Cirie's today's session is on the release of Ethics documents under the

0:05

Freedom of Information Act the Privacy Act and the ethics and Government Act as mentioned my name is Jennifer mattis I'm

0:11

attorney with the program counsel division at OGE and I'm really excited to welcome two excellent attorneys from the Department

0:18

of Justice's Office of Information policy to talk to you about the Freedom of Information Act and the Privacy Act

0:24

we have Bobby Talib Ian chief of the FOIA compliance staff at oh I pee his

0:31

team assists oh hi pianist responsibilities to oversee and encourage government-wide compliance

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with the FOIA in addition to serving as an instructor for FOIA training programs he provides legal advice on the FOIA to

0:42

various federal agencies and it's oh I peas subject matter expert for exemption for and reverse FOIA lawsuits and here's

0:51

illuzzi roberts an attorney advisor with oh i pee her responsibilities include providing guidance to DOJ components and

0:58

other federal agencies on FOIA issues including reporting and regulatory requirements in addition to serving as

1:04

an instructor for various FOIA training programs she is oh IP subject matter expert for FOIA Privacy Act interface

1:11

and FOIA exemption six before I turn things over I just want to briefly let

1:17

you know why we thought this session would be useful as oh geez alternate

1:22

FOIA officer and one of our Privacy Act experts I often receive questions from

1:28

inside our agency and also from ethics officials regarding the release of ethics documents and in my experience

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these questions rarely implicate just the FOIA or just the Privacy Act rather

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untangling the issues usually requires at least some understanding of all three of these laws so that's why we thought

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it would be useful to discuss all three in one session so with that I'll turn things over to Bobbi and Lindsay to

1:54

discuss the Freedom of Information Act and the Privacy Act respectively and then when they're done I'll take a couple of minutes to go over some

2:00

relevant ethics and government Act provisions okay thanks Thank You

2:05

Jennifer I'm very excited to be here and this was a really great idea on Jennifer's part to really for us to just

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take a brief moment to discuss all the three laws that involve disclosure of ethic records so I was going to start

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off with the FOIA and I know we have a question and answer period at the end of this but I also just invite if there's

2:26

any FOIA questions at any time and after this session I invite you to also call the wipey so a counselor service line at

2:33

202 5-1 for FOIA but with that I will start off with the FOIA hand it over to

2:38

my colleague Lindsay for the Privacy Act and the Privacy Act FOIA interface and then we will go to Jennifer for the

2:44

ethics and government Act so starting with the first slide the starting with

2:55

the first slide the FOIA pertains to federal agency records that exist and can be locating agency files these are

3:02

records that are created or obtained by an agency and are under the control of the agency at the time of the FOIA

3:07

request for control we look at four factors the intent of the document

3:13

creator to retain control the ability of the agency to dispose the record as it see fits as it sees fit the extent of

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the agency that has the extent that the agency has relied on the records and the degree that the records have been

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integrated into the agency's files or systems with those factors in mind I

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would say that the vast majority of records that are found in agency files are agency records that are subject to

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the FOIA often what typically would not be an agency record would be a personal record for example if for some reason my

3:46

grocery list for the day was in in the files for some reason I'm in my office those would not typically be that would

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not be a agency record that's more of a personal record and then also

3:58

congressional records the Supreme Court

4:06

has highlighted the basic purpose of the FOIA but the basic purpose of the FOIA is the allowing it for a informed

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citizenry the FOIA allows any person the right gives any person their right to request agency records from the

4:20

government in the government in turn has an obligation to release all portions of those records unless they

4:26

are protected by one of nine exemptions that protect important interests on his

**President Obamas First Day**

4:35

first full day in office President Obama highlighted the importance of government transparency the Freedom of Information

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Act and ethics as means for government accountability so I think President

4:47

Obama's first day was very exciting time for both of our offices if our FOIA the

4:52

President issued a memorandum on the FOIA directing a new policy of a

4:59

presumption of openness we're in doubt openness should prevail the president directed the Department of

5:06

Justice to issue new FOIA guidelines to agencies on their implementation of the law and in March of that year in 2009

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the Department of Justice issued its FOIA guidelines to agencies and one of the things that we have in the

5:19

guidelines is a foreseeable harm standard where we encourage agencies to make discretionary releases of

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information when there is no foreseeable harm in that disclosure of the information and not to withhold

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information when simply because an exemption applies and we'll get more

5:36

into that as we talk about exemptions but I wanted to highlight that from the president's memo and the AG's FOIA guidelines so as I said the FOIA

**The 9 Exemptions**

5:47

requires a agency disclose all material that I've been requested

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unless portions of that material are protected by one of the interests that are in one of the nine exemptions that

6:00

are specifically exempted from the disclosure provisions of the FOIA for

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context across the government pretty consistently exemption six and seven C

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and exemption 7 e are the most frequently cited exemptions for withholding information exemption 6 and

6:18

7 C are the personal privacy and personal privacy exemptions so here agencies are protecting unwarranted

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invasions of an individual personal privacy exemption 7 e is the law enforcement Sande techniques and

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procedures and then this can change from year to year the next that last year was the fourth exemption

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was exemption five which protects the civil discovery privileges but for today

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we thought we'd focused on the exemptions that the office of government ethics specifically cites to in looking

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at the office of government ethics annual for airports we know that not only are these the most cited but they

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were the only cited exemptions so their exemption 6 which is the personal privacy exemption exemption 5 the civil

7:01

discovery privileges in exemption 3 and I'd like to unwrap those a little bit

7:07

since those are typically the exemptions one would consider when looking at the ethics records so when considering

**Types of Records**

7:19

ethics records there are many types of Records some not too unique to just ethics but some that are unique to

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ethics where we may be examining these records for exemption applicability and

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disclosure determinations financial disclosure forms those are the the form 450s and is it 278 yes forints thank you

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form 278 any records related to that agencies may form recusal lists ethics

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advice and counsel that's been given waivers and approvals of conflicts of

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interests training records reports and Wrekin anywhere for also the Department

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of Justice these are all the types of records that we'll want to consider as we're considering the exemptions and as

8:06

we go through each of the the different statutes that we're talking about have a certain role in how this information

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gets disclosed so starting with exemption 3 we're going to take them in

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chronological order so starting with exemption 3 exemption 3 protects

**Exemption 3 Statute**

8:27

information that has been specifically exempted from disclosure by another statute so the first thing we want to

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look to when considering an exemption 3 use is whether the statute we're relying on is a proper 3 exemption statute in

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the first place a statute is a proper exemption 3 statute if it either

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absolutely prohibits disclosure of information of information with no

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discretion to the agency or if it provides discretion it limits that to

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excuse me to either establish criteria or by referring to particular matters

9:05

that are to be withheld also through the amendments to the FOIA any statutes that have been enacted

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after October 28 2009 must also specifically point to exemption 3 of the

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FOIA in order to be a proper exemption 3 statute the Department of Justice provides resources to help agencies

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determine whether a exemption 3 statute is a proper exemption 3 statute and one

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of those resources is our approved exemption 3 lists which is really a exemption is a list of exemption 3

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statutes that the courts have found to qualify as exemption 3 provisions it's obviously on an all-inclusive list

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because there could be provisions that have not reached the courts and that very well could be proper we also in

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have a separate list of exemption 3 statutes that we put out every year citing all the exemption 3 statutes that

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agencies have cited in their annual reports so those are good two resources to look to when trying to determine

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whether exemption 3 statutes a proper exemption 3 statute to use for ethics we

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have the office of government ethics in Government Act which has been fun which

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has provisions that have been qualified to be exemption 3 statutes to be an exemption 3 statute for those

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confidential 450 forms exemption 3 could be which should be cited to withhold

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those forms under the exemption 3 of the FOIA under 5 USC 107 a and any portions

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of those forms that are transferred into another record so if you have a recusal list and you've taken information from

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the 450 form and you've just transferred it over into another form exemption 3 would still apply it's not specific just

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to the form the 278 forms while there is a public access Avenue through the

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statute itself FOIA is not the proper Avenue for

11:02

seeing those records so there's an exemption 3 would be cited in the FOIA context but as I'm sure Jennifer will

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get into as a matter of good customer service is always I'd always encourage anyone who's citing exemption 3 for

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those types of forms to explain to the requester how they can properly access those records access those records and

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then for the conflict of interest waiver determinations we bullet here for 18 USC

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208 D 1 the conflict information the conflict of interest waiver

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determinations tells are something that is publicly releasable however courts

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have found that any information that's been put into those that go beyond what is required in the 450 it can be

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withheld one example from the I don't know how you pronounce this but I've heard I look at it at this fe case which

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is cited there was designation of family

11:59

members designating which financial interest belonged to them and while the forum allowed for that the court found

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that it wasn't a required thing so since it was not required by the 450 that was something that was withheld another

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example the courts have also said that anything that can be withheld under exempt under FOIA is can be protected on

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these records as well so exemption 6 may be something to consider on a case-by-case basis for these records

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exemption 5 of the FOIA is our next exemption that we want to look at for

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Ethics records and the language of exemption 5 says that agencies can

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protect under the 4 that can protect interagency or intra-agency memorandums

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or letters which would not be available by law to a party other than an agency in litigation with agency I don't know

12:57

about you but when I first looked at that I had no idea what that meant but what that convoluted language really

13:03

means is that information that meets either information that meets both the

13:09

intra intra agency threshold and is covered by a civil discovery privilege

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can be protected on five of the FOIA exemption five protects the civil discovery privileges while

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exemption three may not be a good candidate for a discretionary released because you have a statute that bars

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disclosure so there is no discretion under exemption 5 especially with deliberative process information there

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could be very good candidates for discretionary and so these are where we would encourage you're looking at these

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records not only for the applet e of the exemption but to see if there is a foreseeable harm in disclosure so as I

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said the first requirement for exemption 5 to apply to records is a threshold

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requirement that the records be intra or inter or intra agency records and here

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what this means is that the agent the records created by the federal agency stay within the agency or amongst the

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federal agencies it's not shared with the outside however there is an exception to this which makes a lot of

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sense courts early on recognized that like any other organization federal

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government agencies have the need to consult with outside parties to effectuate their missions so we have a

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doctrine that we the consultant core a core corollary and so as a consultant

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when agencies are seeking or given neutral advice on a topic that

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information can still meet the threshold requirement in determining whether the consoler Coralie is met courts have

14:49

looked to see the court some courts have looked to see if it is neutral advice not given at the expense of another

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party there's been some mix on whether how much weight is given to that what's been very I think strongly looked at is

15:01

whether the consultant or the person is in any way adversarial to the agency and

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in that situation that consultant way which makes sense would not be applicable here what's kind of the best

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analogy is that the consultant while not a federal agency employee not the federal government is really acting as

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if they were akin to that and really providing consultant services to the

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federal government so if the threshold requirement of

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exemption 5 is met the next requirement is that one of the civil discovery privileges one of the recognized

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discovery privileges must apply and any of the civil discovery privileges can be

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protected under exemption 5 however there are by far three privileges that the government looks to incise two most

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often than any other privilege and those are the deliberative process privilege the attorney work product privilege and

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the attorney-client privilege and so I'll highlight those briefly today the

16:01

deliberative process privilege really protects or provides protection for the

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decision making process of agencies it really it encourages open and frank discussion within the agency in order to

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enhance the quality of an agency's decision making and so there are two

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requirements for the deliberative process first the information must be pre-decisional so it must be antecedent

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to a final decision typically anything that is leading up to a final decision discussion wise any discussions that are

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in the in the in this process leading up to a final decision will be pre-decisional there are factors that

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you can look at you can look to see who is the document creator for what purpose

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are they creating the document is it going to a subsequent is it a subordinate going to a supervisor those

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factors can help decide if it's pre-decisional but they're not determinate because even a person in a

16:58

supervisory decision making a thoreau can have deliberative information that's pre-decisional right if I am a if I am a

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decision-maker I have a thought process in making my decision the final decision

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and that thought process could it would still be pre-decisional in addition to being pre-decisional the information

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must be deliberative again this is this privilege is protecting the decision-making process so things like

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recommendations discussions discourse opinions and so forth these are things

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that would be protected on the deliberative process privilege what typically is not protected are factual

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information because they have nothing typically will not have anything to do with the actual deliberative process unless

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the factual information itself is so interwined in the deliberative process that there's no way that you can remove it without

17:51

revealing delivery of information this

18:00

is typically where I'd ask for any other questions but we'll save this for the end so the other discovery privilege is

18:07

the attorney work product privilege and the attorney-client privilege the attorney work product privilege protects

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any information prepared by attorney under the or under the attorneys direction in reasonable anticipation of

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litigation litigation does not have to commence and litigation does not have to be civil or criminal it can be civil

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criminal or administrative proceeding but really what you're looking for here

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is being able to articulate that the information was prepared in anticipation

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of a reasonable claim that could have been that could have a raisin for the

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attorney work product privilege facts can be protected as well that is part of

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the attorneys work product and also there is no temporal limit so there's no

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time limit that would diminish the attorney work product privilege the

19:00

attorney-client privilege it protects communications from a client

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to an attorney these are communications when a client seeks the advice of the attorney so the factual information

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actually that the client provides to the attorney can be protected and then the legal advice given by the client to the

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attorney and an agency situations this is often a situation where the agency is

19:23

going to the office of general counsel for a legal opinion

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so for applying exemption five ethic records some of the records we may want to consider our email as memoranda

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recommendations notes and approvals related to ethics analyses and waiver requests emails are just another

19:45

platform for how records can be created but often we have candid in discussions

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on email trying to determine a final decision or trying to determine a recommendation and so emails can often

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contain deliberative process deliberative information or work product or attorney-client really it's not the

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email that's that's the determinant factor but just a place where that type of information can be contained same for

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memos recommendations and notes typically our deliberative by nature

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ethics guidance opinions in advice typically are not are typically

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releasable but depending on so any any guidance for example the way-o IP gives guidance for foia matters any ethics of

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ethics guidance on how ethical should be interpreted those types of finally those types of guidance from the office of

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ethics office of government ethics OGE would be would be releasing and should

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be released ethics programs and training materials same-same for that as as you

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can see for foia all of our P's training material we post those online those are fully releasable ethics related policies

21:01

final agency opinions and policies are not only things that should be released are things that we have proactive

21:08

disclosure obligations as well for some of those and referrals the Department of Justice may depend on what is part of

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those records that are being referred to the department justice but b5 critics

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certainly for work product and for delivery process it could certainly be

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something that be considered so the

21:34

third and final exemption that I was going to go over today is exemption six of the FOIA an exemption six protects

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individual personal privacy it's one of the one of two exemptions in the FOIA that provides us protection

21:46

exemption 7 C pertains specifically for law enforcement records where personal

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privacy can be implicated but the language of exemption 6 says that we should we can protect information in

21:57

personal and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal

22:03

privacy so there are two things really to unpack here first is a threshold requirement which is that the

22:09

information being personnel and medical files and similar files and then is the

22:14

the other standard that disclosure would constitute a clearly unwarranted invasion of personal privacy so looking

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at the threshold personal and medical files are pretty straightforward and we all know what those are so the question

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really is what is similar files mean well thankfully the similar files has been given a very easy and a broad

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interpretation and generally any information that can leak be linked to a person would would fall under the

22:45

threshold of exemption 6 the Supreme Court when they looked at this said that

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you know that it would it would be unreasonable to assume that Congress thought that the labeling of a file could dictate what exemption six should

22:57

apply and when it shouldn't when we should protect these privacy and wait when we shouldn't and I think to me that

23:03

makes a lot of sense and and it can be an it's not just paper records we have case law that has exemption 6 applied to

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audio records so it could be in any file or format so living individuals have

23:19

generally have a privacy interest in not having agencies disseminate personal

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information about them so once we identify that we have the threshold of

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exemption 6 met meaning that there is a link to a person this is information that can be linked to someone we then

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want to identify whether there is a privacy interest and this is really going to help us this next part analysis is going to help us understand if

23:45

releasing information would cause it would cause a unwarranted invasion of

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personal privacy so first we want to identify if there is a privacy interest and as I said this is

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sometimes not what someone would think about privacy interests would be so it's not just limited to intimate or personal

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details or what someone might find personally to be embarrassing if release really here we're looking at the

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person's interest of maintaining control over information about themselves so living individuals have a privacy

24:19

interest and not having that type of information personal to them released or not having that control over it so

**Privacy Interest**

24:31

there's been privacy interest that has definitely been found in the person's name address phone number date of birth

24:36

criminal history medical history or social security numbers

24:42

and before we get into a little bit more that I wanted to highlight this Glomar

24:47

response so sometimes we may get a request that's so targeted that it's not

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just the information in the records the release of and protection of might might

24:58

implicate a privacy interest it's even acknowledging that that record exists a a pretty good example is if for some

25:08

reason and I hope you know I know this is not to be the case the FBI is investigating me and Lyndsey for some

25:14

reason as an interest in making a request to the FBI and I want all records on on Bobby Julian and the F God

25:24

has not acknowledged and no one knows that I'm being investigated publicly there's no public acknowledgement of it so just the fact of whether there exists

25:33

a record with the FBI yes or no that in itself would invade my personal privacy

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so the FBI would then say we can neither confirm nor deny that there is an investigative file on Bobby Lee when a

25:47

similar experience a similar situation might arise with ethics records whether someone's being investigated or looked

25:54

into for an ethics violation and if the request is specifically targeted in a

26:00

way for looking for that and there's nothing that's been acknowledged by the agency for that individual that agency

26:05

would want to glow more the response to the third party I'm just an FYI

26:10

one place where this might come up with ethics records would be in this stock act post employment negotiation

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letters that are required that might be a situation and in some circumstances it

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would be appropriate to glamorize yes thank you yes perfect I said living

26:30

going back together living individuals have a signal for privacy interest for

26:36

deceased individuals that privacy interest has diminished and so agencies have not been very I mean course have

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not been very clear on what agencies should what reasonable steps agency to do to determine the life status of a

26:49

person to determine if the privacy interest been diminished but one of the things that has been upheld is the FBI's

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100-year rule if it's not known basically that anyone based on their

27:00

birthday who is over a hundred years old is presumed to have a diminished privacy

27:05

interest unless we know they're not diseases so another group that has

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diminished privacy interest are federal civilian employees who do not have sensitive sensitive occupations as in

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law enforcement in not personal details

27:32

about their about themselves but in details about their their work in the

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federal government and their qualifications for the job that they're

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there they're conducting for the government there is an OPM regulation that directs agents that that actually

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has a list of certain items that agency should be releasing about federal civilian employees and that includes

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named present and past position titles and occupational series president pass grades president pass annual salary

28:04

rates including performance awards and bonuses president and past duty stations and position descriptions job elements

28:11

and performance standards it's a diminished privacy interest in what we do in our employment with the

28:17

government but like I said it does not diminish our privacy interest of more personal matters for example what health

28:24

insurance I picked what days I've taken off where I've gone for vacation so forth and so on so if we've identified a

**Public Interest**

28:37

privacy interest at play the next question would be if there is a FOIA public interest and FOIA public

28:45

interests may not be what one would think of it at first glance either it's not a I like to say like a a tabloid

28:52

public interest not the general public's interest it is the FOIA public interest is directly

28:58

related to the core purpose of the FOIA which is to shed light on agency actions and activities in their performance of

29:04

their statutory missions so FOIA public interest is limited to anything that was shed light on agency's activities when

29:17

considering if there is a FOIA public interest the identity of the requester or the reason that they need that

29:22

information particularly if it's for personal needs are not factors what

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we're really looking at here is by how by disclosure of these records we can shed light on the agency's performance

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of its statutory mission so it's really the agency's action that's that's the FOIA public interest

**The FourStep Process**

29:50

I think I skip the side there we go so if we have a significant privacy

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interest we then look to see if there is a FOIA public interest and if we have a

30:01

FOIA public interest we have to balance those interests so the way I like to look at this is for exemption 5 I mean 6

30:08

is a is a four-step process first if you recall going back we need to satisfy that threshold requirement which is most

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often easily done if the information is going to be a link to a person once we satisfy the threshold requirement we

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identify if there's a privacy interest and if there is a significant privacy interest meaning anything more than a de

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minimis privacy interest then we need to go see if there is a public interest if

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there's no privacy interest the information should be released if there is a substantial privacy interest then

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we look to see for public interest if there's no FOIA public interest can be identified then to protect the privacy

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interest we withhold that information under exemption 6 if there is a FOIA public interest as well then we have to

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balance the two and determine which one outweighs the other so some things to

30:59

consider when balancing some factors information concerning to intimate details of a person's life would

31:06

generally deserve protection or they would have a very significant privacy interest the passage of time for

31:13

exemption 6 not only does not diminish the privacy interest in many instances

31:18

can elevate it can make it more significant particularly when we're

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talking about things like someone's criminal or this car is some kind of misconduct history you know let's say

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twenty years ago I was I was I was convicted of some kind of a crime

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without disparaging myself too much I and i rehabilitated myself I've become a

31:46

good citizen I'm not working for the federal government I'm doing great public service and even though that may

31:53

have once been in the courts public files and if you really look hard you could find it it's practically obscured and so my

32:02

privacy interest is now only diminish its increase now because bringing that back to light would

32:07

significantly invade my privacy and there would be potentially very very little FOIA public interest in doing so

32:15

one thing we can also can thing is should also consider is is there the adverse consequences for the person if

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their information is disclosed that could also elevate the the the the

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privacy interest proven allegations of official misconduct could constitute a

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significant public interest so for official misconduct depend it

32:39

depends on two factors the level of the person who's who who's there who were

32:46

the misconduct is applying to you and also the what the misconduct is so the

32:52

more serious and intentional the misconduct and the higher the level the officials the higher the public interest

32:58

and the lord lower level of the official the federal employee and the less

33:05

serious the misconduct for example if I'm taking long lunch breaks and I and

33:11

those types of things the higher the privacy interest and and lower if not any public interests in

33:21

identities of law enforcement individuals can have a significant privacy interest which would also be protected under exemption 7 C which

33:28

we're not getting into today so in balancing the interest one thing we want

33:34

to look to is one approach we want to always consider is how we can meet any redact the personally identifying

33:40

information and still release information that would serve that FOIA public interests oftentimes there are

33:45

ways particularly when information is asked with involving a large number of people so for example if one request

33:53

asked for I want to know all the pharmaceutical the prescription that were filled at the congressional

34:00

pharmacy and we can give them all of those prescriptions without identifying

34:05

who they are and it's a long list no one will ever know you know who was the one

34:12

who's actually filling that prescription that could be something where we can

34:17

remove the privacy interest and then release information in ethics documents

34:26

were looking at financial and business relationships information often time that can have significant privacy

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interest but again it can be a case-by-case balancing determination if

34:38

there's a significant public interest particularly maybe there's a conflict of interest family information typically

34:44

would be given high very high privacy protection things like home addresses

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and contact information would be protected Social Security numbers date of birth gifts and travel information

34:55

are things that there would be more of a FOIA public interest and so we would typically release those outside

35:01

activities depending on who it is and what they are that would be more I think a case by case identities have 278 and

35:09

450 filers the identities themselves are not something that we protect under exemption 6 again civilian federal

35:14

employees have no protection have been have very diminished privacy I have a

35:20

diminished privacy interest in the fact that they're working for the federal government where the public servants in

35:25

our positions and so our identities as civilian federal employees would not be withheld and with that I look forward to

35:33

any questions at the end of the session but I'll hand it over to Lindsay for the FOIA interface thanks Bobby good afternoon

35:41

everyone and in this portion of the presentation we're going to be talking about the interface between the Freedom

35:47

of Information Act and the Privacy Act but what I mean by interface as we'll discuss Privacy Act records are subject

35:55

to both the Privacy Act and the FOIA the interface comes up primarily when you

36:00

have a first party request for a Privacy Act record so that's when someone is making a request for their own records

36:07

and so it's important to understand the relationship between these two statutes which provide separate and distinct

36:14

rights of access to the individual this helps ensure that you're properly handling the Privacy Act records so

36:22

during this portion I'll briefly compare the FOIA and Privacy Act and provide an overview of how Privacy Act records may

36:28

be disclosed under the FOIA let's start by a comparison with the

**The Privacy Act**

36:35

comparison of the statutes Congress enacted the Privacy Act in 1974 mostly

36:43

because it was very concerned about how the government was what information the government was collecting about individuals and how it was handling that

36:50

information once it had it so the Privacy Act was intended to protect the privacy of individuals about whom the

36:57

government maintains records and it does so in a couple of different ways first it limits the collection maintenance use

37:05

and disclosure of personally identifiable information or PII it

37:11

regulates how agencies handle the information that they can collect and once they have it how they maintain that

37:18

and use that information the Privacy Act also gives individuals the right to

37:23

request access to their own records they can also seek to amend those records and

37:28

requests an accounting of disclosures concerning the records about themselves and so this access right is distinct

37:36

from the right that they have under the FOIA but the general presumption of the

37:41

Privacy Act is that we protect the records that are covered by it and so if

37:48

you have a Privacy Act record and you want to share it with somebody whether that be another agency or just some

37:55

member of the public the presumption is that you're going to protect that information you need a clearly defined

38:01

reason to disclose it and we'll talk a bit about that later in the presentation

**The FOIA**

38:07

but let's contrast that with the FOIA which as Bobbie provided a great

38:13

overview of facilitates government transparency and accountability the FOIA is a way for the public to know what the

38:20

government is up xiu by allowing them to access government records of course it

38:25

permits agencies to protect certain records that fall within the FOIA is a nine exemptions in contrast to the

38:32

Privacy Act where the general presumption is to protect the records the general presumption of the FOIA is that you disclose the records unless an

38:39

exemption applies and so keeping these two different purposes in

38:44

mind it's important to really understand kind of the analysis required by each

38:50

statute so that you can satisfy the purposes of both of them of both statutes while making your disclosure

38:57

determination the records covered by the

39:02

Privacy Act must be about an individual stored in a system of Records and access

39:08

by personal identifiers let's quickly define those terms individual under the

39:14

Privacy Act refers to US citizens or lawful permanent residents some agencies

39:21

have expanded that definition to apply to non-us persons in certain situations but the Privacy Act itself limits it to

39:28

u.s. persons the records must be stored

39:33

in a system of Records a system of Records is a group of Records under the control of any agency from which

39:40

information is retrieved by a personal identifier so numbers two and three kind of go together here when basically the

39:49

agency will have a comp some compilation of records and they locate those records

39:54

using some personal identifier so that could be somebody's name their social security number some unique number or

40:03

account you know name that is attached to that person that's how the system

40:10

that's how the records are located by the agency but an easy way to know whether or not a record is in a system

40:17

of records is if it has what's called a systems of Records notice or a sorne for

40:23

short this notice is something that the Privacy Act requires agencies to publish

40:28

in the Federal Register whenever a system of Records exists and so the sorne provides an overview of the types

40:36

of records that are contained in the system the types of uses that the agent

40:41

you know that the agency plans to use the information for potential routine

40:48

uses for that information and any FOIA I'm sorry any Privacy Act exemptions

40:53

that the agency thinks will apply for that to that information if a sorne applies to a set of records

41:02

you know right from the start that their Privacy Act records and the stornes are a great resource if you ever have

41:07

questions about whether or not a certain disclosure or use of a record is appropriate they're you know they they

41:14

define all of that out and most agencies will have them posted on their websites so that is kind of the limited you know

41:24

realm of Privacy Act Records the FOIA on the other hand covers all agency records

41:29

and so while Privacy Act records are agency records not all agency records or

41:35

Privacy Act records the general rule of

41:43

the Privacy Act is that you cannot disclose Privacy Act records without the

41:48

prior written consent of the individual so that is the baseline rule when you

41:54

have a Privacy Act record unless you have prior written consent you cannot disclose it now there are certain

42:01

conditions that may come up that would allow you to disclose it without prior

42:06

written consent and the Privacy Act in Section B lists these conditions I'm

**Conditions of Disclosure**

42:13

going to cover just some of the more commonly encountered ones in today's

42:18

presentation but B 1 of the Privacy Act allows you to share information within

42:23

your agency on a need-to-know basis this is what allows you to do your job basically you know that Congress did not

42:31

want agencies to be hindered and actually fulfilling their mission because they couldn't share information

42:37

b2 is most important for our purposes today for this presentation is if

42:44

required under the FOIA now what does this mean if the FOIA does not if a FOIA

42:51

exemption would not apply to the Privacy Act record then you are allowed to

42:57

release that record in fact you would be required to release it if someone is requesting it and so a FOIA release

43:06

under the FOIA is required if no FOIA exemption could potentially apply so if

43:11

no FOIA exemption as you release it now typically when you have Privacy Act Records exemption six

43:17

or seven C is going to apply because it's you know it's personal information

43:23

about an individual that's generally going to be protected but there may be

43:29

circumstances where where it's not and so this is what allows us to release information under FOIA that is a Privacy Act record and b3

43:37

allows agencies to release information or share information pursuant to a

43:43

routine use that's published in the Soron so this is why the Soren's are important because sometimes they'll

43:48

provide for things like sharing with law enforcement or sharing with news

43:54

organizations or publishing information to their website but these will be clearly defined in the storm so those

**Access Rights**

44:05

were the some of the more commonly encountered conditions of disclosures that allow you to disclose and so now

44:11

we're going to move a bit into the access rights under the Privacy Act and the FOIA so both statutes like I

44:19

mentioned provide separate and distinct rights for individuals to access records about themselves however there may be

44:27

differences in the extent of access depending on the statute who has a right

44:36

of access under each statute well for the Privacy Act that just goes back to the definition of individual so any US

44:43

citizen or lawful permanent resident will have access to Privacy Act records

44:49

now this means that they can request access about themselves it's the first party requesters will have access under

44:56

the Privacy Act under the FOIA anyone can make an access request about for any

45:03

record they can be requesting records about another person that can be requesting records about a topic but

45:08

anyone can make an access and so we'll talk about how this plays out in a

**Privacy Act exemptions**

45:15

moment but first I want to highlight that the Privacy Act similar to the FOIA

45:21

has exemptions that limit access under that and there are 10 exemptions I'm not

45:28

going to go through them in detail but they are listed at D 5 section J and

45:35

section K of the Privacy Act and these exemptions limit access under the

45:42

Privacy Act so you have a first party requester but it the agency generally

45:48

has to publish notice in the Federal Register if they will invoke the exemption the one exception to that is Z

45:54

Phi which is the one special exemption which is a civil attorney work product

46:00

that is like a self invoking exemption it does not need to be published in a

46:06

sorne but for any of the law enforcement exemptions which is j2 or k2 or some of

46:11

the other all of the other exemptions under the Privacy Act the agency actually needs to publish notice that

46:18

they're going to use that exemption in the sorne and for that reason knowing

46:24

where to find the sauron's is very important because that will in some cases determine whether or not you can

46:30

release the information

**Processing requests**

46:35

so in processing requests you're going to process first party requests under

46:41

the Privacy Act and then under the FOIA for the greatest amount of disclosure this is because we don't want to limit

46:50

someone's access by only looking at one statute so whenever you receive a first

46:55

party request you want to look at it under the Privacy Act and then also under the FOIA because something may be

47:01

exempt under the Privacy Act but not under the FOIA and so we don't want to limit their access third party requests

47:07

are processed only under the FOIA and so that would really just go right in line

47:14

with what Bobby was talking about earlier and talking about all of the different exemptions that would apply you treat a third party request I'm even

47:20

if it's for Privacy Act Records as you would any other FOIA request so let's

**Processing firstparty requests**

47:27

break down how to process a first party request or how they will be processed if you are not the one who actually processes them first you'll look to see

47:36

whether and not whether or not a Privacy Act exempt and applies if no Privacy Act exemption

47:42

applies the information gets released to the first party requester you do not even move on to the FOIA analysis so a

47:50

great example of this actually are any records that fall within the OGE gov -

47:56

one and - two swords because those do not have any Privacy Act exemption so if

48:02

you have a first party request for those records they will be released to that first party and this is actually a great

48:11

example of the dynamic between the FOIA and the Privacy Act and first and third party requesters because if a third

48:16

party came and requested that information they probably wouldn't get it because of some of the exemption 3

48:22

statutes depending on specifically what they were asking for and so that would be only looked at under FOIA because it

48:29

would be a third party request however if you've got a first party request and

48:35

a Privacy Act exemption does apply then you're not done yet you have to continue

48:40

on to the FOIA analysis and determine whether or not a FOIA exemption applies if you cannot find a corresponding FOIA

48:48

exemption that information needs to be released this is because if someone

48:54

makes a Privacy Act request the fact that they made a Privacy Act request shouldn't like that shouldn't be the

49:02

determining factor in whether or not they get the information if they came back the next day and made a FOIA request and they would get that

49:08

information it just you know those things don't really make sense so whenever you have a first party request

49:14

whether or not they're specifying FOIA or Privacy Act you really want to just look at both statutes and analyze them

49:20

they're both statutes because they're entitled to the that will give them the greatest amount of access so if no FOIA

49:29

exemption applies but there is a Privacy Act exemption then you do need to release that information

49:35

despite the Privacy Act exemption however if a Privacy Act exemption applies and a FOIA exemption applies

49:41

then you can withhold the record information can only be withheld when

49:46

you have exemptions under the Privacy Act and the FOIA that apply

**Processing thirdparty requests**

49:54

now when processing third-party requests as I've mentioned you process them only

50:00

under the FOIA and you release records if FOIA requires disclosure FOIA

50:06

requires disclosure if no FOIA exemption applies so one slightly different aspect

50:12

about processing Privacy Act Records under the FOIA is that you cannot make

50:19

discretionary releases of Privacy Act records so as I mentioned in most you

50:25

know in many many cases exemption 6 and 7c are going to cover the Privacy Act

50:31

records but in some cases that you know that may not be the case or maybe you

50:37

can segregate out certain information but if there's another exemption another FOIA exemption that maybe perhaps is

50:45

discretionary like an exemption 5 deliberative process information that's contained within the Privacy Act record

50:53

you cannot make a discretionary release of that information because of this language from the Privacy Act B 2 which

51:00

says that you release records if FOIA requires disclosure so if exemption 5 deliberative process

51:05

can be applied technically a FOIA exemption applies and so you have to invoke it one last thing to remember is

51:14

that when you have a third party request well generally to release Privacy Act records you need a request in hand in

51:22

order to yeah in order to release the record generally we're not going to see

51:27

proactive disclosures of Privacy Act records but once you have a request you can go through and do the analysis and

51:35

make the release if doing so is appropriate all right and with that I

**Resources**

51:44

think we'll turn it over to Jen but here are some resources for oh I pee and our contact information in case you have any

51:50

further questions after this presentation great thank you

**OGE Guidance**

51:57

I did something that Patrick taught me not to do and I loaded these slides with a lot of information that I'm not

52:03

necessarily gonna go go over every detail but I wanted you to have it sort

52:08

of in one place for future years but I'm gonna just touch on a few points before

52:14

we do I just wanted to clarify I guess he can't clarify it's something that someone else said but I wanted to make a

52:19

note of something that Bobby had said he mentioned that OGE guidance would be

52:25

something that would be disclosable in fact would most likely be required to be disclosed which is of course we do not

52:31

question that but I did want to point out that oh jee considers that

52:36

communications between our desk officers and agency ethics officials I don't know

52:42

if you would use the term guidance for that it would be more than seeking advice and assistance in how they would

52:49

either advise their employees or or do take other actions and and OGE does

52:57

consider those discussions with the desk officers to be deliberative and we do

53:02

frequently invoke exemption 5 over that so it's just in case that caused any

53:08

confusion I like to point that out because one of my pet peeves is when

53:14

people are inhibited from taking down

53:21

information or using information in certain ways because they're so fearful of the Freedom of Information Act and so

53:26

I like to clarify certain places where information is protected so that it

53:31

doesn't inhibit I wouldn't want people to be inhibited in contacting your desk officer and having that back-and-forth because of the fear that that would be

53:38

released um the the desk officers are not decision-makers they can't make official OGE guidance so to speak would

53:45

be distinguished from our legal advisories or other such official OGE kind of stuff just want to make that

53:51

point but anyway so getting to disclosure under the ethics and Government Act this is the basic public

53:58

financial disclosure provision 105 it essentially limits the disclosure to the

54:05

what we would call the form 201 requirements it's not very onerous you

54:12

need to give a few basic pieces of information and then those reports are public but they are the requirements are

54:19

there and as such this this would be an exemption three situation where he would

54:25

turn to the ethics and Government Act say to file the to require a form 201

54:32

for that and I and the bottom you'll note I also highlighted our regulation and the system of record notice that

54:39

applies as as Lindsay pointed out and og

54:45

has to government-wide system of records notices this one for the public financial disclosure reports and another

54:50

one for the and related records and another one for the confidential and they're both available on our website in

54:56

our Privacy Act FOIA section of our website so this is the provision that

55:03

talks about to the disclosure the the 201 process just to note that you also

55:08

can use a form to a 1 to obtain completed form to your ones and that the the the statute explicitly provides for

55:16

that process this is one of the things I definitely wanted to highlight so

55:22

there's generally a six year time limit on the public financial disclosure reports these are the two relevant

55:29

provisions you can see the first one says it can only be made available to the public for six years and the second

55:36

one says it will be destroyed unless needed in an ongoing investigation after

55:41

that time period so what I like to say about this is that two wrongs don't make

55:48

a right these are two separate provisions there's a requirement to destroy and also a limitation on when

55:54

the report can be made available so if for some reason the report has not been destroyed within the 6-year period it

56:01

doesn't mean you cannot you can now disclose it and release it this is I

56:07

point this out because it's contrary to the typical FOIA situation where even if

56:13

a record could have been destroyed if it hadn't you you still need to normally if

56:19

you would otherwise have to release it on the FOIA you can't withhold it because you could have destroyed it when

56:26

we're dealing with these ethic and ethics and government Act provisions that doesn't apply because it's again

56:32

we're dealing with exemption 3 so even if you haven't complied with the requirement to destroy you still cannot

56:37

release it after the time frame has expired I just put this up here that

**Fees**

56:45

there are provisions and the ethics a government that allow agencies to require fees we never charge fees for

56:51

ethics and government disclosures or for our FOIA really because everything is

56:57

done electronically and it just doesn't come up that fees are really incurred

57:02

but I just wanted you to know that those provisions do exist to confidential

**Confidential Financial Disclosure**

57:11

financial disclosure obviously the basic rule is that those records are confidential and as Bobby explained

57:19

again exemption 3 would apply I just

57:24

wanted to point out here and I quote our regulation on this point to make it

57:31

explicit that there there's no public access to these reports except pursuant to the order of a federal court or as

57:37

otherwise provided under the Privacy Act and I point that out because one question we often get is can I can I

57:45

show HR the convention financial disclosure report or can I show the person's supervisor and as Lindsay

57:52

pointed out there is a need-to-know within the agency condition within the

57:58

private sex so of course they can be shared within the agency as as long as

58:05

we pointed out to the point that it's needed to do to do ones job

58:12

so getting FOIA requests for financial disclosure reports as Bobby said courts

58:18

have found that the ethics and Government Act is an exemption 3 statute and we routinely withhold confidential

58:25

financial disclosure reports pursuant to that so if you get a FOIA request

58:38

exemption 3 applies for both public and for public financial schools or reports

58:45

as well by I did want to note that as Bobby mentioned we don't want to we here at

58:52

OGE don't want to be overly bureaucratic about it if if we can point them to the

58:58

place on our website where they can obtain it after filling out electronic 201 we do that if if they have emailed

59:06

us the same information that would be on the 201 you know we go ahead and give it so although it's important you know in

59:14

our mind we want to comply with the ethics income or night disclosure provisions we don't want to be

59:19

bureaucratic and we do want to provide good customer service and that's really

59:25

the the main points that I wanted to make sure to to get across and so to

59:33

make sure to leave plenty of time in case folks had questions do we have any

59:39

questions you'll be prompted to record

59:57

your first and last name you do need to check that your phone is unmuted before you record your name if you decide to

1:00:03

withdraw your question you can press star two and this is just a reminder

1:00:12

that if you're on the Google hangout you can ask a question by typing it in the Box in the lower right hand corner of

1:00:17

your screen

1:00:31

no such thing as a bad question once

1:00:37

again please press star followed by the number 1 on your phone to record your name if you have a question or comment

1:00:49

and I'm not showing any questions on the Google hangout well then thank you and

1:01:02

that concludes today's presentation please join us next time for the fundamentals series

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