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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0051]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL–029 Civil Rights and Civil Liberties Records System of Records

AGENCY: Privacy Office, DHS.

AGENCY: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, “Department of Homeland Security/ALL–029 Civil Rights and Civil Liberties Records System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the “Department of Homeland Security/ALL–029 Civil Rights and Civil Liberties Records System of Records” 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 July 26, 2011.

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

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking (NPRM) in the **Federal Register**, 75 FR 39184, July 8, 2010, 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–029 Civil Rights and Civil Liberties Records System of Records. The DHS/ALL–029 Civil Rights and Civil Liberties Records system of records notice (SORN) was published concurrently in the **Federal Register**, 75 FR 39266, July 8, 2010, and comments were invited on both the NPRM and SORN.

Public Comments

DHS received one comment on the NPRM and one comment on the SORN.

NPRM

Public Comment: The commenter asked that DHS “consider then the longevity of your agency’s [DHS] decision to classify civil rights records; pent up negativity tends to torrentially destroy future objectives, and undermines the legitimacy of the work done to bring justice to those who deserve its retribution.”

DHS Response: DHS is not seeking, through the proposed rule, to classify civil rights records. Rather, DHS has exempted certain records within this system of records from release under the Privacy Act because they are classified records, investigatory records compiled for law enforcement purposes, records related to the protection of the President and others, and investigatory records used for employee and contractor suitability determinations.

SORN

Public Comment: The commenter noted that “many persons affected by these programs are afraid to complain about misconduct because they fear that the personally identifying information that they provide will not be kept confidential or that they will be retaliated against by the agencies about which they complain. The SORN does nothing to alleviate these fears. In fact, it makes explicit that identifying information will be shared among government agencies, including state and local agencies. This was a missed opportunity to ensure that complaints may be made without fear of reprisal. It does not provide any meaningful opportunity for complainants to learn the results of their complaints.”

DHS Response: The purpose of a Privacy Act SORN is to provide reasonable notice to the public on information that the Department is collecting, maintaining, and retrieving

by personal identifier related directly to an individual in an agency system. The purpose is also to state the purpose, information on records and individuals covered, information sharing with other entities, records retention, and redress on information within that system. It is not intended to be a mechanism for complainants to learn the results of their complaints. There is a separate process for that. Information received within these systems of records must be protected by government agencies as outlined in statutes, executive orders, regulations, and DHS policy; in this case, records related to civil rights and civil liberties. There are limits to sharing information in a Privacy Act system of records, this includes between Federal, state, and local agencies including law enforcement. Sharing must be done in accordance with the routine uses in the Privacy Act system of records as published in the **Federal Register**. Routine uses apply to information sharing external to DHS. The term “routine use” is defined, with respect to the disclosure of a record, as the use of such record for a purpose which is compatible with the purpose for which the record was collected. This ensures the public receives adequate notice of the Department’s planned uses of the information in the system of records.

DHS will implement this 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, revise paragraph 2 to read as follows:

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

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2. The DHS/ALL–029 Civil Rights and Civil Liberties Records System of Records consists of electronic and paper records and

will be used by DHS and its components. The DHS/ALL-029 Civil Rights and Civil Liberties Records System of Records 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 thereunder; national security and intelligence activities; and protection of the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. The DHS/ALL-029 Civil Rights and Civil Liberties Records System of Records 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 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), (k)(3), 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 individual who is the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that 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 individual who is the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that 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 unreasonable administrative burden by requiring investigations to be continually 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.

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Dated: June 9, 2011.

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-2011-0054]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security National Protection and Programs Directorate—001 National Infrastructure Coordinating Center 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 newly established system of records titled, "Department of Homeland Security/National Protection and Programs Directorate—001 National Infrastructure Coordinating Center Records System of Records" from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the "Department of Homeland Security/National Protection and Programs Directorate—001 National Infrastructure Coordinating Center Records System of Records" from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement

requirements. The Department will not claim Privacy Act exemption (k)(3) as originally published in the Notice of Proposed Rulemaking.

DATES: *Effective Date:* This final rule is effective July 26, 2011.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Emily Andrew (703-235-2182), Senior Privacy Officer, National Protection and Programs Directorate, Department of Homeland Security, Washington, DC 20525. For privacy issues please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS), National Protection and Programs Directorate (NPPD), published a notice of proposed rulemaking (NPRM) in the **Federal Register**, 75 FR 69603, on November 15, 2010, 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/NPPD—001 National Infrastructure Coordinating Center (NICC) Records System of Records. The DHS/NPPD—001 NICC Records system of records notice (SORN) was published concurrently in the **Federal Register**, 75 FR 69693, November 15, 2010, and comments were invited on both the NPRM and SORN. The Department will not claim Privacy Act exemption (k)(3) as originally published in the NPRM.

Public Comments

DHS received one set of public comments from the Electronic Privacy Information Center (EPIC). Comments submitted for the NPRM and SORN were identical. Each comment is outlined below followed by the Department's response.

1. By exempting this system of records from certain provisions of the Privacy Act, DHS is contravening the purpose of the Act.

Comment: EPIC urged DHS to limit its exemptions from the Privacy Act's provisions, including 5 U.S.C. 552a(c)(3), which entitles individuals to an accounting of disclosures of their records, stating that individuals should be able to know, after an investigation is completed or made public, the information stored about them in the system. Further, EPIC wrote that because information from informants may be used to initiate investigations,