

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.

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 2904, 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—023 Personnel Security Management system. The DHS/ALL—023 Personnel Security Management system of records notice was published concurrently in the **Federal Register**, 74 FR 3084, January 16, 2009, 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 or system of records notice published on January 16, 2009.

Prior to the January 16, 2009 publishing, DHS published a notice of proposed rulemaking and system of records notice for the DHS—OS—001 Office of Security File System on September 12, 2006. The notice of proposed rulemaking published in the **Federal Register**, 71 FR 53609, September 12, 2006, proposed 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 notice published concurrently in the **Federal Register**, 71 FR 53700, September 12, 2006, and comments were invited on both the notice of proposed rulemaking and system of records notice. The notice of proposed rulemaking received four public comments and system of records notice received one public comment but were never addressed after the publication period expired.

Because the DHS—OS—001 Office of Security File System notice of proposed rulemaking and system of records notice, published on September 12, 2006, have been superseded by the DHS/ALL—023 Personnel Security Management notice of proposed rulemaking and system of records notice published on January 16, 2009, the Department will respond to previous public comments in this final rule as if

they were submitted under the new docket number.

Public Comments

DHS received no public comments on the DHS/ALL—023 Personnel Security Management system notice of proposed rulemaking and system of records notice published on January 16, 2009. As described above, DHS received four public comments on DHS—OS—001 Office of Security File System notice of proposed rulemaking and one public comment on the system of records notice published on September 12, 2006.

Notice of Proposed Rulemaking 71 FR 53609, September 12, 2006

Public comments noted that the functions of law enforcement and personnel security should be two separate systems of records, not commingled systems. In January 2009, the Department published two new system of records notices: (1) DHS/ALL—023 Personnel Security Management system, 74 FR 3084, January 16, 2009; and (2) DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system, 74 FR 3088, January 16, 2009. Publishing these two systems of records notices provides transparency to the public of the Department's security authorities and exemptions for personnel security and law enforcement activities and addresses the concerns expressed in the public comments.

Final exemptions for the DHS/ALL—023 Personnel Security Management system of records are published below under PART 5—DISCLOSURE OF RECORDS AND INFORMATION. The Department's authorities for use of these exemptions are provided therein. The Department, through the Freedom of Information Act and Privacy Act, wishes to remain transparent in providing as much information as possible to the public when formally requesting information.

Having addressed the issues published in response to this notice of proposed rulemaking and after receiving no public comment on the DHS notice of proposed rulemaking published in the **Federal Register**, 74 FR 2904, January 16, 2009, DHS will implement the rulemaking as proposed.

System of Records Notice 71 FR 53700, September 12, 2006

Public comments noted that the functions of law enforcement and personnel security should be two separate systems of records, not

commingled systems. In January 2008, the Department published two new system of records notices: (1) DHS/ALL—023 Personnel Security Management system, 74 FR 3084, January 16, 2009; and (2) DHS/ALL—025 Law Enforcement Authority in Support of the Protection of Property Owned or Occupied by the Department of Homeland Security system, 74 FR 3088, January 16, 2008. Each of the above cited systems of records contains a law enforcement and/or a counterintelligence component. Both personnel and physical security systems of records necessarily require law enforcement or counterintelligence information in order to protect the Department from infiltration or compromise. As complementary information collections, both systems ensure the security and integrity of DHS personnel and facilities. Considering those purposes, it is appropriate for the systems of records to take exemptions available under (k)(1), (k)(2), (k)(3) and/or (k)(5) as all of the functions covered by these exemptions are directly relevant to the investigations of threats to the Department's personnel and facilities. Publishing these two systems of records notices provides transparency to the public of the Department's security authorities and exemptions for personnel security and law enforcement activities.

Public comments also noted concern over Routine Use H and Routine Use I of the system of records notice. Routine Use H permits release of information to Congress. It may be necessary, from time to time, for the Department to release information to a Member of Congress working on behalf of a constituent. While such a disclosure might be acceptable under consent of the constituent, Office of Management and Budget guidance recommends additional notice through the published routine use be given. As such, DHS continues to keep this routine use in the SORN.

Routine Use I releases information to contractors, which includes students. One commenter stated that it was inappropriate for DHS to share information with any contractor or student working officially on behalf of the Department. Contractors, including students, are subject to the same screening as full time employees. The Department relies on contractors and students in the course of its day to day activities and it may become necessary for information to be released to them for official government use just as it would be for a DHS employee. The decision to allow students access to DHS facilities and a certain information

level rests solely with the DHS Office of Security and component security offices. Employees, contractors, students, detailees, grantees, experts and any other person working at a DHS facility and accessing DHS information are required to undergo the same background investigation as it pertains to their required classification level. Those decisions are left to the discretion of the Office of Security and the component or office to which the employee, contractor, student, detailee, grantee, expert, or other person is assigned. As such, DHS shall maintain this routine use.

Having addressed the issues published in response to this system of records notice and after receiving no public comment on the DHS system of records notice published in the **Federal Register**, 74 FR 3084, January 16, 2009, 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 40 to read as follows:

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

* * * * *

40. The DHS/ALL—023 Personnel Security Management system of records consists of

electronic and paper records and will be used by DHS and its components. The DHS/ALL—023 Personnel Security Management 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 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—023 Personnel Security Management 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), (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 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), (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.

Dated: September 23, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

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