



DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 001-2018]

Privacy Act of 1974; Implementation

AGENCY: Federal Bureau of Investigation, United States Department of Justice.

ACTION: Final rule.

SUMMARY: The Federal Bureau of Investigation (FBI), a component of the United States Department of Justice (DOJ or Department), is finalizing without change its Privacy Act exemption regulations for the system of records titled, “FBI Online Collaboration Systems,” JUSTICE/FBI-004, which were published as Notice of Proposed Rulemaking (NPRM) on December 4, 2017. Specifically, the FBI exempts the records maintained in JUSTICE/FBI-004 from one or more provisions of the Privacy Act. The exemptions are necessary to avoid interference with the FBI’s law enforcement and national security functions and responsibilities. The Department received only one substantive comment on the proposed rule.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Katherine M. Bond, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, Washington DC, telephone 202-324-3000.

SUPPLEMENTARY INFORMATION:

Background

On December 4, 2017, the FBI published in the Federal Register a System of Records Notice (SORN) for an FBI system of records titled, “FBI Online Collaboration Systems,”

JUSTICE/FBI-004, 82 FR 57291. On the same day, the FBI published a Notice of Proposed Rulemaking (NPRM) proposing to exempt records maintained in JUSTICE/FBI-004 from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j) and (k), and inviting public comment on the proposed exemptions. 82 FR 57181. The comment period was open through January 3, 2018. DOJ received only one substantive comment responsive to the proposed exemptions. That comment supported the proposed exemptions in order to protect the safety of law enforcement officers and better enable them to conduct their investigations. After consideration of this public comment, exemptions necessary to protect the ability of the FBI properly to engage in its law enforcement and national security functions have been codified in this final rule as proposed in the NPRM.

Response to Public Comments

In its Online Collaboration Systems NPRM and SORN, both published on December 4, 2017, the Department invited public comment. The comment periods for both documents closed January 3, 2018. The Department received six total comments, only one of which contained any substance related to the SORN or NPRM. The one responsive comment received stated that the submitter agreed the exemptions proposed in the NPRM are needed for effective law enforcement. The FBI has considered, and agrees with, this comment. Because no other responsive comments were submitted, and because the FBI continues to assert the rationales in support of the exemptions as stated in the NPRM, the FBI adopts in this final rule the exemptions and rationales proposed in the NPRM.

Executive Orders 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation, and Executive

Order 13563 “Improving Regulation and Regulatory Review” section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Information and Regulatory Affairs within the Office of Management and Budget pursuant to Executive Order 12866.

Regulatory Flexibility Act

This rule will only impact Privacy Act-protected records, which are personal and generally do not apply to an individual’s entrepreneurial capacity, subject to limited exceptions. Accordingly, the Chief Privacy and Civil Liberties Officer, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 - Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction..

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

This rule will have no implications for Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

Paperwork Reduction Act

This rule imposes no information collection or recordkeeping requirements.

List of Subjects in 28 CFR Part 16

Administrative practice and procedure, Courts, Freedom of information, Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated

to me by Attorney General Order 2940-2008, 28 CFR part 16 is amended as follows:

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

Subpart E—Exemption of Records Systems Under the Privacy Act

2. Amend § 16.96 by adding paragraphs (x) and (y) to read as follows:

§ 16.96 Exemption of Federal Bureau of Investigation Systems-limited access.

* * * * *

(x) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8); (f); and (g):

(1) The FBI Online Collaboration Systems (JUSTICE/FBI-004).

(2) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) or (k). Where the FBI determines compliance with an exempted provision would not appear to interfere with or adversely affect interests of the United States or other system stakeholders, the FBI in its sole discretion may waive an exemption in whole or in part; exercise of this discretionary waiver prerogative in a particular matter shall not create any entitlement to or expectation of waiver in that matter or any other matter. As a condition of discretionary waiver, the FBI in its sole discretion may impose any restrictions deemed advisable by the FBI (including, but not limited to, restrictions on the location, manner, or scope of notice, access or amendment).

(y) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access provisions of subsection (d). Also, because making available to a record subject the accounting of disclosures

from records concerning him/her would specifically reveal any law enforcement or national security investigative interest in the individual by the FBI or agencies that are recipients of the disclosures. Revealing this information could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and defuse any potential acts of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during any investigation and to take measures to circumvent the investigation (e.g. destroy evidence or flee the area to avoid investigation).

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the accounting disclosures provision of subsection (c)(3). The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases.

(3) From subsections (d)(1), (2), (3), and (4); (e)(4)(G) and (H); (e)(8); (f); and (g) because these provisions concern individual access to and amendment of law enforcement and intelligence records and compliance with such provisions could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access rights could compromise sensitive law enforcement information, disclose information that could constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses. The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion,

agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases with subjects of the information.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes. Relevance and necessity are questions of judgment and timing. For example, what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after information has been fully assessed that its relevancy and necessity in a specific investigative activity can be determined.

(5) From subsections (e)(2) and (3) because application of these provisions requiring collection directly from the subject individuals and informing individuals regarding information to be collected about them could present a serious impediment to efforts to solve crimes and improve national security. Application of these provisions could put the subject of an investigation on notice of the existence of the investigation and allow the subject an opportunity to engage in conduct intended to obstruct or otherwise impede that activity or take steps to avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has already been published in the Federal Register through the SORN documentation. Should the subsection be so interpreted, exemption from this provision is necessary to protect the sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes it is often impossible to determine in advance what information is accurate, relevant, timely, and complete. With time, additional facts, or analysis,

information may acquire new significance. The restrictions imposed by subsection (e)(5) would thus limit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement. Although the FBI has claimed this exemption, it continuously works with its federal, state, local, tribal, and international partners to maintain the accuracy of records to the greatest extent practicable. The FBI does so with established policies and practices. The criminal justice and national security communities have a strong operational interest in using up-to-date and accurate records and will apply their own procedures and foster relationships with their partners to further this interest.

April 2, 2018

Dated:

Peter A. Winn,
Acting Chief Privacy and Civil Liberties Officer

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