



Billing Code: 4410-30

**DEPARTMENT OF JUSTICE**

**28 CFR Part 16**

**[CPCLO Order No. 11-2019]**

**Privacy Act of 1974; Implementation**

**AGENCY:** United States Department of Justice, Executive Office for Immigration Review.

**ACTION:** Final rule.

**SUMMARY:** The Executive Office for Immigration Review (EOIR), a component within the United States Department of Justice (DOJ or Department), is finalizing without changes its Privacy Act exemption regulations for the system of records titled, Office of the Chief Administrative Hearing Officer (OCAHO) Case Management System (CMS), JUSTICE/EOIR-002, which were published as a Notice of Proposed Rulemaking (NPRM) on August 16, 2019. Specifically, the Department's regulations will exempt the records maintained in JUSTICE/EOIR-002 from one or more provisions of the Privacy Act. The exemptions are necessary to ensure the integrity of investigatory and adjudicatory records in cases before OCAHO. The Department received two comments and neither comments were substantive.

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

**FOR FURTHER INFORMATION CONTACT:** Michelle Curry, Associate General Counsel and Senior Component Official for Privacy, Office of the General Counsel,

Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, by e-mail at *michelle.curry@usdoj.gov*, or by facsimile at 703-305-0443.

**SUPPLEMENTARY INFORMATION:**

**Background**

EOIR created a new system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. The system of records will be used by OCAHO to facilitate adjudication of its cases and may include paper and electronic files maintained by OCAHO. The records to be maintained in this new system historically have been included as part of EOIR-001, Records and Management Information System. They are being transferred into this new system to improve efficiency, improve records management practices, and provide better access for parties to proceedings.

OCAHO Administrative Law Judges (ALJs) hear cases and adjudicate issues arising under the provisions of the Immigration and Nationality Act (INA) relating to: (1) knowingly hiring, recruiting or referring for a fee, or continuing to employ unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (8 U.S.C. 1324a), (2) immigration-related unfair employment practices in violation of section 274B of the INA (8 U.S.C. 1324b), and (3) immigration-related document fraud in violation of section 274C of the INA (8 U.S.C. 1324c).

Complaints under sections 274A and 274C of the INA are filed by the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE). Complaints under section 274B of the INA may be filed by private individuals or entities, or by the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee

Rights Section (DOJ/CRT). The respondents in OCAHO cases are typically businesses or employers. The parties to 274A and 274C cases may seek administrative review of ALJ decisions and orders by the Chief Administrative Hearing Officer (CAHO). Parties in all case types may appeal final agency orders to the appropriate United States Circuit Court of Appeals.

In order to process and adjudicate cases and appeals, OCAHO must collect certain information and documents from and about complainants and respondents. The DOJ/CRT and DHS ICE can file complaints with OCAHO. Often, these agencies will submit investigatory records as exhibits or attachments to other filings. The investigatory records include, but are not limited to, notices of inspection, summaries of inspection results, affidavits or memoranda from investigators, results from searches of internal agency databases, and similar records. These exhibits or attachments then become part of OCAHO's official case record.

To improve tracking and storage of case-related information and documents, OCAHO is implementing a new electronic case management system (CMS). The OCAHO CMS will manage the entire life cycle of OCAHO's case processes, including tracking and managing case information and documents, facilitating case research, and reporting on key business functions and metrics. The OCAHO CMS will also include an electronic filing capability, which will enable parties to submit case information and documents electronically through a secure web-based portal. The portal will also provide notifications and updates on case status, and will allow authorized parties to access copies of all case-related documents electronically. The system is segregated by "need to know" user controls and allows authorized users to track various stages of the proceedings. The

system also contains templates to generate letters, notices, and decisions used in the OCAHO process. The system can generate reports by case status and disposition.

### **Response to Public Comments**

In its OCAHO CMS NPRM and Notice of a New System of Records, published on August 16, 2019, the Department invited public comment (84 FR 41940 and 84 FR 42016). The comment periods for both notices closed on September 16, 2019. The Department received two comments from individuals. The Department has closely reviewed and considered these comments. Both comments received were concerned with the general appropriateness of exempting records from certain provisions of the Privacy Act, including the provision for individual access to records under the Act. Congress recognized the need for exemptions to these provisions of the Privacy Act to ensure the integrity of investigatory and adjudicatory records. As noted in the NPRM, the exemptions taken here apply in “limited circumstances,” only to the extent information in this system comes within the scope of 5 U.S.C. 552a(k)(1) and (2).

### **Executive Orders 12866, 13563, 13771–Regulatory Review**

In accordance with 5 U.S.C. 552a(j) and 552a(k), this action is subject to rulemaking procedures, which give interested persons an opportunity to participate in the rulemaking process “through submission of written data, views, or arguments,” pursuant to 5 U.S.C. 553. The exemptions claimed by the system, as detailed below, do not raise novel legal or policy issues, nor do they adversely affect the economy, the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof in a material way. 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.

### **Regulatory Flexibility Act**

This regulation 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.

### **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**

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires the Department to consider the impact of paperwork and other information collection burdens imposed on the public. The Paperwork Reduction Act applies to some of the records collected as part of this system of records. The following approved information collection is associated with this system of records: Form EOIR-58, Unfair Immigration-Related Employment Practices Complaint Form, and OMB #1125-0016. This system of records will also collect information via a web-based electronic filing portal. The Department is in the process of seeking approval of this information collection under the Paperwork Reduction Act.

### **Unfunded Mandates Reform Act of 1995**

This regulation 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.

**List of Subjects in 28 CFR Part 16**

Administrative practices and procedures, 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, the Department of Justice amends 28 CFR part 16 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.

2. Amend § 16.83 by adding paragraphs (e) and (f) to read as follows:

§ 16.83 Exemption of the Executive Office for Immigration Review System—limited access.

\* \* \* \* \*

(e) The following system of records is exempt from 5 U.S.C. 552a(d): Office of the Chief Administrative Hearing Officer (OCAHO) Case Management System (CMS) (JUSTICE/EOIR-002). This exemption applies only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(k)(1) and (2).

(f) Exemption from 5 U.S.C. 552a(d) is justified for the system of records in paragraph (e) of this section for the following reasons:

(1) In limited circumstances, from subsection (d) when access to the records contained in the system of records in paragraph (e) of this section could inform the subject of an ongoing investigation of an actual or potential criminal, civil, or regulatory violation or the existence of that investigation; of the nature and scope of the information and evidence obtained as to the subject's activities; of the identity of confidential sources, witnesses, and law enforcement personnel; and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law and regulatory enforcement where they prevent the successful completion of the investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel; and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties.

(2) From subsections (d)(2), (3), and (4) because the administrative case files constitute an official record which includes transcripts of administrative proceedings, investigatory materials, evidentiary materials such as exhibits, decisional memoranda, and other case-related papers. Administrative due process could not be achieved by the ex parte "correction" of such materials by the individual who is the subject thereof.

Dated: November 14, 2019.

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Peter A. Winn,

Acting Chief Privacy and Civil Liberties  
Officer, United States Department of Justice.

[FR Doc. 2019-25080 Filed: 11/20/2019 8:45 am; Publication Date: 11/21/2019]