information (*e.g.*, files compiled to determine suitability for Federal employment).

Congress addressed these problems by providing fairly broad disclosure exemptions for the Central Intelligence Agency and criminal law enforcement agencies (552a(j)), and more narrow, precisely specified exemptions for several civil-investigative and administrative functions (which permit nondisclosure, for example, where disclosure would "compromise the objectivity or fairness" of tests or examinations, or would "reveal the identity" of a confidential source of information) (552a(k), (k)(2), (k)(5)–(7)). In both cases, Congress provided that the disclosure exemptions were to apply only to designated "systems of records," were to exclude only certain requirements of the Act, and were to go

into effect only upon public notice and explanation.

These policies and procedures would be rendered virtually meaningless if the FOIA (b)(3) exemption were ignored. An individual denied access to his records under sections (j) or (k) of the Privacy Act could nonetheless obtain them simply by invoking FOIA instead (except to the extent some other FOIA exemption, such as (b)(6) or (b)(7), were found to apply to the contents of those records). Agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration, having established systems of records on sensitive criminal matters and exempted them from first-party access under section (j) of the Privacy Act, would nevertheless be obliged to sort through the contents of these files in response to first-party requests and, absent successful invocation of another FOIA exemption, be obliged to reveal their contents to the subjects of their investigations.

The *Greentree* opinion argues that permitting FOIA access to records that had been exempt from disclosure under sections (j) or (k) of the Privacy Act would not render these exemptions *totally* meaningless. The exemptions could still be used to excuse systems of records from Privacy Act requirements *other than* the section (d) access requirements, and could also be used to cut back first-party access from the broad disclosure requirements of section (d) of the Privacy Act to the more narrow requirements of FOIA as qualified by the FOIA (b)(6) and (b)(7) exemptions. *See*, 674 F.2d at 80–81.

We find this argument unpersuasive. That one could ignore FOIA (b)(3) and still leave intact some aspects of sections (j) and (k) of the Privacy Act is no reason not to leave all of its provisions intact as written—especially its most important one. As explained above, the primary purpose of sections (j) and (k) is to protect certain sensitive records from access by the subjects of those records, and both sections do so in terms that meet the specifications of FOIA (b)(3) with exactitude. Moreover, as the Seventh Circuit points out in its *Shapiro* opinion, limiting the scope of Privacy Act section (j) exemptions to the scope of any applicable FOIA exemptions "is contrary to the intent of Congress * * * as shown both by the [section (j)] exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act" (721 F.2d at 221).

While parties on both sides of the controversy acknowledge that the legislative history of the two statutes is "ambiguous" on some points, we do not think this history is at all ambiguous on the key issue whether Congress thought that intelligence and criminal investigation records covered by the Privacy Act should be disclosed to the subjects of the investigations. The discussion and legislative citations in the *Sehapiro* opinion are lucid on this question. The *Shapiro* discussion concludes that—

> * * * The legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigation files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

721 F.2d at 222.

It is clear, moreover, that Congress has been cognizant of the sometimes complex interrelationships between the Privacy Act, FOIA, and related statutes, and where appropriate has taken direct steps to adjust the statutes' general provisions to account for these interrelationships. At one point the Privacy Act provides that first-party control over disclosure of government records shall not apply to disclosures required by FOIA (552a(b)(2)); at another point, it provides that FOIA exemptions shall not be used to deny access to records otherwise available under the Privacy Act (552a(q)). And FOIA's (b)(3) exemption was itself revised in 1976 to exclude the government in the Sunshine Act (5 U.S.C. [illegible]) from its incorporation of other statutory exemptions—Congress could have excluded the Privacy Act exemptions as well by adding a single term to this provision.

The record comments and court opinions contain three further arguments for permitting FOIA disclosures of exempt Privacy Act records that merit discussion here. The first is the assertion that the Privacy Act is not (or should not be, or was never intended to be) a FOIA (b)(3) statute. This assertion, taken as a legal proposition, is addressed above. In many cases, however, the assertion seems to be based on the general supposition that since the Privacy Act was intended to *expand* access to government records, it should not be applied so as to *limit* access from that provided by another disclosure statute.

In fact, however, the purpose of the Privacy Act is not disclosure but the protection of individual privacy, and toward this end it restricts disclosure of government records in as many cases as it requires disclosure. The statute provides for public disclosure of the existence, nature, and uses of government "systems of records" on individual citizens. But as to the actual disposition of these records, the Act establishes four types of requirements which are necessarily, and for the most part carefully, balanced among each other. First, the Act gives individuals control over the disclosure of information about themselves in certain government records—but second, it provides explicit limitations on such control. Third, it gives individuals access to information about themselves in certain government records (and the means of correcting erroneous information)—but fourth, it provides explicit limitations on that access. To accept the view that the Privacy Act should not be considered a FOIA (b)(3) statute would be to read the four policy out of the Act, although this policy is fully consistent with the other three, and protects the privacy of certain kinds of sensitive communications to the government.

The second argument is that section (b) of the Privacy Act (552a(b)) provides that the Act may not be used to limit disclosures required by FOIA. This argument is prominent in the court opinions in *Porter* (717 F.2d at 793) and *Greentree* (674 F.2d at 79–80). We believe, however, that this view is wholly mistaken. Section (b) does not require agencies to disclose any information at all, but to the contrary establishes qualified limitations on disclosures. In particular, section (b) provides that a record covered by the Privacy Act may not be disclosed to any person without the written consent (or request) of the individual to whom the record pertains, except in twelve specified situations, one of which is that disclosure is required by FOIA (552a(b)(2)).

Thus, 552a(b)(2) says that disclosures from systems of record required by FOIA are not contingent on the permission of the subjects of the records involved. This provision cannot reasonably be read as an affirmative disclosure requirement. We think the conclusion of the *Shapiro* decision that "section (d) provides sole access for first party requests under the Act" (721 F.2d at 220) is inescapably correct. The Privacy Act's limitations on section (d) access set forth in sections (j) and (k), which in turn are recognized by FOIA (b)(3), are unaffected by the Act's separate "conditions of disclosure" specified by section (b)(2).

The final argument is the so-called "third party anomaly" argument.

emphasized in some of the record comments and in the *Porter* and *Greentree* opinions. The argument goes as follows:

The Privacy Act's section (j) and (k) exemptions should not recognaized by FOIA (b)(3) because if they were, there would be cases where individuals would have less access to their own records than third parties, and third parties might even gain access to such records and transmit them back to the first parties. The *Greentree* opinion says that "[s]uch as result would comport with neither logic nor common sense," which suggests that "Congress could not have intended section (j)(2) of the Privacy Act to serve as a withholding statute under FOIA Exemption 3" (674 F.2d at 79, 80).

In our view this point is of little practical importance and does not affect the fundamental legal and policy issues. In virtually all cases of agency records exempt from first-party access under sections (j) and (k), disclosure to others would also be exempt from mandatory FOIA disclosure under the "unwarranted invasion of personal privacy" provisions of sections (b)(6) and (b)(7) of FOIA. As noted previously, the exemptions of FOIA (b)(6) and (b)(7) are narrower than those of sections (j) and (k) of the Privacy Act. However, while these differences can be significant in the case of first-party access, they are small and inconsequential in the case of third-party access to the same records. At most they may result in occasional administrative difficulties and instances of partial and unintended first-party access. These are hardly reasons for ignoring the basic statutory scheme inself by permitting FOIA to nullify the first-party access restrictions of sections (j) and (k).

The text of our revised guidance is set forth below. The guidance refers not only to the Privacy Act exemptions in sections (j) and (k), but to those in sections (d)(5) and (1) as well. The latter provisions, involving information compiled in anticipation of civil actions and records of the National Archives, present FOIA issues similar to those discussed above, but which have not been subjects of significant controversy.

Finally, agencies should note that both the Privacy Act and FOIA provide for universal venue in the District of Columbia. As discussed above, the Courts of Appeals for the District of Columbia Circuit (in *Greentree)* and for the Third Circuit (in *Porter*) have held that the Privacy Act is not a permisible FOIA (b)(3) statute. The Department of Justice is presently seeking a writ of certiorari from the Supreme Court to review the Third Circuit's Decision in *Provenzano v. U.S. Department of Justice*, 717 F.2d 799 (3rd Cir. 1983), a companion case to *Porter*. Pending a dispositive ruling on the issue by the Supreme Court, agencies should not rely exclusively on the guidance on this issue set forth below unless a FOIA matter proceeds to litigation within a judical circuit other than the District of Columbia or Third Circuits.

Christopher C. DeMuth,

Administrator for Information and Regulatory Affairs.

Section (q) of the OMB Privacy Act "Implementing Guidelines" published at 40 FR 28948, July 9, 1975 and supplemented on December 4, 1975 (40 FR 5674), is revised to read as follows:

Section (q) Relationship of the Privacy Act to the Freedom of Information Act

Subsection (q) "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."

This provision makes it explicit that an individual may not be denied access to a record pertaining to him under subsection (d)(1), access to records, because that record is permitted to be withheld from members of the public under the Freedom of Information Act (FOIA). The only grounds for denying an individual access to a record pertaining to him are the exemptions stated in this Act, subsections (j) and (k); subsection (1), archival records; and subsection (d)(5), records compiled in reasonable anticipation of a civil action or proceeding. In addition, consideration may have to be given to other statutory provisions which may govern specific agency records.

In the converse situation, however, agencies should note that FOIA exemption (b)(3) provides that access under the FOIA is not required if the material sought is specifically barred from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. The Privacy Act in subsections (d)(5), (j), (k), and (l) reaches the level of specificity necessary to qualify under paragraph (b)(3)(B) of the FOIA as a withholding statute. Accordingly, should an individual make a FOIA request for his records that are contained in a system of records, agencies may rely on section (d)(5), (j), (k), or (l) of the Privacy Act, when appropriate, to deny such requests. (It should be further noted that for certain exempt systems, substantial portions of the covered records may be required to be released; see, for example, the requirements of (k)(5)).

Whether a request by an individual for access to his records is to be processed under Privacy Act or FOIA procedures involves several considerations. For example, while agencies have been encouraged to reply to requests for access under the Privacy Act within ten days whenever practical, consistent with the FOIA, the Privacy Act does not establish time limits for responding to requests (see discussion of (d)(1)). The Privacy Act also does not establish an administrative appeal on denial of access comparable to that of the FOIA, although agencies are encouraged to permit individuals to request an administrative appeal of initial denials of access to avoid, where possible, the need for unnecessary judicial action. It can also be argued that requests filed under the Privacy Act can be expected to be specific as to the systems of records to which access is sought, whereas agencies are required to respond to a FOIA request only if it "reasonably describes" the records sought. Further, FOIA permits charging of fees for search as well as copying records, while the Privacy Act permits only for the direct cost of making a copy upon request.

It is our view that, as a matter of procedure, agencies should treat requests by individuals for information pertaining to them which specify either the FOIA or the Privacy Act, (but not both), under the procedural provisions established pursuant to the Act specified in the request. When the request specifies both Acts, and may be processed under both, Privacy Act procedures should be employed. When the request specifies neither Act, and could be processed under both Acts, Privacy Act procedures should also be used. However, in these two latter cases, the individual should be advised of the procedures the agency has elected to use, of the existence and general effect of the FOIA, and of the differences, if any, between the agency's procedures under the two (e.g., fees, time limits, access and appeals).

[FR Doc. 84-8460 Filed 3-28-84; 8:45 am]
BILLING CODE 3110-01-M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.