

[Federal Register Volume 78, Number 226 (Friday, November 22, 2013)]
[Rules and Regulations]
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From the Federal Register Online via the Government Publishing Office [www.gpo.gov]
[FR Doc No: 2013-27896]

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Rules and Regulations

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2011-0047]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection--001 Alien File, Index, and National File Tracking 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 an updated and reissued system of records titled, ``Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection--001 Alien File, Index, and National File Tracking System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the 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 November 22, 2013.

FOR FURTHER INFORMATION CONTACT: For general questions about this system of records please contact: Donald K. Hawkins (202) 272-8000, Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue NW., Washington, DC 20529. For privacy issues please contact: Jonathan R. Cantor (202) 343-1717, Deputy Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP) published a notice of

proposed rulemaking in the Federal Register, 76 FR 34177 (June 13, 2011), 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/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking System of Records. The DHS/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking System of Records Notice was published concurrently in the Federal Register, 76 FR 34233 (June 13, 2011), and comments were invited on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

Public Comments

DHS received two public comments regarding the NPRM and one public comment regarding the SORN.

NPRM

DHS received comments from two individuals regarding the DHS/USCIS-ICE-CBP-001 NPRM. We have determined not to make any changes to the Final Rule based on the comments but have made some non-substantive edits for clarity and consistency. Both commenters expressed concerns about DHS exempting records without justification. Pursuant to the Privacy Act of 1974, DHS exempts these records from the access and amendment provisions of the Privacy Act because they may contain classified and sensitive unclassified information related to intelligence, counterterrorism, homeland security, and law enforcement programs. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

One commenter had several additional concerns. This commenter contended that individuals are not properly notified about the extent to which their information may be shared. DHS indicates on all information collection forms that the information will be shared pursuant to the routine uses listed in the appropriate SORN. DHS informs the public that as part of collecting the information in the Alien File, information may be shared for immigration, law enforcement, and national security purposes.

The commenter expressed concern that the new routine uses exceed the purposes of the original collection of information, weakening the privacy protections of the system. DHS is providing this updated list of routine uses to better inform the public about the typical uses of information contained in the Alien File. The Alien File provides a central location for information to address several immigration and law enforcement needs. Because of the nature of the immigration lifecycle, this information must be available for several purposes consistent with the original collection. Information is necessary not just to adjudicate the requested benefit, but also provide information for law enforcement purposes and normal agency functions. The commenter expressed concern about the use of this information for audit purposes, but such a routine use is necessary to ensure the integrity of the immigration system and evaluate DHS's performance.

The commenter expressed concern about DHS reviewing requests for information pursuant to the Privacy Act on a case-by-case basis, because it is an inefficient method for reviewing requests. DHS reviews requests for information on a case-by-case basis to prevent information from being withheld categorically. When the release of information will not interfere with the purposes of an exemption, DHS will release the information. System-level exemptions do not permit the

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individualized attention afforded by a case-by-case review, and would result in information being needlessly withheld.

The commenter expressed concern that the system does not embody the Fair Information Practice Principles (FIPPs). As is evident from the SORN and the above, DHS implements the FIPPs in developing all of its systems of records. DHS provides transparency through notice to the public describing the records it maintains about individuals; provides individual participation by collecting information directly from the individual whenever possible; provides purpose specification and use limitation by enumerating the general purposes and routine uses of the information; provides data minimization by limiting the amount of and

time data is retained; provides data integrity by correcting and updating information and providing redress; and implements security and auditing controls.

The commenter recommended DHS require any agency requesting records from this system complete a Privacy Impact Assessment (PIA). Generally, the E-Government Act of 2002 requires federal agencies to perform a PIA when information technology is involved in collecting, using, or maintaining personally identifiable information from the public. DHS does not evaluate the application of the E-Government Act to another agency's request for records from this system and does not require other agencies to perform PIAs. However, DHS requires each agency that receives information from the Alien File to demonstrate a proper need to know the information consistent with Privacy Act exceptions and routine uses and agree to terms of use safeguarding the information. Accordingly, DHS believes that it takes adequate steps to ensure that information from the Alien file is afforded adequate privacy protections when it is disclosed to another agency.

SORN

DHS received one comment about the DHS/USCIS-ICE-CBP-001 SORN expressing frustration with the public comment process and with the general state of immigration in the United States. DHS acknowledges the commenter's frustration.

After consideration of public comments, DHS will implement the rulemaking as proposed with minor grammatical changes.

List of Subjects in 6 CFR Part 5

Freedom of Information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

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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.

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2. In Appendix C to Part 5, add paragraph 70 to read as follows:

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

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70. DHS/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking System of Records consists of electronic and paper records and will be used by USCIS, ICE, and CBP. DHS/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking 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; and national security and intelligence activities. DHS/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking 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, territorial, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2): 5 U.S.C. 552a(c)(3) and (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12), (f), (g)(1), and (h). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(2): 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections may be 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) and (4) (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 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 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 subsection (e) (2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e) (3) (Notice to Individuals) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses, DHS employees, or confidential informants.

(f) 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, potential witnesses, and confidential informants.

(g) From subsection (e) (5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e) (5) would impede DHS officials' ability to effectively use their investigative training and exercise good judgment to both conduct and report on investigations.

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(h) From subsection (e) (8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (e) (12) (Computer Matching) if the agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(j) From subsection (g) (1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act. (k) From subsection (h) (Legal Guardians) if the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, is acting on behalf of the individual.

Dated: October 28, 2013.
Jonathan R. Cantor,

Deputy Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2013-27896 Filed 11-21-13; 8:45 am]
BILLING CODE 9111-97-P