

# Intersection of FOIA and Privacy

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## Background

Since the Privacy Rights Clearinghouse began tracking privacy incidents in 2005, 561,341,962 records have been breached. Risks from a privacy incident include financial, reputational and other harm. The most common form of financial harm is identity theft. The FTC describes identity theft:

Identity theft occurs when someone uses your personally identifying information, like your name, Social Security number, or credit card number, without your permission, to commit fraud or other crimes.

The FTC estimates that as many as 9 million Americans have their identities stolen each year. In fact, you or someone you know may have experienced some form of identity theft.

The crime takes many forms. Identity thieves may rent an apartment, obtain a credit card, or establish a telephone account in your name. You may not find out about the theft until you review your credit report or a credit card statement and notice charges you didn't make—or until you're contacted by a debt collector.

Identity theft is serious. While some identity theft victims can resolve their problems quickly, others spend hundreds of dollars and many days repairing damage to their good name and credit record. Some consumers victimized by identity theft may lose out on job opportunities, or be denied loans for education, housing or cars because of negative information on their credit reports. In rare cases, they may even be arrested for crimes they did not commit. <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html>

Identity thieves are amazingly resourceful, clever and innovative. They are able to steal identities today from shreds of information. Information that previously was considered safe is now a commodity on the black market.

West Virginia has taken steps to protect its citizens' privacy. In 2006, former Governor Manchin issued Executive Order No. 6-06 that established the West Virginia Executive Branch Privacy Program. This Order requires the Privacy Program to "balance individuals' right of privacy against others' need and right of access to confidential and personally identifiable information." Governor Tomblin recognized the Order by Proclamation earlier this year. Additionally, in 2008, the West Virginia Legislature established a privacy imperative through its enactment of a breach notification law which requires notification of a breach of the security of a system to impacted individuals. This law is designed to put impacted individuals on notice of the loss of personal information that could lead to identity theft or other financial damage. Further, the West Virginia Attorney General's Office, Consumer Protection Division, was recently authorized to enforce HIPAA Privacy Rules and took action last year with respect to a local health care facility's privacy breach.

### What is privacy?

The West Virginia Executive Branch defines Privacy as "the appropriate use and disclosure of PII under the circumstances. What is appropriate will depend on context, law and individual's expectations. . ." As required by Executive Order and other law, privacy and FOIA go hand in hand. While private business can quickly respond to evolving threats to privacy, government can only refuse disclosure of private information where it is allowed to do so under law.

The West Virginia Executive Branch Privacy Policies ("Policies") establish a framework for its agencies to use to safeguard both citizens and employee's private information. <http://www.privacy.wv.gov/privacypolicies/Pages/default.aspx> All departments within the Governor's Executive Branch are required to implement these policies. Implementation of this framework covers the collection, use, disclosure, retention and destruction of personally identifiable information or PII. PII is all information that identifies, or can be used to identify, locate, contact, or impersonate a particular individual, such as a SSN, driver's license number or credit card number. PII also includes Protected Health Information (PHI), such as your medical record, regulated by HIPAA.

### FOIA and Privacy

FOIA directly impacts the disclosure of PII. The WV FOIA allows all persons the right to inspect or copy any public record of a public body, except as expressly provided by a

listed exemption. W. Va. Code § 29B-1-3(1).<sup>1</sup> There are two exceptions to this general right of inspection that apply to PII. First, W. Va. Code § 29B-1-4(a)(2), provides an exemption to information of personal nature. Second, W. Va. Code § 29B-1-4(a)(5), gives an exemption to information specifically exempted from disclosure by statute.

The West Virginia Privacy Policy re Minimum Necessary and Limited Use sets the standard for limiting the collection and disclosure of PII. This policy states that the disclosure of PII to third parties must be restricted to the elements of PII that are reasonably needed by the third party to accomplish the purpose of the disclosure, or otherwise permitted by law.

Therefore, the first step in the FOIA/Privacy review for disclosure is to determine whether any PII is part of the public record that is the subject of the FOIA. Next, determine whether the requestor is really asking for the PII or whether the PII is in the record and only incidental to other information that the requestor wants. If the requestor is not interested in the PII, it is recommended that it be redacted, as all PII contains risk. If the requestor actually wants the PII, then you need to evaluate whether one of the exceptions applies. It is actually easiest to start with the second applicable exception – where disclosure is exempted by statute.

#### Information Specifically Exempted by Statute

Where there is a specific law that prohibits disclosure of PII, those elements of PII must be redacted from a public record before it is produced pursuant to FOIA.

West Virginia law requires different protections for state employees and citizens' privacy. W. Va. Code § 5A-8-21 limits the release of certain personal information maintained by state agencies and entities regarding state employees in their capacity as state employees. The information is deemed confidential and includes an individual's home address, social security number, credit or debit card number, driver's license identification number and that individual's marital status or maiden name. Protection for citizens generally is more limited. Under W. Va. Code § 5A-8-22, disclosure of an individual's social security number or an individual's credit and debit card number is prohibited. Both statutes restrict the disclosure to non-governmental entities, unless authorized by federal law or legislative rule.

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<sup>1</sup> A public body, as defined under FOIA, includes every state officer, agency, department, including legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority. W. Va. Code § 29B-1-2(3). Public record includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body. W. Va. Code § 29B-1-2(4).

Another example of a law that protects specific identifiers is HIPAA. If there are other laws that protect PII that apply to your agency, you should identify them and redact all applicable PII. A good resource is the West Virginia Executive Branch Privacy Requirements which can be found at: <http://www.privacy.wv.gov/privacy-program/Documents/Privacy%20Requirements%202011.pdf>

#### Information of a Personal Nature

If there are remaining elements of PII specifically requested under a FOIA that are not prohibited from disclosure by law, then the agency's FOIA administrator should evaluate the application of the second exemption listed under WV FOIA, which exempts from disclosure the release of "information of a personal nature such as that kept in a personal, medical, or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." W. Va. Code § 29B-1-4(a)(2).

The West Virginia Supreme Court, in *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986), provides a five-factor test to be used to decide whether public disclosure of private information would constitute an unreasonable invasion of privacy:

- 1) Whether disclosure would result in a substantial invasion of privacy and, if so, how serious.
- 2) The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
- 3) Whether the information is available from other sources.
- 4) Whether the information was given with an expectation of confidentiality.
- 5) Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Application of this balancing test will necessarily involve an assessment of the relevant privacy risks to the specific PII requested. This assessment should be timely and completed with each FOIA request, as risks change in this ever evolving world of the Internet and electronic information.

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