



## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

#### 43 CFR Part 2

[DOI-2023-0008; 234D0104IG, DG10100000, DIG000000.000000]

RIN 1090-AB27

### Privacy Act Regulations; Exemption for Investigative Records

**AGENCY:** Office of Inspector General, Interior.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of the Interior (DOI) is proposing to amend its regulations to exempt certain records in the INTERIOR/OIG-02, Investigative Records, system of records from one or more provisions of the Privacy Act of 1974 because of criminal, civil, and administrative law enforcement requirements.

**DATES:** Submit comments on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number [DOI-2023-0008] or Regulatory Information Number (RIN) Number 1090-AB27, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for sending comments.
- Email: [DOI\\_Privacy@ios.doi.gov](mailto:DOI_Privacy@ios.doi.gov). Include docket number [DOI-2023-0008] or RIN 1090-AB27 in the subject line of the message.
- U.S. mail or hand-delivery: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

*Instructions:* All submissions received must include the agency name and docket number [DOI-2023-0008] or RIN 1090-AB27 for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240, DOI\_Privacy@ios.doi.gov or (202) 208-1605.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Privacy Act of 1974, as amended, 5 U.S.C. 552a, governs the means by which the U.S. Government collects, maintains, uses and disseminates personally identifiable information. The Privacy Act applies to information about individuals that is maintained in a “system of records.” A system of records is a group of any records under the control of an agency from which information about an individual is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See 5 U.S.C. 552a(a)(4) and (5).

Individuals may request access to records containing information about themselves under the Privacy Act, 5 U.S.C. 552a(b), (c) and (d). However, the Privacy Act authorizes Federal agencies to exempt systems of records from access by individuals under certain circumstances, such as where the access or disclosure of such information would impede national security or law enforcement efforts. Exemptions from Privacy Act provisions must be established by regulation pursuant to 5 U.S.C. 552a(j) and (k).

The Office of Inspector General (OIG) maintains the INTERIOR/OIG-02, Investigative Records, system of records to help facilitate the OIG’s various

responsibilities under the Inspector General Act of 1978, as amended. The OIG is statutorily directed to conduct and supervise investigations relating to programs and operations of the DOI, to promote economy, efficiency, and effectiveness in the administration of programs and operations, and to prevent and detect fraud, waste, and abuse in such programs and operations. Accordingly, records in the system are used during the course of conducting investigations on individuals and entities suspected of misconduct, fraud, waste, and abuse, other illegal or unethical acts, and in conducting related criminal prosecutions, civil proceedings, and administrative actions. The system also contains records of complaints, requests to investigate, and administrative referrals; records of case initiation; reports, correspondence, notes and memoranda generated by OIG regarding investigations; and records on complainants, subjects, and victims.

The system notice for INTERIOR/OIG-02, Investigative Records, system of records was previously published in the *Federal Register* at 76 FR 60519 (September 29, 2011), modification published at 86 FR 50156 (September 7, 2021). An updated system of records notice was published elsewhere in the *Federal Register* denoting updates to the modified INTERIOR/OIG-02, Investigative Records, system of records.

Under 5 U.S.C. 552a(j) and (k), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of the Privacy Act. The INTERIOR/OIG-02, Investigative Records, system contains records related to law enforcement investigations that are exempt from provisions of the Privacy Act, 5 U.S.C. 552a(j) and (k). The DOI previously promulgated regulations at 43 CFR 2.254 to exempt records in this system from all provisions of the Privacy Act except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) pursuant to 5 U.S.C. 552a(j)(2); and to exempt records 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)(2).

In this notice of proposed rulemaking (NPRM), DOI is proposing to claim additional exemptions 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)(3), and (k)(5) because this system of records contains material that support activities related to investigations. The OIG may waive exemptions on a case-by-case basis where a release would not interfere with or reveal investigatory material compiled for law enforcement purposes, or reveal records on suitability, eligibility, or qualifications for Federal employment, military service, Federal contracts, or access to classified information, or compromise confidential sources. Exemptions from these particular subsections are justified for the following reasons:

1. 5 U.S.C. 552a(c)(3). This section requires an agency to make the accounting of each disclosure of records available to the individual named in the record upon request. Records in this system may contain investigatory records and material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Release of accounting of disclosures would alert the subjects of an investigation to the existence of the investigation, law enforcement activity or investigation, and the fact that they are subjects of the investigation, or could disclose confidential information that could be detrimental to national security. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature and scope of an investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

2. 5 U.S.C. 552a(d); (e)(4)(G) and (e)(4)(H); and (f). These sections require an agency to provide notice and disclosure to individuals that a system contains records pertaining to the individual, as well as providing rights of access and amendment.

Records in this system may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Granting access to these records in the system could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, the nature and scope of the information and evidence obtained, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation; endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, as well as their families; lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; and disclose investigative techniques and procedures. In addition, granting access to such information could disclose confidential information that could impact national security or could constitute an unwarranted invasion of the personal privacy of others.

3. 5 U.S.C. 552a(e)(1). This section requires the agency to maintain information about an individual only to the extent that such information is relevant or necessary. The application of this provision could impair investigations because it is not always possible to determine the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after information is evaluated that the relevance and necessity of such information can be established for an investigation. In addition, during the course of an investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

4. 5 U.S.C. 552a(e)(4)(I). This section requires an agency to provide public notice of the categories of sources of records in the system. The application of this

provision could provide the subject of an investigation with substantial information about the nature and scope of that investigation, could provide information to enable the subject to avoid detection or apprehension, seriously impede or compromise an investigation, or the fabrication of testimony, and disclose investigative techniques and procedures.

Additionally, the application of this section could cause sources to refrain from giving such information because of fear of reprisal, or fear of breach of promise(s) of anonymity and confidentiality. This could compromise OIG's ability to conduct investigations and to identify, detect and apprehend violators.

## **Procedural Requirements**

### **1. Regulatory Planning and Review (E.O. 12866 and E.O. 13563).**

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

### **2. Regulatory Flexibility Act.**

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-221)). This proposed rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act. This proposed rule is not a major rule under 5 U.S.C. 804(2). This proposed rule:

(a) Does not have an annual effect on the economy of \$100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local Government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

### **3. Unfunded Mandates Reform Act.**

This proposed rule does not impose an unfunded mandate on State, local, or tribal Governments in the aggregate, or on the private sector, of more than \$100 million per year. The proposed rule does not have a significant or unique effect on State, local, or tribal Governments or the private sector. This proposed rule makes only minor changes to 43 CFR part 2. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.) is not required.

### **4. Takings (E.O. 12630).**

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. This proposed rule makes only minor changes to 43 CFR part 2. A takings implication assessment is not required.

### **5. Federalism (E.O. 13132).**

In accordance with Executive Order 13132, this proposed rule does not have any federalism implications to warrant the preparation of a federalism assessment. The proposed rule is not associated with, nor will it have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. A federalism assessment is not required.

#### **6. Civil Justice Reform (E.O. 12988).**

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Does not unduly burden the Federal judicial system.
- (b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

#### **7. Consultation with Indian Tribes (E.O. 13175).**

In accordance with Executive Order 13175, the Department of the Interior has evaluated this proposed rule and determined that it would have no substantial effects on Federally Recognized Indian Tribes.

#### **8. Paperwork Reduction Act.**

This proposed rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) is not required.

#### **9. National Environmental Policy Act.**

This proposed rule does not constitute a major Federal action significantly affecting the quality for the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, et seq., is not required

because the proposed rule is covered by a categorical exclusion. We have determined the proposed rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and technical in nature. We also have determined the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

#### **10. Effects on Energy Supply (E.O. 13211).**

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A statement of energy effects is not required.

#### **11. Clarity of this Regulation.**

We are required by Executive Order 12866 and 12988, the Plain Writing Act of 2010 (Pub. L. 111-274), and the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each proposed rule we publish must:

- Be logically organized;
- Use the active voice to address readers directly;
- Use clear language rather than jargon;
- Be divided into short sections and sentences; and
- Use lists and tables wherever possible.

#### **List of Subjects in 43 CFR Part 2**

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

For the reasons stated in the preamble, the Department of the Interior proposes to amend 43 CFR part 2 as follows:

#### **PART 2 - FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY**

1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461, the Social Security Number Fraud Prevention Act of 2017, Pub. L. 115-59, September 15, 2017.

2. Amend § 2.254 by adding paragraphs (b)(3), (d)(3), and (e)(8) to read as follows:

**§ 2.254 - Exemptions.**

\* \* \* \* \*

(b) \* \* \*

(3) INTERIOR/OIG-02, Investigative Records.

(d) \* \* \*

(3) INTERIOR/OIG-02, Investigative Records.

(e) \* \* \*

(8) INTERIOR/OIG-02, Investigative Records.

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**Signed:**

Teri Barnett,  
Departmental Privacy Officer,  
Department of the Interior.

[FR Doc. 2023-14881 Filed: 7/12/2023 8:45 am; Publication Date: 7/13/2023]