



DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 005-2020]

Privacy Act of 1974; Implementation

AGENCY: Office of Legal Policy, United States Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: On July 14, 2021, the Office of Legal Policy (OLP), a component within the United States Department of Justice (DOJ or Department), published in the *Federal Register* a notice of a modified system of records for the OLP system of records, Judicial Nominations Files, JUSTICE/OLP-002. In this notice of proposed rulemaking, OLP proposes to modify the exemptions from certain provisions of the Privacy Act claimed for this system of records, as well as other administrative modifications. For the reasons provided below, the Department proposes to amend its Privacy Act regulations. Public comments are invited.

DATES: Comments must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments by any of the following methods:

- E-mail: privacy.compliance@usdoj.gov. To ensure proper handling, please reference the CPCLO Order No. in the subject line of the message.
- Fax: 202-307-0693.
- Mail: United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, Two Constitution Square (2Con), 145 N Street, NE Suite 8W.300, Washington DC 20530. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

To ensure proper handling, please reference the CPCLLO Order No. in your correspondence.

- Federal eRulemaking Portal: <http://www.regulations.gov>. When submitting comments electronically, you must include the CPCLLO Order No. in the subject box. Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Daylight Savings Time on the day the comment period closes because <http://www.regulations.gov> terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Time may want to consider this to ensure that their electronic comments are received.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONALLY IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all personally identifying information that you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business

information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, may be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the "FOR FURTHER INFORMATION CONTACT" paragraph, below.

FOR FURTHER INFORMATION CONTACT: Matrina Matthews, Executive Officer, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Room 4234, Washington, DC 20530-0001; telephone: (202) 616-0040; email: matrina.matthews@usdoj.gov.

SUPPLEMENTARY INFORMATION:

The Assistant Attorney General, OLP, is responsible for assisting the Attorney General in, *inter alia*, advising and assisting in the selection and appointment of Federal judges. OLP is comprised of attorneys and other DOJ personnel responsible for assisting the Assistant Attorney General in executing the responsibilities of the office. DOJ established the recently renamed system of records, "Judicial Nominations Files," JUSTICE/OLP-002, to maintain records primarily needed to assist the Assistant Attorney General, OLP, and the personnel within OLP, in assessing candidates for potential nomination to be a Federal judge and securing a judicial nominee's confirmation and appointment.

OLP updated the system of records notice for JUSTICE/OLP-002, 86 FR 37192 (July 14, 2021), to account for a number of organizational, procedural, and technological changes that have modernized the information and information system used to collect,

maintain, and disseminate these records. The Department determined that these updates to the system of records notice were necessary to accurately describe the Department's organizational, procedural, and technological changes.

As part of the existing process for reviewing an individual's potential nomination to a Federal judgeship or other related Executive Branch position, and securing confirmation, individuals agree to a number of evaluations, including but not limited to, a full background investigation. As disclosed in JUSTICE/OLP-002, OLP will maintain records relating to these investigations in its system of records. Given the law enforcement and national security information maintained in these records, as well as the examination materials used to assess a potential nominee, the Department has determined that it is appropriate to claim additional exemptions from certain Privacy Act provisions for these records.

Specifically, certain classified information may be maintained in JUSTICE/OLP-002, including but not limited to, records related to a potential nominee that maintained a previous or current position with access to classified information and/or assigned to a national security sensitive position. Given the law enforcement information that may be discovered as part of the nomination investigation and/or evaluations, certain investigatory materials for law enforcement purposes may be maintained in this system of records. Investigatory material may also be used in determining suitability, eligibility, or qualification decisions, and such information may require exemption to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Department under an express promise that the identity of the source would be held in confidence. The Department also utilizes various examination materials to determine individual qualifications for appointment, which if disclosed, could compromise the objectivity or fairness of the Department's examination and vetting process.

Finally, as an administrative matter, the Department proposes to modify 28 CFR 16.73 as a result of the rescindment of JUSTICE/OLP-001, “Freedom of Information and Privacy Appeals Index,” and JUSTICE/OLP-004, “Declassification Review System.” *See* 66 FR 29994 (June 6, 2001). Specifically, the administrative edits proposed in this rule would: (1) remove the current paragraphs (g), and (h); and (2) revise 28 CFR 16.73(a), (b), (c), and (d), to account for OLP’s two remaining systems of records that claim Privacy Act exemptions—JUSTICE/OLP-002 and the “General Files System of the Office of Legal Policy,” JUSTICE/OLP-003.

Executive Orders 12866 and 13563–Regulatory Review

In accordance with 5 U.S.C. 552a(j) and 552a(k), this proposed action is subject to formal rulemaking procedures by giving 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 Department has determined that this proposed rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this proposed 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 proposed 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.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E– Congressional Review Act)

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, 5 U.S.C. 801 *et seq.*, requires the Department to comply with small entity requests for information and advice about compliance with statutes and regulations within the Department's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in the "FOR FURTHER INFORMATION CONTACT" paragraph, above. Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at <https://www.sba.gov/advocacy>. This proposed rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

Executive Order 13132–Federalism

This proposed rule 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 proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988–Civil Justice Reform

This proposed 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 proposed 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 proposed 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.

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. There are no current or new information collection requirements associated with this proposed rule.

List of Subjects in 28 CFR Part 16

Administrative Practices and Procedures, Courts, Freedom of Information, and the 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 proposes to amend 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.

Subpart E – Exemption of Records Systems Under the Privacy Act

2. Revise § 16.73 to read as follows:

§ 16.73 Exemption of Office of Legal Policy Systems.

(a) The Judicial Nominations Files (JUSTICE/OLP-002) system of records is exempt from subsections (c)(3); (d); (e)(1), (e)(4)(G), (H), and (I); and (f) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), and (k)(6). These exemptions apply only to the extent that information in this system of records is subject to an exemption, pursuant to 5 U.S.C. 552a(k). Where compliance would not appear to interfere with or adversely affect OLP's processes, OLP may waive the applicable exemption.

(b) 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 release of disclosure accountings could alert the subject of an investigation and/or evaluation to the extent of an investigation and/or evaluation. Such a disclosure could also reveal investigative interests by not only OLP, but also other recipient agencies or components. Since release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and/or evaluation, release could result in the destruction of documentary evidence, improper influencing of witnesses, endangerment of the physical safety of confidential sources, witnesses, and law enforcement personnel, the fabrication of testimony, and other activities that could impede or compromise the investigation and/or evaluation. In addition, providing the individual an accounting for each disclosure could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(2) From subsection (d), the access and amendment provisions, because many persons are contacted who, without an assurance of anonymity, refuse to provide information concerning the subject of an investigation and/or evaluation. Access could reveal the identity of the source of the information and constitute a breach of the

promised confidentiality on the part of the Department. Such breaches ultimately would restrict the free flow of information vital to the determination of a candidate's qualifications and suitability, among other determinations. The Department also relies on certain examination materials to assess and evaluate an individual's qualifications for an applicable position. Access and/or amendment to such material could reveal information about the examination and vetting process and could compromise its objectivity and/or fairness. Access and/or amendment to such material could also inappropriately advantage future candidates with knowledge of the examination materials. Finally, providing the individual access or amendment rights could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(3) From subsection (e)(1), because in the collection of information for investigative and evaluative purposes, it is impossible to determine in advance what exact information may be of assistance in determining the qualifications and suitability of the subject of an investigation and/or evaluation. Information which may seem irrelevant, when combined with other seemingly irrelevant information, can on occasion provide a composite picture of a candidate which assists in determining whether that candidate should be nominated for appointment. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In interviewing individuals or obtaining other forms of information during OLP processes, information may be supplied to OLP which relates to matters incidental to the primary purpose of OLP's processes, but also relates to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

(4) From subsections (e)(4)(G) and (H), and subsection (f), because this system is exempt from the access and amendment provisions of subsection (d).

(c) The General Files System of the Office of Legal Policy (JUSTICE/OLP-003) system of records is exempt from subsections 552a(c)(3) and (4); (d); (e)(1), (2) and (3), (e)(4)(G) and (H), and (e)(5); and (g) of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5). These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552(j), (k). Where compliance would not appear to interfere with or adversely affect OLP's processes, the applicable exemption may be waived by OLP.

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

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Department as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) because the records contained in this system relate to official Federal investigations. Individual access to these records might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e)(1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced, the accuracy of

which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information since it may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigation process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsections (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4)(G) and (H) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (g) because this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

Dated: July 1, 2021.

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