

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2009-0068]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a Department of Homeland Security system of records entitled the “Department of Homeland Security/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective October 1, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues, please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, 74 FR 2903, January 16, 2009, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system. The DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property

Owned or Occupied by the Department of Homeland Security system of records notice was published concurrently in the **Federal Register**, 74 FR 3088, January 16, 2009, and comments were invited on both the notice of proposed rulemaking and system of records notice. Public comments were received on the notice of proposed rulemaking and the system of records notice.

Public Comments

DHS received two public comments on the notice of proposed rulemaking and one public comment on the system of records notice.

The two public comments received on the notice of proposed rulemaking were in support of the use of exemptions for this system of records noting that exemptions are needed at times to refrain from informing those who may be criminally or civilly prosecuted that may tamper with the investigation. Permitting access to certain documents would disclose information that would put homeland security at risk. Further, public comments stated that classified information must be safeguarded in order for DHS to operate efficiently. DHS concurs with these two public comments on the notice of proposed rulemaking and further establishes the rationale to make this proposed rule final.

The one public comment received on the system of records notice focused on concern over the Department collecting “bias-related” information unless the public has an opportunity to see what criteria are utilized to establish the bias, the bias-ratings, and the groups which the Federal government seeks to monitor. The Department is unsure of what the author means by “bias-related” information. Information collected will only be within the parameter of this authority, by those delegated the authority from the Secretary of Homeland Security, without a premeditated bias-related focus. The purpose of this system is to maintain and record the results of law enforcement activities in support of the protection of property owned or occupied by DHS. The Secretary of Homeland Security was given this authority through the Homeland Security Act of 2002. The Department will appropriately safeguard all information collected pursuant to this system of records notice. DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.
 ■ For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 et seq.; Pub. L. 107-296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. In Appendix C to Part 5, add a new paragraph 38 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

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38. The DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system of records consists of electronic and paper records and will be used by DHS and its components. The DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory

violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: September 23, 2009.

Mary Ellen Callahan,
Chief Privacy Officer, Department of
Homeland Security.

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2009-0066]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL—017 General Legal Records System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a

Department of Homeland Security system of records entitled the “Department of Homeland Security/ALL—017 General Legal Records System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/ALL—017 General Legal Records system from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective October 1, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues, please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, 73 FR 63084, October 23, 2008, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/ALL—017 General Legal Records system. The DHS/ALL—017 General Legal Records system of records notice was published concurrently in the **Federal Register**, 73 FR 63175, October 23, 2008, and comments were invited on both the notice of proposed rulemaking and system of records notice. Comments were received on the notice of proposed rulemaking and no comments were received on the system of records notice.

Public Comments

DHS received one comment on the notice of proposed rulemaking. The comment received focused on the expansiveness of the exemptions, specifically subsection (e)(2) “Collection of Information from Individuals.” The public comment recommended that DHS rely on the Freedom of Information Act (FOIA) when screening information for release and not Privacy Act exemptions because the FOIA would potentially allow for higher probability of information release. Although the comment was intended to be helpful, current FOIA processing practices eliminate the requester’s concern. If a first party requester makes a request for records under the Privacy Act and those records are exempt from disclosure,

DHS will automatically process that request under the FOIA. Should the record be releasable under FOIA, despite not being releasable under the Privacy Act, the record will be released to the first party requester. This is consistent with Department of Justice guidance and directives, including the Overview of the Privacy Act of 1974, 2004 Edition (<http://www.usdoj.gov/oip/1974indrigacc.htm>). The same commenter observed that the notice in question states that “applicable exemptions may be waived on a case by case basis.” This is standard language for all proposed and final exemptions at DHS to ensure that where it is possible to release records, DHS will do so. In application to this system of records, though, the commenter acknowledges the legitimate need to exempt some records due to national security, investigations, and other reasons, but that other records would not be of such concern such as records relating to “foreclosures, titles to property, copies of petitions filed with DHS, and some records of discrimination.” The commenter is concerned that DHS could refuse record requests for the latter types of records by simply including them in this exempted system of records notice.

The process in place to review records, to ensure they meet specifically requested records, today addresses the comments.

DHS carefully reviewed the public comment received on the notice of proposed rulemaking and the recommendations within the public comment. DHS has determined that since this system is to assist DHS attorneys in providing legal advice to DHS senior leadership and management on a wide variety of legal issues, to collect the information of any individual who is, or will be, in litigation with the Department, as well as the attorneys representing the plaintiff(s) and defendant(s), it is important that the exemptions remain in place. DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

■ For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq.; 5 U.S.C. 301.