agency ethics officials my name is Diana Villa and I'm the chief of the legal External Affairs on performance branch

0:26

capacity I'm also the senior agency

3:15

[Music]

3:51

[Music]

6:17

party also just have it released to yourself because you want to have access to that information a second a

6:23

significant way that the information under the Privacy Act can be disclosed is an exception to the Privacy Act and

6:31

again that is a is something that's codified in the Act itself there are

6:36

actually 12 in the exceptions to the Privacy Act and they include things like disclosure made under the Freedom of

6:42

Information Act disclosure made to the census for purposes of planning or carrying out a census or survey to a

6:49

person under compelling in emergency situations where the informations needed or pursuant to a court of competent

6:56

jurisdiction that orders release of the information and the one that we have here on the slide need-to-know within an

7:02

agency is a very kind of common one that a lot of people are probably familiar about without even knowing that it's a

7:07

Privacy Act principle or something that's related to an exception to the Privacy Act and that is if you have

7:13

personnel records that are that are a personnel person in HR we're dealing with that has private information about

7:19

people it's got you know maybe social security numbers or think the information about their jobs or their

7:25

personal circumstances and yet people have access to those records in order to perform that their job duties however

7:31

there was a limit to that however just because someone has a need-to-know within an agency that doesn't mean they can share that information outside with

7:38

people who don't have a need-to-know so there are limitations on that and the final one that we want to talk about

7:44

today is the routine used in the system of Records notice and that one unlike the other two conditions of disclosure

7:51

is something that's outside of the law it's not stated in the these are specific things that have more more

7:57

descriptive information that are not included within the four corners of the Act itself a routine-use is is

8:04

identified and sort of created in a system of Records notice and and we've

8:09

talked a little bit about before system of record notice is information that's

8:14

protected by the Privacy Act that is used by a particular agency so they're required to identify assist

8:20

of records that are used in an agency either externally government-wide or just within their agency itself and

8:26

they're required to identify the records that are de quired to identify what information is collected and there in

8:32

the records how it's maintained how can have access to it and one of the major features is the what routine uses apply

8:39

that would allow disclosure of that information so so something that's very particular eyes to the set of Records

8:46

that are described in the sorne itself now this is not something that's that's easily obtained an agency can't decide

8:53

tomorrow that they're going to have a new routine use that allows release of records instead it's a process that has

8:59

to go through many steps those steps include writing up a very detailed description of the documents in the

9:05

system of Records as well as any proposed routine uses has to be published in the Federal Register if

9:11

it's a government-wide system of Records it has to be shared with other executive branch agencies so that they can comment

9:16

on it and finally has to be approved by OMB which has a very rigorous of process and I can speak from experience

9:23

it's not easy Jenna and I have had to have any discussions with OMB about concerns at which we had to resolve

9:29

before our routine our new government-wide source could go forward so it's a very it's a process that's

9:36

designed to protect the integrity of the Privacy Act and to make sure that records are not you know sent around or

9:41

give it access lightly so now we're going to talk about some actual examples

9:49

so and when we go through these examples I want you to think of the question which is what is the mechanism that

9:55

prevents disclosure of this record so the first one is the ethics office gives

10:01

the agency's inspector general access to a written widely attended gathering determination involving a specific

10:07

employee so which one of these disclosure mechanisms would apply what is a consent is this an exception under

10:14

the Privacy Act or is it a routine use that's in a storm I'll pause a minute so

10:20

you can think it through for yourselves if you order for number two you're

10:26

correct this is actually an exception under the Privacy Act is the this is an example of

10:32

they need to know within an agency the exception assuming that the Inspector General and wants this

10:38

information for a proper purpose such as an audit or investigation at her agency and she would be able to get this

10:43

information and under the Privacy Act and it would be appropriate for her to have it because she would need to know

10:51

here's another example again the question is what's the mechanism for

10:56

disclosure of this record a nominee calls and asked the agency to email a

11:01

copy of her draft ethics agreement to her attorney and the agency complies so

11:07

do you think this is disclosed pursuant to a consent do you think its exception

11:12

to the Privacy Act or do you think it's a routine use in a sorne

11:17

well you said consent that's the right answer number one as we mentioned before a person who is the subject of a record

11:25

can always consent to its release that includes releasing the record to a third party so in this instance when the

11:31

nominee asked for the particular information to be released to her attorney that's perfectly okay now one

11:38

thing I would say if you ever get such a contact like this do you make sure that the person that you're speaking to is

11:43

actually the person whose record it is because you don't want to you know because that's not appropriate if you think it is but you're not sure you know

11:50

make sure before you you do just disclose that record here's another

11:55

example the National Archives and Records Administration is conducting an inspection of the agency's records

12:02

management processes and the agency gives it access to its file room containing pre integrity paper 278 so is

12:10

this an example of consent this is an example of disclosure pursuant to the

12:15

privacy and privacy act exception or is this a routine use under a thorn well I

12:22

think my process of elimination we're at three so that means it's a routine use under sorne and so this is and this is a

12:29

fairly common one because most of the pretty much I would say every sorne in the government is going to have routine

12:35

use that allows Nara to come in and do records inspections so this is one that

12:41

obviously it's okay for them to do that under their routine use and I would say that oh gee

12:48

eze source government-wide saurons specifically include this routine use as

12:53

one of the ones in that we had approved recently actually thought it was pretty old so but it still has been really in

12:59

our approval so this is a perfectly good time for me to turn the clicker over to Jed he's going to continue our discussion of saurons the

13:07

government-wide saurons at EDD oh gee thank you yeah so as we were saying oh

13:13

gee has two government-wide swords that cover ethics records and the easiest way

13:18

I like to describe them is backwards from this slide the first one being confidential financial disclosure

13:24

reports which is OGE government - and that's just confidential financial disclosure reports that's it the other

13:31

one is OGE government one and that's public financial disclosure reports and other name received ethics records which

13:38

is going to be pretty much all other executive branch ethics records that are you're going to be dealing with that are

13:43

Privacy Act protected so it's it's it's basically everything else and we've talked about how these are

13:49

government-wide soren so what is a government-wide store and specifically it's a system of Records where one

13:55

agency that has regulatory authority over records that are in the custody of multiple agencies will issue one system

14:03

of Records notice to cover all of the records regardless of their custodial location so in this case Oh G has

14:09

regulatory authority over ethics records so we published these government-wide Soren's that cover all of these ethics

14:16

records regardless of their custodial location but it's important to remember that all agencies not just a GE have

14:24

responsibility for ensuring compliance with the terms of the sorne and the terms of the Privacy Act with regard to

14:30

these records so we publish the sauron's but their responsibilities is all of ours regardless of which agency it is so

14:40

in order to start talking about some of the recent changes that we made to our sauron's we thought we would look at it

14:45

in terms of examples of situations that might come across your desk and the first one is let's say there's a

14:51

suspected breach of your agency's Network and Department of Homeland Security wants to access the drive

14:56

containing your ethics advice files to try to figure out the source of the spray so just think to yourself for a second

15:02

what you might do in this situation how you might go about responding to this request so hopefully you're thinking

15:11

based on our prior discussion these files might be privacy are protected and

15:16

if so we need a mechanism to allow disclosure one of them is consent which

15:22

doesn't seem to be very practical in this situation another one is there might be a exception to the Privacy Act

15:28

that might apply but let's say there isn't the third mechanism for disclosure

15:34

would be a routine use and in fact this is a routine use that is currently in

15:41

both OG government 1 and government 2 and it basically says that records can be disclosed to help respond to a

15:48

suspected or actual breach of the system of Records and this was recently added

15:53

to both of our government-wide sauron's on the guidance of OMB who has required all agencies to include this Brut breach

16:01

routine use and another similar one in all systems of Records and that arose out of the OPM breach apparently they

16:08

found in the course of trying to deal with that breach that these routine uses were necessary to appropriately deal

16:14

with breaches so if we look at this scenario this is exactly the type of

16:21

scenario that these routine uses were intended to address and these routine

16:26

uses were added to our government-wide Soren's just this fall so prior to that it may have been difficult to allow DHS

16:34

access in that situation but now we do have these routine uses so this is an example of why it's important to be

16:40

familiar with the Soren's for the records that you deal with on a daily basis and let's look at another example

16:48

if the agency wants to save FOIA resources by proactively posting all of its ethics agreements on its website

16:54

I think for for yourself for a moment of how you might answer this question if somebody came to you so hopefully you're

17:02

thinking about the mechanisms for disclosure since you're being asked to allow disclosure of these ethics agreements and you're thinking about do

17:09

I have consent is there an exception to the Privacy Act is there a routine use and in fact there is a routine-use in OG

17:16

government one which does cover ethics agreements that allows ethics agreements and certifications of ethics agreement

17:23

compliance to be posted to the web now the routine use regarding ethics agreements has been in the Soron for

17:30

quite a while but in this recent round of changes we did clarify the Soron to

17:35

explicitly include certifications of ethics agreement compliance so we've

17:40

seen two examples of the changes that were recently made and let's talk about them in a little bit more detail this

17:47

happened in the fall of 2019 after OMB issued guidance telling all

17:53

agencies to add the breach routine uses OGE began the process to add the breach routine uses exactly like we were told

18:00

and we also decided to clarify a couple of our routine uses and this is because

18:06

as Diana said the purpose of sorons is to provide notice and if something is

18:11

not well explained if people don't understand it it's not good notice and it had come to our attention that some

18:17

of the routine uses were not being well understood so we decided to make clarifications we also decided to add a

18:25

couple of new routine uses in OG government one to allow us to be more transparent which furthers OG ease

18:31

strategic goal to engage the public and overseeing government integrity and then

18:37

finally we streamlined some of the language especially in OG government one basically to follow plain language

18:45

principles some of the language was overly technical and difficult to understand and again it's important to

18:50

have good notice that things are clear but please remember that with the streamlining changes no substantive

18:56

changes were made so for example we made changes to the section about the purpose of the system no changes to the

19:02

substantive purpose of the system were made it's just just trying to be click more clear language so when we got

19:08

together our proposed changes we had to follow the extensive process that diana

19:13

mentioned which requires OMB approval and publication in the Federal Register and which all new Soren's or change

19:22

Soren's require that part of the process when there's a government-wide sorne there's an inter-agency commenting process for all

19:30

agencies that are potentially affected which in this case is all executive branch agencies and so somebody in your

19:38

agency was asked to comment we did receive quite a number of comments that we had to respond to and as Diana said

19:44

it was quite an extensive process and so in addition to the changes that we just listed that we proposed several other

19:51

changes ended up being made as a result of the interagency and OMB process

19:56

before I get on to the final changes I'll just let you know we are preparing a program advisory on that will detail

20:04

all of the changes that were made to these sorne so this is more of an overview you don't you'll have the

20:10

program advisory very shortly to be able to look at in detail so this is the

20:16

final list with the additional changes in bold at the bottom the in the end

20:22

result we also modified our litigation routine uses and modified the routine

20:28

uses that was there that addressed congressional constituent inquiries and basically questions were raised during

20:34

the interagency review process about whether the prior language that were used by these routine uses whether it

20:40

was compatible with Department of Justice guidance and applicable case law so as a result oh gee II ended up

20:47

revising the routine uses in accordance with language recommended by OMB the

20:52

both of the the Federal Register notices were published on September 9th and the

20:58

changes went into effect on November 8th and in the handouts for this session we've provided you the copy of the

21:05

Federal Register notices so you can take a look at those at your convenience and and see for yourself

21:11

so to go over some more of the implications from the changes we thought

21:18

we'd look at a couple more scenarios again you can think to yourself what what you might do or how you might go

21:25

about addressing this if this came across your desk an ethics official from another agency calls you and asked whether an

21:31

individual detailed from your agency to hers has notified your agency about the commencement of employment negotiations

21:38

this is something that's often called a stop gack notification so in this situation

21:44

what would you do hopefully you're thinking about can I disclose this is this Privacy Act protected and in fact

21:51

OGE revised just recently in these round of changes a routine use in OG government 1 which does cover these

21:58

records that makes it clear that these notifications can be forwarded to a

22:03

filers new agency along with the filers financial disclosure report and it was

22:08

our position all along that this was permitted by another routine use but again this is one of the situations

22:14

where it came to our attention that people were not aware that this was permitted so we made it clear another

22:23

scenario this one can get a little bit complicated an attorney for an apartment of justice calls you and wants a copy of

22:31

a notification of commencement of employment notifications to use as evidence in litigation so what are you

22:38

think to yourself what are your thoughts on this situation now if you're thinking about routine uses in fact there is a

22:45

litigation routine used in both of our government-wide Soren's that have recently been amended and as amended it

22:52

broadly allows disclosure when the disclosing agency determines that the records are arguably relevant to a

22:57

proceeding before a court grand jury administrative or adjudicated body or when the adjudicator determines that the

23:04

records are relevant be aware however that not all disclosures under a routine

23:10

use are going to be appropriate just because they may meet the plain language of the routine use a routine use must

23:16

also be compatible with the purpose for which the information was collected so

23:22

in this case even if your situation appears to fit under this routine use

23:28

for the disclosing agency determines that the records are arguably relevant you're still gonna have to look at what

23:35

is the purpose for which this disclosure is being made so if you think to yourself what's the purpose for

23:41

collecting these notifications conflict of interest to see if there's a

23:46

potential conflict between the negotiations that are going on in the person's official position that that

23:52

type of thing and then think about the purpose for the disclosure obviously we would need more information in this

23:58

situation we from the face of it we don't know why do J wants this it could

24:03

be something that is related to a conflict of interest prosecution or some other conflict of interest related

24:09

matter which may very well be compatible but maybe they just want a copy of the person's signature for some unrelated

24:15

reason and maybe that wouldn't be compatible with the purpose for which the information was collected so this is

24:21

why it's important to consult your privacy office before disclosing records in any situation other than the most

24:28

routine situations because you're going to be looking at whether routine uses apply whether exceptions apply and also

24:35

whether the disclosure is compatible with the purpose for which the record was collected before we move on I do

24:42

want to note that it's important to remember that nothing in the Privacy Act compels disclosure to a third party so

24:51

we'll talk later about the situation when somebody is looking for their own records that's a

24:56

different situation but there's nothing in the Privacy Act no routine use no exception nothing that will compel you

25:03

to disclose a record to a third party and that's important to remember and OMB

25:08

has explicitly stated that agencies shall not automatically disclose a record to someone other than the subject

25:16

of the record simply because the disclosure is permitted by a routine use or other Privacy Act exemption so these

25:22

things permit disclosure they don't mandate disclosure so let's look at

25:29

another situation slightly different in fact it doesn't have to do with disclosure directly in this situation

25:35

but your agency is developing an ephah application for confidential filing financial disclosure reports and the

25:42

contractor is asking you whether we need to include all of the texts in the box labeled Privacy Act statement and I will

25:48

show you what that looks like for your reference now I will preface this by saying oh gee I'm sure has its own

25:54

reasons why we don't want you to be messing with our forms that's kind of a separate issue we're just talking about

25:59

the Privacy Act issues right now but so here is the Privacy Act statement on the

26:04

current version of the OGE 450 and it is long so I and why the contractors are asking that

26:10

but hopefully you're thinking to yourself well there must be a reason it's there if it's there and in fact it is well let you know that the Privacy

26:18

Act actually requires that agencies provide certain notifications to individuals who are asked to supply

26:24

information at the time that we're asking them to supply the information so this notification must include the

26:31

purpose for which this information will be used the consequences of not providing the information and the

26:37

routine uses that may be made of the information and the purpose of this notification is so that the individual

26:43

can provide informed consent on whether they want to provide the information or not so if they don't have this

26:49

information then they may agree to it but they don't really know what they're agreeing to we given this notice they

26:54

know what they're agreeing to so note that it's the responsibility for

26:59

providing the Privacy Act statement rests on the agency collecting the information on an ogee form such as this

27:05

we include a Privacy Act statement but if your agency is collecting information in another setting it could be your

27:10

responsibility to provide the Privacy Act statement and it applies not just to

27:16

written collections of information but also to oral collections of information such as an interview so if we think back

27:26

to this question you know hopefully you're thinking from the very start it's

27:32

probably not a good idea and indeed it's not you know GE has crafted the Privacy

27:38

Act statement on its forms to be in compliance with the Privacy Act and there's a good reason for it being there

27:45

you may be out of compliance with the Privacy Act statement if you change it certainly do not do so without consulting your privacy office another

27:52

thing to keep in mind is that oh gee II has saw and received paperwork reduction act approval for its forms that's PR we

28:00

call PRA approval and if you alter the language of the Privacy Act statement or anything else in a paperwork reduction

28:06

Act approved form you could be in violation of the paperwork reduction Act as well

28:11

so speaking of ogee forms OGE is the sponsor for five forms all of which

28:18

capture information subject to one of AG's government-wide Soren's and therefore they all contain a Privacy

28:23

Act statement referencing the applicants or these are the five and the og form 50

28:29

is maintained under OG government - for confidential financial disclosure

28:35

reports and the others are all maintained under OG government one as we

28:41

said we've recently changed both of those government-wide swords and so we

28:46

have updated the Privacy Act statement on the OG form 50 the 278 integrity the

28:52

two 70 80 and the model trust documents all have updated Privacy Act statements

28:58

and we are currently in the process of getting approval to update the Privacy Act statement in the 201 before we move

29:06

on I want to give you a reminder about alternative forms you may have alternative confidential financial disclosure forms in particular and you

29:13

should ensure that your alternative forms if you're using if you're collecting information that's being

29:19

maintained under OG government - or government one make sure that your alternative forms also have updated

29:25

Privacy Act statements and also a reminder that you do need ot permission to change your alternative forms and you

29:33

can do that by emailing our Doug Chapman here at OU GE and you may also need PRA

29:38

approval for these alternate forms OGE as we said we get the PRA approval for

29:43

our forms that we sponsor but if you have alternative forms those are not included under OGIS

29:49

paperwork reduction act submissions so you may want to check on that as well

29:58

thank you thank you well this is another scenario we want to talk to you about a

30:04

former employee calls you to request a copy of her own 2016 confidential

30:09

financial disclosure report what would you do and what we have here is an

30:14

example of a person who's seeking access to their own records and what are the rules about that so so far we've already

30:21

talked about what so called third party request where we have individuals requesting access to information that's

30:29

not theirs and and the rules of the road to that are no disclosure without consent unless there's an exception

30:35

- the Privacy Act that applies that or some other proper authority such as a routine use and a sorne that makes the

30:43

that allows access to the information and also as Jen mentioned when you're

30:48

looking at those rules they don't they don't compel disclosure of the information there are mechanisms to

30:54

evaluate whether it's proper under the Privacy Act but here we have again a situation where an individual is

31:00

requesting access to their own records and this is a situation where they are they do have a right to have access to

31:06

that information and in fact the Privacy Act compels it so we're going to talk about ways that they can get access to

31:12

that information in this situation one of the ways is is is probably just we

31:17

can consider it consent and you can provide that information to the person but what if it's an individual that you

31:23

that you don't know or wants a lot of information and you don't want to just start handing over things you feel uncomfortable about that there are other

31:29

ways that an individual can have their own personal request form from their own information processed and that is

31:37

generally through Privacy Act request procedures every agency is required to

31:42

have these and what they do is they spell out processes for the way that an individual can request documents that an

31:49

agency maintains about them from the agency in addition to allowing a

31:54

providing a mechanism for access it also provides mechanism for other Privacy Act

31:59

protected rights such as the right to have an of changed if it's incorrect

32:05

now the Privacy Act regulations also provide appeal rights that are very important if someone disagrees with what

32:12

the information that they're getting or they're not satisfied with an agency's response if they want to have a record

32:17

corrected these all provide very important protective rights that an individual has to have their their

32:23

request acted on and processed so under

32:30

scenario six if a former employee calls you to request a copy of her own 2016

32:35

confidential financial disclosure report again I said this is sort of like this is a consent situation so one ways you

32:41

can provide the document to them another way is you can refer the person to their what your agency's regulations on

32:48

Privacy Act requests or you can just refer the person to your Privacy Act office which again you

32:53

should by this time I'm sure you're putting on your steepy speed dial if you didn't already have them on there and that person we should be able to help

33:00

you dealing with the proper information to provide to this person so now we've

33:07

kind of gone through a lot of information Jen so I kind of I want to touch back on some issues that I think probably are coming up to people as

33:14

they've they've listened to our speech today one of them is the overlap between the FOIA and the Privacy Act in addition

33:21

to being a privacy officer jess also the alternate FOIA officer so what would you do if you had a Privacy Act request that

33:28

came in as a FOIA request how would that be processed yes are not necessarily

33:33

familiar with the procedures for a FOIA request or for a first party Privacy Act

33:39

request so often you know it's not necessarily clear on the face of it but

33:45

essentially the best practice is anytime you get a first party request for

33:51

someone's own information you process it broadly for the greatest disclosure

33:56

under both the Privacy Act and the FOIA and you don't take a bureaucratic position on whether it's labeled to be a

34:04

private sacrifice or label to be a FOIA request you regardless of how it's structured you treat it as both and you

34:11

process it broadly for the maximum disclosure and we do have a archive

34:17

video in our Institute for ethics and government website where we had a couple of DOJ attorneys come in and explain the

34:23

interactions between the Privacy Act and the FOIA so I recommend that people take a look at that video for more

34:29

information about that Thank You Jen well another question I wanted to ask you is kind of how do we take all of

34:36

this information that we've been talking about today and apply it practically so as the Privacy Act officer fro for OGE

34:42

you get a call or request written for information that's covered by the Privacy Act that potentially is covered

34:48

by the Privacy Act what are the steps that you go through to analyze whether it's proper to release information for

34:54

to into that request yeah great the first thing I definitely want to do is to find out if it's practice

34:59

protected by the Privacy Act and find what is the real in sorne and make sure I have the most up-to-date version of the sword and then

35:07

I'm going to think about who is asking for it because again it's going to be a very different situation as we discussed

35:13

whether it's a first party person asking for their own information or a third party request so I'm gonna figure that

35:19

out and then I'm gonna start to think about can we disclose it and we talked about the three mechanisms for disclosure I'm

35:26

gonna think about is this something that's just easiest to just get consent on is there some reason we can't just get consent I'm gonna think about is

35:33

there a Privacy Act exception that's potentially applicable and I'm gonna think about is there a routine-use

35:38

that's potentially applicable and there may be more than one of those that is potentially applicable but of course

35:45

anytime we're thinking about disclosure under exception or a routine use we're gonna be thinking about is the

35:50

disclosure compatible with the purpose for which the record was collected with the info was collected so I'm probably

35:57

gonna need some more information from whoever is asking for this information and I'm gonna need to know what is their

36:02

purpose so we can look at is it compatible and we could think about that now in in the end it may not be

36:09

absolutely clear we may have a couple of routine uses that might apply we may not be 100% sure if it's compatible there's

36:15

some case law it goes one way maybe some case law that goes another way so another thing I'm gonna want to know is

36:22

is this something that we can say no to remember when you're talking about a third party a request for information

36:28

we're never if the Privacy Act isn't going to compel us to disclose so is there something else that's compelling

36:34

us to disclose is do have a subpoena is there some statute they're citing to us that requires us to give them the

36:40

information because we definitely want to balance the risk for the agency if

36:45

we're not sure that we can disclose it we want to balance the risk of disclosing versus the risk of not

36:51

disclosing and then with all of that information in mind we can make a decision on what's best for our agency

36:56

but you can see there's a lot of pieces of information that I need before I can make this decision or or even be able to

37:03

advise my superiors I'm making a decision so that's why it's important to have the ethics officials be helping

37:11

their privacy office to gather that information and to put all the information in context so they can make those good

37:18

decisions so again what should an ethics official do if you if he or she is

37:23

contacted and asked for information do they have to pull out our presentation and try to analyze it themselves or

37:28

should they get support from from someone else well I hope I know that that's a leading question and they know the answer that they should definitely

37:35

contact either their agency counsel or their privacy officer but hopefully now they have a good vocabulary and a good

37:42

basis to have that conversation with them well that's all that we have today for our presentation thank you for

37:48

joining us and again if you have questions or comments please feel free to email either myself or jed we'll be

37:55

happy to follow up and answer them for you thank you for joining us today thank you

English (auto-generated)