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3910-A79-P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1701

Privacy Act of 1974: Implementation

AGENCY: Office of the Director of National Intelligence.

ACTION: Final rule.

SUMMARY: The Office of the Director of National Intelligence (ODNI) is issuing a final rule exempting six new systems of records from certain provisions of the Privacy Act. In addition, the ODNI invokes a subsection of the Privacy Act as an additional basis for exempting records in ODNI/OIG-003 (Office of Inspector General Investigation and Interview Records, published in the Federal Register on Dec. 28, 2007) from these provisions of the Act.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. John F. Hackett, Chief, Information Management Group, 703-874-8085.

SUPPLEMENTARY INFORMATION:

Background

On July 19, 2011, the Office of the Director of National Intelligence (ODNI) published notice of the following new systems of records: Human Resources Records (ODNI-16); Personnel Security Records (ODNI-17); Freedom of Information Act, Privacy Act and Mandatory Declassification Review Request Records (ODNI-18); IT Systems Activity and Access Records (ODNI-19); Security Clearance Reciprocity Hotline Records (ODNI-20); and IT Network Support, Administration and Analysis Records (21). These systems of records contain records that range from Unclassified to Top Secret. In conjunction with publication of these systems notices, the ODNI initiated a rulemaking to exempt the systems of records, in relevant part, from subsections (c)(3); (d)(1),(2),(3),(4); (e)(1) and (e)(4)(G),(H),(I); and (f) of the Privacy Act pursuant to exemption authority afforded agency heads by subsection (k) of the Privacy Act. The systems notices and proposed exemption rule are published at 76 FR 42737 and 43629. The enumerated exemptions will be invoked on a case-by-case basis, as necessary to preclude interference with investigatory, intelligence and counterterrorism functions and responsibilities of the ODNI.

Public Comments

ODNI received a single comment on its proposed rule and six new systems of records notices. ODNI has determined that the comment received does not warrant modifying the proposed exemptions or the systems notices prior to implementation.

Regulatory Flexibility Act

This rule affects only the manner in which ODNI collects and maintains information about individuals. ODNI certifies that this rulemaking does not impact small entities and that analysis under the Regulatory flexibility Act, 5 U.S.C. 601-612, is not required.

Small Entity Inquiries

The Small Business Regulatory enforcement Fairness Act (SBREFA) of 1996 requires the ODNI to comply with small entity requests for information and advice about compliance with statutes and regulations within the ODNI jurisdiction. Any small entity that has a question regarding this document may address it to the information contact listed above. Further information regarding SBREFA is available on the Small Business Administration's web page at <http://www.sba.gov/advo/laws/law-lib.html>.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 944 U.S.C. 3507(d)) requires that the ODNI consider the impact of paperwork and other burdens imposed on the public associated

with the collection of information. There are no information collection requirements associated with this rule and therefore no analysis of burden is required.

Executive Order 12866, Regulatory Planning and Review

This rule is not a “significant regulatory action,” within the meaning of Executive Order 12866. This rule will not adversely affect the economy or a sector of the economy in a material way; will not create inconsistency with or interfere with other agency action; will not materially alter the budgetary impact of entitlements, grants, fees or loans or the right and obligations of recipients thereof; or raise legal or policy issues arising out of legal mandates, the President’s priorities or the principles set forth in the Executive Order. Accordingly, further regulatory evaluation is not required.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, 109 Stat. 48 (Mar. 22, 1995), requires Federal agencies to assess the effects of certain regulatory actions on State, local and tribal governments, and the private sector. This rule imposes no Federal mandate on any State, local or tribal government or on the private sector. Accordingly, no UMRA analysis of economic and regulatory alternatives is required.

Executive Order 13132, Federalism

Executive Order 13132 requires agencies to examine the implications for the distribution of power and responsibilities among the various levels of government resulting from their rules. ODNI concludes that this rule does not affect the rights, roles and responsibilities of the States, involves no preemption of State law and does not limit state policymaking discretion. This rule has no federalism implications as defined by the Executive Order.

Environmental Impact

This rulemaking will not have a significant effect on the human environment under the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 – 4347.

Energy Impact

This rulemaking is not a major regulatory action under the provisions of the Energy Policy and Conservation Act (EPCA), Public Law 94-163) as amended, 42 U.S.C. 6362.

List of Subjects in 32 CFR Part 1701

Privacy, Reporting and recordkeeping requirements.

For the reasons set forth above, ODNI amends 32 CFR Part 1701 as follows:

PART 1701—ADMINISTRATION OF RECORDS UNDER THE PRIVACY ACT OF 1974

1. The authority citation for part 1701 continues to read as follows:

Authority: 50 U.S.C. 401–442; 5 U.S.C. 552a.

Subpart B – [Amended]

2. Amend §1701.24 by revising paragraph (a) introductory text, and adding paragraphs (a)(15) through (a)(20), and (b)(7) through (b)(12), to read as follows:

§ 1701.24 Exemption of Office of the Director of National Intelligence (ODNI) systems of records.

(a) The ODNI exempts the following systems of records from the requirements of subsections (c)(3); (d)(1),(2),(3) and (4); (e)(1); (e)(4)(G),(H),(I); and (f) of the Privacy Act to the extent that information in the system is subject to exemption pursuant subsections (k)(1), (k)(2) or (k)(5) of the Act as noted in the individual new systems notices and in the existing system notice entitled Office of Inspector General Investigation and Interview Records (ODNI/OIG-003), published at 72 FR 37902 (December 28, 2007):

* * * * *

(15) Human Resources Records (ODNI-16).

(16) Personnel Security Records (ODNI-17).

(17) Freedom of Information Act, Privacy Act and Mandatory Declassification Review Requests Records (ODNI-18).

(18) IT Systems Activity and Access Records (ODNI-19).

(19) Security Clearance Reciprocity Hotline Records (ODNI-20).

(20) IT Network Support, Administration and Analysis Records (ODNI-21).

(b) * * *

(7) From subsection (c)(3) (accounting of disclosures) because an accounting of disclosures from records concerning the record subject would specifically reveal an intelligence or investigative interest on the part of the ODNI or recipient agency and could result in release of properly classified national security or foreign policy information.

(8) From subsections (d)(1), (2), (3) and (4) (record subject's right to access and amend records) because affording access and amendment rights could alert the record subject to the investigative interest of intelligence or law enforcement agencies or compromise sensitive information classified in the interest of national security. In the absence of a national security basis for exemption, records in this system may be exempted from access and amendment to the extent necessary to honor promises of confidentiality to persons providing information concerning a candidate for position. Inability to maintain such confidentiality would restrict the free flow of information vital to a determination of a candidate's qualifications and suitability.

(9) From subsection (e) (1) (maintain only relevant and necessary records) because it is not always possible to establish relevance and necessity before all information is considered and evaluated in relation to an intelligence concern. In the absence of a national security basis for exemption under subsection (k)(1), records in this system may be exempted from the relevance requirement pursuant to subsection (k)(5) because it is not possible to determine in advance what exact information may assist in determining the qualifications and suitability of a candidate for position. Seemingly irrelevant details, when combined with other data, can provide a useful composite for determining whether a candidate should be appointed.

(10) From subsections (e)(4)(G) and (H) (publication of procedures for notifying subjects of the existence of records about them and how they may access records and contest contents) because the system is exempted from subsection (d) provisions regarding access and amendment, and from the subsection (f) requirement to promulgate agency rules. Nevertheless, the ODNI has published notice concerning notification, access, and contest procedures because it may in certain circumstances determine it appropriate to provide subjects access to all or a portion of the records about them in a system of records.

(11) From subsection (e)(4)(I) (identifying sources of records in the system of records) because identifying sources could result in disclosure of properly classified national defense or foreign policy information, intelligence sources and methods, and

investigatory techniques and procedures. Notwithstanding its proposed exemption from this requirement, ODNI identifies record sources in broad categories sufficient to provide general notice of the origins of the information it maintains in its systems of records.

(12) From subsection (f) (agency rules for notifying subjects to the existence of records about them, for accessing and amending records, and for assessing fees) because the system is exempt from subsection (d) provisions regarding access and amendment of records by record subjects. Nevertheless, the ODNI has published agency rules concerning notification of a subject in response to his request if any system of records named by the subject contains a record pertaining to him and procedures by which the subject may access or amend the records. Notwithstanding exemption, the ODNI may determine it appropriate to satisfy a record subject's access request.

Dated: October 19, 2011

Mark W. Ewing

Chief Management Officer

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