

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.

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 39 to read as follows:

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

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39. The DHS/ALL—017 General Legal Records system of records consists of electronic and paper records and will be used by DHS and its components. The DHS/ALL—017 General Legal 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—017 General Legal 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 the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g), pursuant to exemption 5 U.S.C. 552a(j)(2). Additionally, 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), (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) 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 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 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 an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (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.

(g) From subsection (e)(5) (Collection of Information) because in 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 (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' 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 (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

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-2009-0069]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL—023 Personnel Security Management 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—023 Personnel Security Management System of Records" from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/ALL—023 Personnel Security Management 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.