



BILLING CODE 754501

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rule Exempting an Amended System of Records from Certain Provisions of the Privacy Act

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

Summary: The National Labor Relations Board (NLRB) exempts an amended system of records, NLRB-17, Personnel Security Records, from certain provisions of the Privacy Act of 1974, 5 U.S.C. 552a, pursuant to sections (k)(1), (2), (3), (5), (6), and (7) of that Act.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further action, unless adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If adverse comment is received, the NLRB will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency regarding the rule shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street, S.E., Third Floor, Washington, DC 20570-0001, or submit them electronically to pac@nlr.gov. Comments may also be submitted electronically through <http://www.regulations.gov>, which contains a copy of this rule and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Prem Aburvasamy, Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street, S.E., Third Floor, Washington, DC 20570-0001, (855)-209-9394, *pac@nlr.gov*.

SUPPLEMENTARY INFORMATION: Elsewhere in today's issue of the Federal Register, the Agency is amending one of its systems of records, NLRB-17, Personnel Security Records, pursuant to the Privacy Act of 1974.

Pursuant to subsections (k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, and for the reasons set forth below, the Board includes within Section 102.119, additional paragraphs (o) and (p), exempting portions of the amended system of records (NLRB-17) from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act.

Subsection (k)(1) of the Privacy Act authorizes the head of an agency to exempt a system of records from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act (5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), (f)) (hereinafter, "the applicable subsections") if records are properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1).

Subsection (k)(3) of the Privacy Act authorizes the head of an agency to exempt a system of records from the applicable subsections where the information is maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code.

Subsections (k)(2), (5), and (7) of the Privacy Act, in combination, authorize the head of an agency to exempt a system of records from the applicable subsections if records are created or maintained for the purpose of determining suitability, eligibility, qualifications, or potential for promotion for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. As indicated in the Agency's accompanying Privacy Act system of records notice amending NLRB-17, this system contains information compiled by the Agency in the course of carrying out its personnel security responsibilities.

Subsection (k)(6) of the Privacy Act authorizes the head of an agency to exempt a system of records from applicable subsections when they might compromise the objectivity of testing and examination materials used for a personnel investigation for employment or promotion in the Federal service.

The requirements of the applicable subsections, if applied to the amended system of records, NLRB-17, would substantially compromise the ability of the Agency's Security Branch staff to effectively conduct background investigations concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and contract positions at the Agency, in addition to determining the appropriate level of access to the Agency's facilities. For

instance, the disclosure requirements as set forth in the provisions for notice, access, amendment, review, and accountings, could enable subject individuals to take action to jeopardize the physical safety or anonymity of confidential sources used during background proceedings. Additionally, the disclosure of information gathered during a background investigation may unreasonably weaken the interests of protecting properly classified information and the objectivity of certain examination materials.

This rule relates to individuals rather than small business entities. Accordingly, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, this rule will not have a significant impact on a substantial number of small business entities.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Agency has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements on the public.

The rule will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among levels of government. Therefore, it is determined that this rule does not have federalism implications under Executive Order 13132.

In accordance with Executive Order 12866, it has been determined that this rule is not a "significant regulatory action," and therefore does not require a Regulatory Impact Analysis.

List of Subjects in 29 CFR Part 102

Privacy, Reporting and recordkeeping requirements.

For the reasons stated in the Supplementary Information section, Part 102 of title 29, chapter I of the Code of Federal Regulations, is amended as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

1. The authority citation for Part 102 continues to read as follows:

AUTHORITY: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156).

Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

SOURCE: 24 FR 9102, Nov. 7, 1959, unless otherwise noted.

Subpart K—Records and Information

2. Section 102.119 is amended by adding paragraphs (o) and (p) to read as follows:

§102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

* * * * *

(o) Pursuant to 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the system of records maintained by the NLRB containing Personnel Security Records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2);

(3) Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code;

(4) Investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment and Federal contact or access to classified information;

(5) Testing and examination materials used for a personnel investigation for employment or promotion in the Federal service;

(6) Evaluation materials, compiled during the course of a personnel investigation, that are used solely to determine potential for promotion in the armed services.

(p) The Privacy Act exemptions contained in paragraph (o) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at

his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) Personnel investigations may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal agency. Application of exemption (k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d).

(iii) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d).

(iv) Personnel investigations may also contain information obtained from another Federal agency that relates to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) is necessary to preclude an individual's access to and amendment of such records under 5 U.S.C. 552a(d).

(v) Exemption (k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material

compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. Similarly, personnel investigations may contain evaluation material used to determine potential for promotion in the armed services. Application of exemption (k)(7) is necessary to the extent that the disclosure of data would compromise the anonymity of a source under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. Both of these exemptions are necessary to safeguard the integrity of background investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, these exemptions reduce the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(vi) All information in this system that meets the criteria articulated in exemption (k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by an individual. This exemption is claimed because portions of this system relate to testing or examining materials used

solely to determine individual qualifications for appointment or promotion to the Federal service. Access to or amendment to this information by an individual would compromise the objectivity and fairness of the testing or examining process.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of personnel background investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference of influence, and psychological conditions, that are relevant to future personnel security or suitability determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to

him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record pertaining to that individual. The application of this provision could compromise the progress of an investigation concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and

impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

Dated: Washington, DC, November 9, 2016.

By direction of the Board.

William B. Cowen,

Federal Register Liaison, National Labor Relations Board.

[FR Doc. 2016-27487 Filed: 11/18/2016 8:45 am; Publication Date: 11/21/2016]