UNITED STATES GOVERNMENT

Memorandum

RAILROAD RETIREMENT BOARD

April 7, 1975

L-75-114
M-10

TO: Chief Executive Officer

FROM: General Counsel

SUBJECT: Privacy Act of 1974

Public Law 93-579 known as the Privacy Act of 1974 enacted December 31, 1974, will have a substantial impact on record keeping and disclosure by the Board. The important portions of that Act do not, however, become effective until September 27, 1975.

For purposes of this analysis, the Privacy Act of 1974 may be divided into four parts: (1) conditions imposed on agencies with regard to disclosure of an individual's records; (2) an individual's right of access to records which pertain to such individual; (3) responsibilities imposed on an agency with regard to the proper maintenance of records; and (4) civil and criminal actions for violations of the Privacy Act.

CONDITIONS IMPOSED ON AGENCIES WITH REGARD TO DISCLOSURE OF AN INDIVIDUAL'S RECORDS

The Act places quite stringent restrictions on the disclosure of an individual's records to any other person or agency. Generally speaking, such records may not be disclosed without the prior written consent of the individual to whom the records pertain unless disclosure of the record would be--

> "(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
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> "(2) required under section 552 of this title;
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> "(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
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> "(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
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> "(5) to a recipient who has provided the agency with advance adequate written assurance that the record will

be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States 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 law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) 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;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction." (5 U.S.C. § 552a(b).)

The above-quoted provisions permitting disclosure of an individual's records, with the exception of (2) disclosures required under section 552 of title 5 and (3) disclosure of records for "routine use," are self-explanatory. Section 552 of title 5 contains the Freedom of Information Act, the ramifications of which have been discussed in a prior memorandum. The one important point to be drawn from the reference to section 552 disclosures is that anything which cannot be disclosed to an individual or agency under the Privacy Act would be exempted from disclosure under the Freedom of Information Act as personal information the "disclosure of which would constitute a clearly unwarranted invasion of privacy" (5 U.S.C. § 552(b)(6)). The term

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"routine use" is defined as "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." The legislative history of the "routine use" provision leaves its intended scope somewhat questionable. The enacted "routine use" provision was the result of a compromise between the House and Senate versions. During debate on the compromise bill which ultimately was enacted as the Privacy Act of 1974, Senator Ervin entered into the record an Analysis of House and Senate Compromise Amendments to the Federal Privacy Act. That analysis contained the following remarks regarding the "routine use" provision:

> "Where the Senate bill would have placed tight restrictions upon the transfer of personal information between or outside Federal agencies, the House bill, under the routine use provision, would permit an agency to describe its routine uses in the Federal Register and then disseminate the information without the consent of the individual or without applying the standards of accuracy, relevancy, timeliness or completeness so long as no determination was being made about the subject.
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> "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. 21817 (1974).)

The "routine use" provision appears to be broad enough in scope to permit the Social Security Administration to transfer employment and earnings records of individuals to the Railroad Retirement Board. The records transfers mandated by the Railroad Retirement Act sections 7(b)(7) (from the Social Security Administration) and 7(b)(8) (pertaining to military service credits) are clearly covered by the "routine use" provision. A "routine use" transfer of social security records would seem to be appropriate not only for purposes of calculating the social security level benefit under the Railroad Retirement Act of 1974, but also for last person service and earnings restriction policing purposes. The Board would be permitted to transfer like records to the Social Security Administration. With respect to the transfer to agencies of any other types of records

for which the Board has designated a "routine use" by publication in the Federal Register, the Board will be required to examine the request and determine if the intended use by the requesting agency is consistent with the "routine use" of that record by the Board.

Any disclosures made to an agency or an individual other than those made to officers and employees of the Board itself or those required by the Freedom of Information Act must be accurately recorded. The accounting made of such disclosures must include the date, nature, and purpose of each disclosure as well as information regarding the identity of the person to whom the disclosure was made. The accounting of disclosures made, other than those made to a government agency or instrumentality for law enforcement purposes, must be made available to the affected individual upon request. Records of disclosures made must be maintained for at least five years following the date of the disclosure.

The question arises as to whether the Board will be required to maintain "accountings" of the transfers of compensation and service records to the Social Security Administration. The actual meaning of the "accounting" requirement is clarified by the House Report which states as follows:

> "The Committee has used the term 'accounting,' rather than 'record,' to indicate that an agency need not make a notation on a single document of every disclosure of a particular record. The agency may use any system it desires for keeping notations of disclosures, provided that it can construct from its system a document listing of all disclosures." (H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 14 (1974).)

The Board is required under section 7(b)(7) of the Railroad Retirement Act to furnish records of compensation and service to the Social Security Administration in cases where the individual or his survivors do not meet the requirements for benefits under the Railroad Retirement Act. In such a case the compensation and service credited in the records which had been held by the Board actually become creditable under the Social Security Act as wages and service. The procedure is not a true transfer or disclosure of records but is rather a non-physical act by which a record is transformed from the status of one containing information pertinent to the administration of the Railroad Retirement Act to the status of one containing information necessary to the payment of benefits under the Social Security Act. Given the underlying philosophy behind enactment of the Privacy Act, that is to inform the public of the existence and uses of various records, it seems highly unlikely that Congress would have intended the accounting requirements to apply to a statutorily compelled "transfer" of

records. Individuals whose records are "transferred" to the Social Security Administration have notice that such will occur. They will also have notice of the fact that their railroad service and earnings had been transferred because their monthly social security benefits should reflect the transfer. An argument along these lines could certainly be made for exempting the transfers of service and earnings records from the accountability provision.

It is nonetheless my opinion that the Board should establish a system to comply with the accountability requirement for all disclosures and transfers. A discussion with the acting director of data processing and accounts revealed that the Board's computers could be programed to record the transfer of records to the Social Security Administration. On the basis of this discussion it appears that the establishment of such a system while being somewhat of a problem, would not place an undue burden on the Board.

INDIVIDUAL'S RIGHT OF ACCESS TO HIS OR HER OWN RECORDS

The Privacy Act of 1974 provides a new section 552a(d) of title 5 of the United States Code which requires that any agency maintaining a records system must make available, upon request of an individual, any information which such agency has pertaining to the individual. The head of an agency may promulgate rules to exempt certain types of information from that which must be disclosed. However, none of the specified types of information which may be withheld are pertinent to the records maintained by the Board.

The question of importance to the Board with regard to the access provision is whether that provision applies to medical evidence, the disclosure of which is forbidden by the Railroad Retirement Act and Railroad Unemployment Insurance Act. The wording of the access provision is clearly broad enough to include medical evidence, but there is no clear indication that such provision was intended to override a statutory prohibition against disclosure.

The Privacy Act of 1974 adds a new section 552a(f)(3) to title 5 of the United States Code which states that an agency shall promulgate rules to

> "establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him."

Section (f)(3) makes it quite clear that the access provision was intended to apply to medical evidence but it still does not answer the question as to whether that provision was meant to override an express statutory prohibition against disclosing such information. Evidence indicating that the access provision was not intended to override statutory provisions prohibiting the disclosure of medical records may be drawn from the legislative history of that provision. The Senate Report on S. 3418 indicates that the access provision was only intended to override unilateral agency determinations to withhold certain types of records when it states as follows:

> "The Committee recognizes that while many agencies afford such rights, many agencies deny them with respect to certain files. Allowing only these narrow areas for exemption may well promote the reassessment of existing practices whereby individuals are deprived of full access to records about themselves, and some agencies, in the year before the Act takes effect, may well see fit to seek special legislation permitting special treatment of certain files they hold. * * *" (Emphasis added.)

It would seem reasonable to assume that since Congress contemplated the possibility of new legislation to exempt certain types of records or information from disclosure, it would not have intended to, in effect, repeal an already existing prohibitory statute unless it expressly so provided. Indeed in setting forth the purpose of the Privacy Act (see section 2(b) of Public Law 93-579) Congress stated that the Act would permit exemptions from its requirements "only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority." (Emphasis supplied.) Furthermore, in Public Law 93-647, which was enacted at about the same time as the Privacy Act, Congress did specifically override provisions such as section 14 of the Railroad Retirement Act in providing that railroad retirement and social security benefits would be subject to attachment for child support and alimony payments. Presumably, if Congress had, in enacting the Privacy Act, intended to override all specific statutory prohibitions against disclosure of information, it would have likewise included a provision to that effect in the Privacy Act.

The draft guidelines issued by the Office of Management and Budget, however, indicate that, in its view, Congress intended to override statutory prohibitions against disclosure of medical records to the individual on whom the records are kept. Such indication is found in its interpretation of subsection (q) of the Privacy Act which states as follows:

> "No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section."

As stated previously, the section 552 of title 5 referred to in the above-quoted provision contains the Freedom of Information Act. The Freedom of Information Act exempts from disclosure under that Act matters which are exempted from disclosure by another statute. It may be noted in this regard that the Board does not directly rely on any exemption contained in the Freedom of Information Act for withholding medical records but, rather, relies on the non-disclosure provision of section 12(n) for this purpose. The Freedom of Information Act merely provides that information exempted from disclosure by a provision such as section 12(n) need not be furnished under that Act. Nevertheless, if the Office of Management and Budget's interpretation of subsection (q) of the Privacy Act is correct, then it would seem that Congress, in effect, repealed the non-disclosure provision of section 12(n) of the Railroad Unemployment Insurance Act insofar as it applies to the individual on whom the record is kept. In view of the uncertainty existing in this area, it is my recommendation that the question concerning the continued effectiveness of the provision of section 12(n) barring disclosure of medical records be submitted to the Office of Management and Budget for a more definitive opinion.

Section 552a(d)(2) of title 5 of the United States Code makes provision for a procedure whereby an individual may request that an amendment be made in his records. Within 10 working days following the date on which a request for an amendment of a record is made, an agency must acknowledge receipt of the request and promptly either make the amendment or inform the individual that the request was denied, the reason for the denial, and the procedure which may be followed to request a review of the denial.

If the individual requests a review of the denial, the head of the agency, or his designee, must review the denial and issue an opinion regarding the request within 30 working days. If the denial is upheld, the individual must be permitted to file a detailed statement of his reasons for disagreeing with the statement and he must be informed of his rights to judicial review.

RESPONSIBILITIES IMPOSED ON AN AGENCY WITH REGARD TO THE PROPER MAINTENANCE OF RECORDS

The Privacy Act of 1974 includes provisions intended to foster a greater diligence on the part of agencies to maintain accurate and up-to-date records. Agencies may maintain in their records systems only

that information which is relevant and necessary to accomplish the purposes or goals of the agency. Employees who handle any personal records must be fully informed as to the proper means by which to carry out their jobs and agencies must establish safeguards to protect the records which they maintain.

The Act also sets forth certain requirements which must be followed by agencies in the gathering of information. Agencies are directed to collect information as much as possible from the individual involved. In obtaining information directly from individuals, agencies must inform such individuals of the authority under which the information is sought, the purposes for which the information is sought, any routine uses for which the information may be used, and the effects on the individual should he refuse to supply the information.

The Board will be required to publish in the Federal Register at least annually the following information regarding the records systems which it maintains:

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system."

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All agencies are required to promulgate rules and regulations which will comply with and carry out the provisions of the Privacy Act.

CIVIL AND CRIMINAL ACTIONS FOR VIOLATIONS OF THE PRIVACY ACT

The Privacy Act of 1974 subjects agencies which fail to comply with the provisions of the Act to civil actions which may be brought in the United States district courts by the wronged individual. In a case where the individual is, in effect, appealing an agency denial of access to his own records or a refusal to correct a record, the court will hear the case de novo. With respect to access cases, the burden of proof is on the agency to show why its denial should be upheld. The court may assess court costs and attorney's fees against the United States where the individual substantially prevails. Actions brought against the agency for failure to maintain accurate and fair records may result in liability for actual damages as well as attorney's fees and court costs, if the court finds the agency acted in a willful or intentional manner.

The Act also provides criminal penalties, with fines up to $5,000, in cases where it is found that an officer or employee of the agency knowingly acted in a manner violative of the Privacy Act.

The remainder of the Act is devoted to the authorization for and powers of a Privacy Protection Study Commission and other matters which, with one exception, are of no real importance to the Board.

The exception referred to above relates to the use of an individual's social security number by governmental agencies. Section 7 of Public Law 93-579 provides as follows:

> "(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
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> "(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--
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> "(A) any disclosure which is required by Federal statute, or
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> "(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence

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and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

Although there is no express statement in the Railroad Retirement Act or in the Board's regulations requiring an individual to furnish his social security number, both section 10(b)4 of the Railroad Retirement Act of 1937 (which was the provision of law in effect prior to January 1, 1975) and section 7(b)(6) of the Railroad Retirement Act of 1974 require the furnishing of such information as is necessary to the administration of the Act. Since an individual's social security number, not just any identifying number, is absolutely essential for this purpose, it is clear that the above-quoted section 7 does not prevent the Board from requiring an individual to furnish his social security number.

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