JUL 18 1977

Director of Retirement Claims
Director of Data Processing and Accounts

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General Counsel

Exchange of data between the Railroad Retirement Board and the Social Security Administration

This is in reply to your joint memoranda of April 29, 1977 and June 8, 1977, in which you requested my opinion with respect to the transfer of certain records to the Social Security Administration.

The questions raised in your memoranda concern the legality of certain bulk record transfers between the Railroad Retirement Board and the Social Security Administration and Health Care Financing Administration. The Social Security Administration would apparently like to be furnished the Master File of Service and Compensation maintained by the Bureau of Data Processing and Accounts for use in its daily claims operations. Apparently this file is already being furnished to the Administration for its Automated Earnings Recomputation Operation. In addition, the Railroad Retirement Board is currently furnishing the Benefit Payment File to the Social Security Administration and the Health Care Financing Administration. The Combined Health Insurance and Checkwriting Operation File and the Accumulative Monthly Activity File are furnished for use in the Supplemental Security Income program.

As attachments to your June 8, 1977, memorandum you included detailed descriptions of the records systems and semi-systems which are currently being furnished to the Social Security Administration. In addition, you briefly explained the uses to which these records are put by the Social Security Administration and the Health Care Financing Administration. It is apparent from the detailed listing of the information provided to these agencies and the explanation of the uses made of such information, that much of the information provided is not necessary for their purposes. It is also apparent that the records systems or semi-systems contain information on certain individuals not within the scope of the programs for which furnished.

In your memoranda you indicated that it has been your belief that the bulk record transfers currently being accomplished and the additional transfer being contemplated fall within the purview of the Board's regulations as promulgated under the Privacy Act of 1974 and further would be authorized by sections 7(b)(7) and 7(d)(5) of the Railroad Retirement Act (45 U.S.C. §§ 231f(b)(7) and 231f(d)(5)).

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Under section 7(b)(7) of the Railroad Retirement Act, the Board is authorized to furnish to the Secretary of Health, Education, and Welfare (1) records of compensation and service and other records pertinent to the administration of the Social Security Act as it is applied where railroad retirement credits are creditable under the Social Security Act pursuant to section 18 of the Railroad Retirement Act; and (2) benefit payment and compensation and service records and other records pertinent to the financial interchange determination. Section 7(d)(5) of the Railroad Retirement Act provides that the Board and the Secretary of Health, Education, and Welfare are directed and authorized to furnish to one another "such information, records, and documents as may be considered necessary to the administration of" subsection (d) of section 7 of the Railroad Retirement Act, which authorizes the Board to make determinations of entitlement and otherwise administer the Medicare program for railroad employees.

In order to avoid any conflict between the record transfers as authorized by the Railroad Retirement Act of 1974 and the restrictions placed on the disclosure of personally identifiable records by the Privacy Act, the Board designated the Social Security Administration as a routine use recipient of records and information provided as authorized by section 7 of the Railroad Retirement Act. The transfer of records pertinent to the two uses referred to in section 7(b)(7) of the Railroad Retirement Act is provided for by routine use "a" in record system 5, Master File of Railroad Employees' Creditable Compensation and routine use "a" in record system number 27, Railroad Retirement Board - Social Security Administration Financial Interchange System. Records and information concerning the Board's administration of the Medicare program for railroad employees may be released to the Social Security Administration under several routine uses contained in system number 20, Health Insurance and Supplementary Medical Insurance Enrollment and Premium Payment System. In view of the fact that the Health Care Financing Administration apparently now has primary authority in the administration of the Medicare programs, the routine use designations should be amended to expressly permit disclosure to this Administration.

In addition to the statutorily mandated routine use descriptions covering record transfers to the Social Security Administration, the Board also designated that agency as a routine use recipient of certain other records and items of information which are relevant to the questions considered herein. Routine use "e" contained in record system number 5 permits the release of beneficiary identifying information and potential entitlement information to the Social Security Administration, Bureau of Supplemental Security Income, and to other welfare or public aid-type agencies to be used by those entities in processing applications for benefits under their respective programs. Routine uses "g" and "k" of record system number 22,

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Railroad Retirement, Survivor, and Pensioner Benefit System provide, respectively, for the transfer of (1) beneficiary identifying information, entitlement data and benefit rate, medical evidence and related data to the Social Security Administration to correlate administration of titles II and XVIII of the Social Security Act; and (2) beneficiary identifying information, benefit entitlement and rate information, and periods of payments to the Social Security Administration, Bureau of Supplemental Security Income, and other welfare and public aid-type agencies for use in processing applications for benefits under the programs administered by these agencies.

It is evident from an examination of the relevant provisions in the Railroad Retirement Act of 1974 and the published notices of the records systems maintained by the Railroad Retirement Board, that the Board would be permitted to furnish certain information and records to the Social Security Administration and the Health Care Financing Administration for the purposes outlined in your memoranda. However, sections 7(b)(7) and 7(d)(5) of the Railroad Retirement Act and the routine use descriptions published by the Board are restrictive in terms of what types of information may be released. Sections 7(b)(7) and 7(d)(5) authorize the Board to furnish to the Secretary of Health, Education, and Welfare only such records as are pertinent and necessary for the purposes enumerated in those sections, whereas the routine use descriptions briefly describe the types of records or information that might be released for particular purposes. Neither the statutory provisions nor the routine use descriptions published by the Board are broad enough to authorize the Board to furnish to the Social Security Administration or the Health Care Financing Administration entire files or tape systems for the purposes discussed in your memoranda. The question presented by your memoranda becomes, therefore, whether the Board might expand the scope of the routine use descriptions which apply to the Social Security Administration and the Health Care Financing Administration to encompass the release of entire files or tape systems, or in the alternative, whether disclosure of such records might otherwise be permissible under the Privacy Act.

The only exception to the general rule contained in the Privacy Act prohibiting disclosure of individually identifiable records to third parties, other than the routine use exception, which arguably might permit disclosure of entire files or tape systems to the Social Security Administration and the Health Care Financing Administration would be the second exception which permits the disclosure of records the disclosure of which would be required under the Freedom of Information Act.

The Freedom of Information Act (5 U.S.C. § 552) requires that agencies make available to the public the records they maintain unless the records fall within one of the stated exemptions contained in that Act. Where

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disclosure of personally identifiable records is in question, the two pertinent exemptions of the Freedom of Information Act are the third, which permits withholding of a record where the record is exempted from disclosure by another statute, and the sixth, which permits withholding of "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Under the sixth exemption of the Freedom of Information Act personally identifiable records, the disclosure of which would not constitute a clearly unwarranted invasion of personal privacy, must be disclosed and, therefore, such records could be disclosed notwithstanding the Privacy Act without the consent of the subject individual. There have been numerous court decisions interpreting the sixth exemption. However, the decisions do not precisely set out what types of personally identifiable records may be withheld under the sixth exemption and which types must be disclosed. The courts that have decided sixth exemption cases are in substantial agreement with respect to the appropriate test to be applied in determining whether a record may be withheld under that exemption. Under the generally accepted test, agencies must examine the requested record to determine the extent and nature of the subject individual's interest in maintaining the privacy of the record and balance that interest against the interest of the public in its need to know. Getman v. NLRB, 450 F. 2d 670 (C.A. D.C., 1971); and Wine Hobby USA, Inc. v. Internal Revenue Service, 502 F. 2d 133 (C.A. 3, 1974). The interest of the public in its need to know includes the interest of the party requesting the records, and the agency must examine this interest and the intended use to which the records would be put. Getman, supra, at 677.

Although no court has specifically so held, it appears that the Getman and Wine Hobby approach would apply not only to situations involving the disclosure of a particular record for a particular purpose, but also to a situation such as that presented here involving the bulk transfer of records where a portion of the data contained in the records transferred would not actually be necessary for the purpose stated in the request. See Department of Justice Memorandum re: Release of payroll information to state and local taxing authorities (March 4, 1976). In its memorandum opinion of March 4, 1976, the Office of Legal Counsel advised that, in its opinion, Federal agencies could under the Freedom of Information Act furnish to state and local taxing authorities Form W-2-type information on their employees including amounts of income and amounts of tax withheld, this latter information pertaining not just to the recipient authority, but also showing the amounts withheld for all other taxing authorities. In examining the question as to whether extraneous information such as withholding amounts for other taxing authorities could be disclosed to a given authority, the Office of Legal Counsel indicated that the Getman and Wine Hobby test must be applied and that some public interest must be found to justify the transfer of unnecessary information. The Office

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of Legal Counsel was not, however, required to inquire into possible public interests to justify the transfer of the withholding information inasmuch as it found that such information could easily have been computed by other taxing authorities from the data which was already available to them. Therefore, no guidance may be drawn from that memorandum concerning the nature of the public interests that might justify the transfer of records in a bulk form.

Although certain items of information appearing in one or more of the files or tape systems which would be furnished to the Social Security Administration and the Health Care Financing Administration, such as an individual's bank account number and private pension information, is information of a sensitive and confidential nature, the great majority of the extraneous data that is included in the systems is of a relatively low degree of confidentiality. In addition, the files and tape systems are, according to your memoranda, used by the Social Security Administration and the Health Care Financing Administration only for the uses stated and are thereafter destroyed. Accordingly, the public interest factor that would justify transfer of information and records beyond that which is actually required need not be of a compelling magnitude to tip the balance under the Getman and Wine Hobby test in favor of disclosure.

The public interest is served by quick and accurate adjudication of claims for benefits and also by reduced administrative costs. It is not clear from your memoranda exactly how much time would be saved in the adjudication of claims and the handling of other matters as a result of being permitted to transfer unedited record files and tape systems to the Social Security Administration and the Health Care Financing Administration; nor is it clear what the extent of the savings in administrative costs would be if such were permitted. It would be my opinion with respect to the records herein in question that if savings in both time and administrative costs resulting from the interagency transfer of complete, unedited files and tape systems would be other than insubstantial, the records and data could be furnished to the Social Security Administration and the Health Care Financing Administration under the Freedom of Information Act exception contained in the Privacy Act.

As I stated earlier in this memorandum, the disclosure of complete files and tape systems to the Social Security Administration and the Health Care Financing Administration might also be permitted under the routine use exception contained in the Privacy Act if the Board were to amend the appropriate routine use descriptions covering the Social Security Administration. Under the Privacy Act agencies must publish an annual notice of the systems of records which they maintain. Agencies are permitted to designate in that notice the "routine use" recipients outside

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the agency to whom the agency plans to disclose particular records. The term "routine use" is defined in section (a)(7) of the Privacy Act as follows:

> "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected."

Although there have not, as yet, been any court decisions interpreting the "routine use" exception, the guidelines published by the Office of Management and Budget do provide some assistance in this area. The guidelines cite the legislative history of the Privacy Act in explaining that the "routine use" exception was included to permit the ordinary uses made of records "that are appropriate and necessary for the efficient conduct of government and in the best interest of both the individual and the public" (Privacy Act Guidelines, 40 Fed. Reg. 28948, 28953 (July 9, 1975)). An analysis of the bill which ultimately became the Privacy Act describes the "routine use" exception, in part, as follows:

> "The compromise definition should serve as a caution to agencies to think out in advance what uses it will make of information. This act is not intended to impose undue burdens on the transfer of information to the Treasury Department to complete payroll checks, the receipt of information by the Social Security Administration to complete quarterly posting of accounts, or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material." (120 Cong. Rec. 21816 (1974)).

Although some of the information contained in the files and tape systems that would be furnished to the Social Security Administration and the Health Care Financing Administration would not be needed by those agencies, it is my opinion that complete files and tape systems could, nevertheless, be furnished to them as a routine use if it is determined that such records could be furnished under the Freedom of Information Act exception as discussed above. Such a determination would be based on a finding that the transfer of complete files and tape systems would be justified from the standpoint of increased efficiency in the administration of certain of the programs under the Social Security Act and expediting services to the public. These are, of course, the concerns which led Congress to add the routine use exception.

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If, upon examination of the degree of complexity that would be involved in editing the files and tape systems in order to segregate the data necessary from that unnecessary you determine that disclosure of the complete files and systems would be permitted under the Freedom of Information Act exception, I would suggest that the appropriate routine use notices be revised so as to authorize the contemplated transfers to the Social Security Administration and the Health Care Financing Administration. Until such time as the amendments become effective, i.e., 30 days after publication, transfer of records to the Social Security Administration and the Health Care Financing Administration could be accomplished under the Freedom of Information Act exception.

In your April 29, 1977, memorandum you also requested my opinion as to whether there would be any restrictions imposed by the Privacy Act on the Social Security Administration with respect to its furnishing to the Board the social security Master Benefit Record.

Under section 7(b)(7) of the Railroad Retirement Act, the Secretary of Health, Education, and Welfare is required to furnish to the Board "reports of wages, self-employment income, and periods of service and of other records in his possession, or which he may secure, pertinent to the administration of" the Railroad Retirement Act. Section 7(b)(7) is expressly limited to records pertinent to the administration of the Railroad Retirement Act. It would appear, therefore, that the Board could not rely on this provision to, in effect, force the Social Security Administration to furnish the entire Master Benefit Record. However, it would seem that the Social Security Administration could furnish to the Board their entire Master Benefit Record under the Freedom of Information Act or the routine use exceptions of the Privacy Act, assuming that it could be shown that the public interest would be sufficiently served by such transfers.

Dale G. Zimmerman
General Counsel

cc: Chief Executive Officer

SAB:das