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Access To SF 278s and Related Materials under the Freedom of Information Act and  
the Privacy Act

**Freedom of Information Act (FOIA)**

An ethics file includes SF 278s and related material (such as notes and correspondence). The SF278s are available under the special access provisions of the Ethics in Government Act (Ethics Act). The related material is available to third-party requesters through FOIA, and is subject to applicable FOIA exemptions.

Section 105 of the Act provides that a Public Financial Disclosure Report (Report) may be disclosed only in accordance with specific requirements: a Report may not be disclosed unless the requester makes a written application, stating the “person’s name, occupation and address, the name and address of any other person or organization on whose behalf the inspection or copy is requested, and that such person is aware of the prohibitions on the obtaining or use of the report.” This satisfies the requirements of FOIA exemption (b)(3) (5 U.S.C. § 552(b)(3)), which protects from disclosure information prohibited from disclosure by another statute, provided that the relevant statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. Accordingly, a request under FOIA for a copy of an SF 278 Report should be denied under exemption (b)(3). See Church of Scientology v. IRS, 816 F. Supp. 1138 (a requester cannot use the FOIA to circumvent the express requirements of the Ethics Act). Rather, the request should be made under the Ethics Act, using OGE Form 201 or equivalent agency access form.

FOIA Exemptions

In reviewing an ethics file in response to a FOIA request for the file, it is necessary to disclose all portions that are not protected by FOIA exemptions.

The exemptions (excluding exemptions (b)(8) and (b)(9)) are:

- (b)(1) - exempts from disclosure classified national security information.
- (b)(2) - exempts from disclosure records related solely to the internal personnel rules and practices of an agency.
- (b)(3) - exempts from disclosure information prohibited from disclosure by another statute.

(b)(4) - exempts from disclosure (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person and (c) privileged or confidential. This exemption applies only to information submitted from outside the government.

(b)(5) - exempts from disclosure internal Federal government documents which are both predecisional and deliberative. In addition, the attorney work-product privilege and the attorney-client privilege have been incorporated into exemption (b)(5).

(b)(6) - exempts from disclosure information about individuals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, so long as that invasion is not outweighed by a public interest in disclosure.

(b)(7) - exempts from disclosure records or information compiled for law enforcement purposes.

## **PRIVACY ACT (PA)**

A PA request for information is a written request by an individual for PA records about himself (*i.e.*, records contained in a system of records retrieved by name or some other personal identifier). An individual has the right of access to his own records, unless there is an applicable PA exemption. The PA exemptions are not the same as the FOIA exemptions. Accordingly, if an individual requests his own ethics file, FOIA exemptions are not asserted to withhold information.

Generally, PA records may not be disclosed to third parties except pursuant to a written request by the individual to whom the records pertain - or with his prior written consent. However, there are twelve exceptions to the "no-disclosure - (to third parties) - without-consent" rule. One of the exceptions is for disclosure that is required by FOIA. If information is required to be released under FOIA (*i.e.*, if there is no applicable FOIA exemption) it is not protected from disclosure by the PA. Discretionary FOIA releases may not be made without the consent of the individual, unless there is another applicable PA exception.

### PA Exceptions

1. "need to know" within agency. This includes disclosure to OGE, since the SF 278s are in an OGE system of records.
2. disclosure required by FOIA.
3. Routine use. Disclosure is authorized pursuant to routine use, which is a use of a

record, published in the Federal Register, compatible with the purpose for which it is collected. Ethics Act releases of SF 278 Reports are covered by routine use a. of the OGE/GOVT-1 executive branchwide PA system of records.

4. disclosure to Census. Information may be disclosed to the Census Bureau in individually identifiable form for use by the Census Bureau pursuant to Title 13 of the United States Code, which prohibits disclosure by Census.

5. disclosure to someone who has provided adequate written assurance that the record will be used solely for statistical research. The request must state the purpose for requesting the record and certify that they will be used only as a statistical record. The record must be transmitted in a form that is not individually identifiable. This means that the identity of the individual cannot reasonably be deduced by anyone from tabulations or other presentations of the information (*i.e.*, the identity of the individual cannot be derived by combining various statistical records or by reference to public records or other available sources of information). A statistical record is one which is not used in making individual determinations.

6. disclosure to the National Archives and Records Administration of a record which has sufficient historical or other value to warrant its continued preservation by the Government, or for evaluation by the Archivist to make that determination.

7. disclosure to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the U.S. for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the specific law enforcement activity. This includes disclosure to another agency or unit of State or local governments. Disclosure to foreign agencies must be established as a routine use, if appropriate. Blanket requests for all records pertaining to an individual are not permitted. Disclosure may be at the initiation of the agency maintaining the record when a violation of law is suspected, provided that such disclosure is an established routine use.

8. disclosure under emergency circumstances. Disclosure may be made pursuant to a showing of compelling circumstances affecting the health or safety of any individual if upon such disclosure notification is transmitted to the last known address of such individual. This provision permits disclosure when, for example, the time required to obtain the consent of the individual to whom the record pertains might result in a delay which could impair the health or safety of any individual - as in the release of medical records to a person undergoing emergency medical treatment. The individual to whom the records pertain need not be the individual whose health or safety is in peril.

9. disclosure to either house of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee. This does not authorize disclosure to members of Congress acting in their individual capacities, without the consent of the individual.

10. disclosure to the Government Accounting Office (GAO), to the Comptroller General or any of his authorized representatives, in the course of the performance of the duties of the GAO.

11. pursuant to the order of a court of competent jurisdiction. A subpoena does not qualify under this exception unless it is specifically approved by a judge. The order must be signed by a judge. The Office of Inspector General of another agency is not a court under this section - neither is an Administrative Law Judge deemed to be a judge nor the Merit Systems Protection Board deemed to be a court.

12. disclosure to a consumer reporting agency in accordance with the Debt Collection Act. There are administrative steps that must be followed in connection with this section.