

FECA & The Privacy Act

UNITED STATES DEPARTMENT OF LABOR



The Privacy Act

DESIGNED TO

- Balance government's need for information against individuals' right to privacy.

APPLIES TO

- Records retrieved by name or other identifying particular assigned to an individual

PREVENTS DISCLOSURE OF THE RECORD

- To people other than the individual who is the subject of the record, except pursuant to certain exceptions.

5 U.S.C. 552a(a)(4): The term record means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history...

5 U.S.C. 552a(a)(5): The term "system of records" means a group of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

FECA Records

Federal Employees' Compensation Act (FECA) Workers' Compensation Records are

CONFIDENTIAL RECORDS

Subject to the Privacy Act

20 C.F.R. § 10.10 - All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974 or under the routine uses provided by DOL/GOVT-1 if such release is consistent with the purpose for which the record was created.

FECA Records

► What is a FECA Record?

- Entire OWCP claim files
- Documents within OWCP claim files
 - Documents originating from the FECA claims process
 - Documents created for the purpose of administering FECA claims
 - Documents/information collected pursuant to DOL's statutory authority to administer FECA claims
- Information retrieved from these documents, even if set down in another format (e.g., an agency report describing FECA records)

5 U.S.C. § 552a – any record which is contained in a system of records—a group of records under control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other “identifying particular” (e.g., OWCP claim file numbers) assigned to the individual.

FECA Records

► What is a FECA Record?

► EXAMPLES:

- Claim forms (CA-1s, CA-2s, CA-7s, etc.)
- Claim decisions
- Correspondence and phone call records
- Medical reports when retrieved from a FECA claim file or obtained by the employing agency as part of its role in administering the FECA claim, such as for return-to-work efforts
- FECA information in other documents such as OIG reports, emails, or other communications needs to be **redacted** because it is Privacy-Act protected information that has been retrieved from the file and set down in another format.

5 U.S.C. § 552a – any record which is contained in a system of records—a group of records under control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other “identifying particular” (e.g., OWCP claim file numbers) assigned to the individual.

FECA Records

ALL FECA RECORDS, INCLUDING EMPLOYING AGENCY COPIES, ARE:



Official OWCP Records Controlled by OWCP

Therefore, OWCP's Privacy Act policies apply both to the original file and to agency copies of FECA documents.

20 C.F.R. § 10.11 – All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT-1 (OWCP, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT-1 are official records of OWCP.

FECA Records

FECA Records may only be disclosed in accordance with:

The Privacy Act of 1974

DOJ OLC Opinion – “In light of the importance of FECA records to the processing and adjudication of claims, DOL reasonably concluded that the question of when and how to disclose FECA records ‘aris[es] under’ FECA, and falls within the Secretary’s jurisdiction. . . . DOL has authority to control the disclosure of FECA records. . . .”

See https://www.justice.gov/sites/default/files/olc/opinions/2012/11/31/ctrl-discl-feca-recs_0.pdf.

The No Disclosure Rule

- ▶ The Privacy Act's general rule is that there can be no disclosure of protected records (i.e., FECA claim documents/information) to someone other than the record's subject (i.e., the FECA claimant) without that person's consent.
- ▶ This includes both written **and** oral disclosures of protected information.
- ▶ The Privacy Act provides **exceptions** to this general rule, discussed on the following slides.

5 U.S.C. § 552a – “No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . .”

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Exception 1: Disclosure with Consent



- ▶ **Consent** → Is there a valid signed waiver from the FECA claimant that authorizes disclosure of the FECA file?

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PRIVACY ACT AUTHORIZATION AND WAIVER

I, _____, authorize the U.S. Department of Labor's
Office of Workers' Compensation Programs and the Department of Veterans' Affairs
(VA) to disclose to the following recipient individuals and/or
entities: _____
any information regarding my claim for compensation filed under the Federal Employees'
Compensation Act, OWCP File No. _____

Recipient mailing address(es):

Recipient email address(es): _____.

This authorization is effective on the date it is signed and is effective for 365 days from
the date of the signature below.

A copy of this authorization shall have the same force and effect as the signed original.

Signature of Claimant

Name of Claimant

Date: _____

A valid waiver must contain
the following:

- ▶ Who can disclose the records (here the VA, OWCP)
- ▶ To whom the records are to be disclosed
- ▶ OWCP claim number(s)
- ▶ Claimant signature

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EXCEPTION 2: COURT ORDER

- ▶ Order must be signed by a judge (subpoena not sufficient)
- ▶ Order must be from a federal court (state court not sufficient)
- ▶ The order should weigh the need for disclosure in the litigation against the privacy interests at stake.

5 U.S.C. § 552a(b)(11) – No disclosure without consent “unless disclosure of the record would be . . . pursuant to the order of a court of competent jurisdiction.”

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EXCEPTION 3: ROUTINE USE



- ▶ Compatibility Required – Requestor's use of the FECA records must be compatible with the purpose for which the information was collected—the processing/administering of FECA claims.
- ▶ The request must also fall into an OWCP-delineated routine use, which are set forth in OWCP's guidance document, DOL/GOVT-1.

5 U.S.C. § 552a(a)(7), (b)(3) – No disclosure without consent “unless for a routine use,” defined as “the use of such record for a purpose which is compatible with the purpose for which it was collected.”

DOL/GOVT-1

Routine Uses

- ▶ The routine uses for FECA records are listed in the System of Records Notice (SORN) DOL/GOVT-1; some are also found in DOL's Universal Routine Uses SORN (universal routine uses apply to **all** types of DOL records, including FECA records).
- ▶ **DOL has the authority to determine if a routine use applies**, *not* the agency seeking permission to disclose a record. If there is any doubt, consult OWCP and/or DOL's Office of the Solicitor (**SOL/FEWC**).
 - ▶ DOL/GOVT-1 SORN and DOL Universal Routine Uses – <https://www.govinfo.gov/content/pkg/PAI-2023-DOL/xml/PAI-2023-DOL.xml#routine>
 - ▶ See also 81 Fed. Reg. 47,418 (July 21, 2016).

DOL/GOVT-1

Routine Use Examples

- ▶ To the employing agency at the time of injury to verify billing, check the status of the claim, consider rehire, evaluate its safety and health program, etc. (b).
- ▶ To potential employers for return to work consideration (c).
- ▶ To rehabilitation agencies for evaluation (d).
- ▶ To physicians for use in treating the claimant (e).
- ▶ To health insurance or medical plans for clarification of billing responsibility (f).
- ▶ To labor unions assisting the employee before OWCP (g).
- ▶ To the employing agency OIG for investigating FECA fraud (s).
- ▶ To agencies including DOJ when they are asserting a litigation defense based on FECA exclusivity or defending an FTCA claim based on the same incident (b).

DOL/GOVT-1

Routine Uses Disclosures Are Limited

- ▶ When OWCP or an agency releases parts of a FECA claim file pursuant to a routine use, they can only release that part of the record that is needed to meet the routine use—in other words, the **least amount** necessary to meet the requester's need.
 - ▶ **Example #1** → The treating physician needs the medical on file to treat the claimant, but doesn't need the claimant's direct deposit information.
 - ▶ **Example #2** → The claimant's supervisor needs to know the claimant's work restrictions to facilitate return to work, but doesn't need the claimant's full detailed medical reports.
- ▶ It is a violation of the Privacy Act to disclose any information not covered by the routine uses to anyone. When in doubt, **contact OWCP!**

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- ▶ EXCEPTION 4: Other statutory exceptions exist, though are rarely used. Some include:
 - ▶ To Census Bureau
 - ▶ Aggregate data for statistical purposes
 - ▶ Congress
 - ▶ For compelling health or safety reasons (as determined by DOL)
 - ▶ For criminal law enforcement activity (as determined by DOL)
 - ▶ To **DOL sub-agencies only** when the record is needed as part of the performance of official duties (agency “need to know”)

Penalties

Criminal:

- If a federal employee discloses protected information.
- Government can prosecute (no private right of action).

Civil:

- Claimant can bring suit against the agency that violated the Act.

5 U.S.C. § 552a(i) – Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited...and who...willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

5 U.S.C. § 552a(g)(1) – Whenever any agency...fails to comply with any...provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency...

Human Resources

No Disclosure for EEO, MSPB, Personnel, Disciplinary, or Other Administrative Matters

Employing Agency Handbook (CA-810), Chapter 9-2:

- ▶ You cannot “use copies of information from claim files in connection with EEO complaints, disciplinary actions or other administrative actions without the employee’s consent.”
- ▶ It is longstanding OWCP policy that documents in the FECA file may not be made available to, or used by, agency human resources officers for any kind of personnel action, and this generally includes termination procedures.
- ▶ There is a rare exception where the EEOC/MSPB complaint involves an aspect of the handling of the FECA claim itself—where the action being challenged is one that relates to FECA. **Consult DOL/SOL/FEWC to see if this exception applies.**
- ▶ Otherwise, have the adjudicating body require the claimant to sign a waiver as part of the discovery/investigatory process or to provide their own records.

Human Resources

What, if any, FECA file information can the EA workers' comp staff provide to HR?

- ▶ Disclosure is permissible only where it involves agency management of the FECA claim (compatibility).
- ▶ **Routine Use (b)** – allows for disclosure to “Federal agencies that employed the claimant at the time of . . . injury . . . in order to verify billing, to assist in administering FECA, to answer questions about the status of the claim, to consider rehire, retention or other actions the agency may be required to take with regard to the claim.”
- ▶ If HR requests FECA file information for any purpose other than processing/administering the FECA claim, then disclosure is not permissible (compatibility).

Examples

- OIG -> **Yes**, if investigating FECA fraud.
- Occupational Safety and Health -> **Yes**, with limitations (not the whole file).
- Supervisor -> **Yes**, for Return to Work purposes, and only limited parts of the file such as work restrictions.
- EEO Investigator -> **No**, not without waiver.
- Union representative -> **Yes**, but only if representing the claimant before OWCP.
- Adverse personnel action -> **No**.
- Agency attorney -> **No**, unless assisting with the handling of the claim itself, or defending an FTCA action with a FECA exclusivity argument.*

* Please consult with SOL/FEWC if your agency has a Federal Tort Claims Act (FTCA) case involving an injury that may be covered by FECA.

RESOURCES

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Main DOL Privacy Act Systems Page

<https://www.dol.gov/agencies/sol/privacy/>

DOL/GOVT-1 Systems Notice

<https://www.govinfo.gov/content/pkg/PAI-2023-DOL/xml/PAI-2023-DOL.xml#govt1>

DOL Universal Routine Uses

<https://www.govinfo.gov/content/pkg/PAI-2023-DOL/xml/PAI-2023-DOL.xml#routine>