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Part V

Department of Homeland Security

6 CFR Part 5

**Privacy Act of 1974: Implementation of
Exemptions; Final Rules**

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2009-0045]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information 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/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology system of records entitled the “Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information 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 December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Paul Hasson (202-298-5021), Privacy Officer, U.S. Visitor and Immigrant Status Indicator Technology, Washington, DC 20598. For 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**, 72 FR 46921, August 22, 2007, 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/National Protections and Programs Directorate (NPPD)/U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT)—001 Arrival and Departure Information system. The DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records notice was published concurrently in the **Federal Register**, 72 FR 47057, August 22, 2007. Comments were invited on both the notice of proposed rulemaking and the system of records notice. Public comments were received on the notice of proposed rulemaking and system of records notice.

Comments on the Notice of Proposed Rulemaking

DHS received eleven comments on the notice of proposed rulemaking (NPRM) (72 FR 46921, August 22, 2007) and seven comments on the system of records notice (SORN) (72 FR 47057, August 22, 2007). The NPRM and SORN received identical comments twice from the same two individuals. One comment was related to permanent resident alien cards and is unrelated to the proposed rulemaking. Two additional comments contained individuals’ personal opinions on DHS’ status within the Federal government that are unrelated to the proposed rulemaking. Several other commenters complained of the Department’s use of Privacy Act exemptions under the Freedom of Information Act (FOIA). The SORN and NPRM relate to the Privacy Act and not FOIA. The proposed exemptions are standard law enforcement and national security exemptions currently being exercised by a large number of Federal law enforcement and intelligence agencies. Moreover, in appropriate circumstances the applicable exemptions may be waived, when compliance would not appear to interfere with or adversely affect the enforcement process.

Below is an analysis of each comment that specifically relate to this NPRM that is not addressed directly above.

An initial commenter expressed concern that inaccurate and irrelevant information could falsely target innocent individuals. DHS notes that occasionally in the course of an investigation into potential violations of Federal law, the accuracy of information obtained or introduced may be unclear, or the information may not be strictly relevant or necessary to a specific investigation, but in the interest of effective law enforcement, it is appropriate for the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records to retain

all information that may aid in establishing patterns of unlawful activity. The DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records information serves as another important tool to support better determinations concerning potentially high-risk travelers that may require additional screening.

Another commenter stated that information in the background section of the notice, specifically a routine use for information sharing with the intelligence community, sharing to prevent identity theft, and sharing with foreign governments, was not present in the body of the SORN. This statement is inaccurate and sharing for those purposes can be found in routine use A, B, G and H. The commenter further states that there is no language in the SORN relating to the retention period for the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records data. This statement is also inaccurate and information relating to the retention period can be found under the Retention and Disposal section of the SORN. Further, the commenter goes on to contest the purpose and use of the information maintained in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records and all information within the SORN and disagrees with the language and truthfulness of the Department’s justification. DHS has provided accurate information regarding purpose and use of information as well as all other information in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records.

One commenter suggested that the proposed exemptions could allow for errors and inaccuracy of information. DHS advises that travelers who believe that the information contained in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records or in any other DHS systems is erroneous may request correction of that information through the Traveler Redress Inquiry Program (TRIP) at <http://www.dhs.gov/trip> or via mail, facsimile, or e-mail in accordance with instructions provided on the Web site listed above or contact DHS/NPPD/US-VISIT directly.

Another commenter suggested that the potential for error and abuse is enormous because the information is regarded as being about non-citizens only. DHS extends administrative Privacy Act protections to individuals where information is maintained on both U.S. citizens, lawful permanent residents, and visitors, on whom a system of records maintains

information. This is the case with the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records and the reason DHS has issued the NPRM and SORN.

A concluding commenter stated that “We have a right and a duty to ensure that we do not relinquish our Constitutional rights.” DHS agrees and has established a number of administrative and policy checks and balances to further ensure that the use of the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records information remains within the appropriate bounds of the mission of DHS. In conjunction with the SORN published in the **Federal Register** 72 FR 47057, August 22, 2007, DHS has also posted on its Web site an updated Privacy Impact Assessment that fully informs the public about the uses of the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records including the privacy risks and the mitigation approaches to address any identified risks.

Comments on the System of Records Notice 72 FR 47057, August 22, 2007

Below is an analysis of each comment that specifically relate to this SORN that is not addressed directly above.

An initial commenter suggested that the routine uses permitting the sharing of information contained in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records should be clarified or expanded to include sharing with companies that have posted immigration bonds pertaining to aliens “based on the traditional notions of fairness.” DHS notes that access to the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records information is strictly regulated. Sharing “based on the traditional notion of fairness” is not within DHS’ mission or based on a need to know. In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act and the routine uses outlined in the SORN, and consistent with DHS’ information sharing limitations, all or a portion of the records or information contained in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records may be shared with other DHS components or outside of DHS with appropriate Federal, State, local, tribal, foreign, or international government agencies, or party after DHS determines that the receiving agency or party has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine

uses set forth in the SORN for the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records.

Another commenter expressed that the exemption of one or more provisions of the Privacy Act is not necessary because information in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records record is already known to the subject. While this is generally true, individuals who desire access to their information in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records may submit a request to gain access.

DHS carefully reviewed all the public comments and the recommendations within the public comments. DHS has determined that since the information in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records is used primarily to facilitate the investigation of subjects of interest who may have violated their immigration status by remaining in the United States beyond their authorized stay; thereby supporting the several and varied missions and functions of DHS, including but not limited to: the enforcement of civil and criminal laws (including the immigration law); investigations, inquiries; national security and intelligence activities in support of the DHS mission to identify and prevent acts of terrorism against the United States, it is important that the exemptions remain in place and be waived only when compliance would not interfere with or adversely affect the law enforcement purposes of the system and the overall law enforcement process.

Having taken into consideration public comments resulting from this NPRM and SORN, as well as the Department’s position on these public comments, 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: Public Law 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. At the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, add the following new paragraph 41 to read as follows:

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

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41. The DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records notice is a system for the storage and use of biographic, biometric indicator, and encounter data consolidated from various systems regarding aliens who have applied for entry, entered, or departed the United States. Information in the DHS/NPPD/US-VISIT—001 Arrival and Departure Information system of records notice is used primarily to facilitate the investigation of subjects of interest who may have violated their immigration status by remaining in the United States beyond their authorized stay; thereby supporting the several and varied missions and functions of DHS, including but not limited to: the enforcement of civil and criminal laws (including the immigration law); investigations, inquiries; national security and intelligence activities in support of the DHS mission to identify and prevent acts of terrorism against the United States. The information 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)(5) and (e)(8); (f); and (g) pursuant to 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); 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 identities 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) and (H) (Agency Requirements), and (f) (Agency Requirements) 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) (Civil Remedies) 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: November 25, 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-2009-0044]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification 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/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology system of records entitled the "Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification System of Records" from certain

provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification 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 December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Paul Hasson (202-298-5021), Privacy Officer, U.S. Visitor and Immigrant Status Indicator Technology, Washington, DC 20598. For 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 33928, June 16, 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/National Protections and Programs Directorate (NPPD)/U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT)—003 Technical Reconciliation Analysis Classification system. The DHS/NPPD/US-VISIT—003 Technical Reconciliation Analysis Classification system of records notice was published concurrently in the **Federal Register**, 73 FR 34028, June 16, 2008, and comments were invited on both the notice of proposed rulemaking and system of records notice. No comments were received on the notice of proposed rulemaking. Comments were received on the system of records notice.

Public Comments

DHS received no comments on the notice of proposed rulemaking. DHS received three public comments on the system of records notice. Two of the public comments were related to an individual's immigration status and unrelated to the proposed rulemaking. The third comment was an individual's personal opinion on illegal immigration and unrelated to the proposed rulemaking. DHS will implement the rulemaking as proposed.