



WORLD **PRIVACY** FORUM

Comments of the World Privacy Forum

To

**The Department of Justice Regarding Notice of Proposed Rulemaking, 81 FR 64092,
CPCLO Order No. 008-2016**

Via Regulations.gov

Attn: Privacy Analyst,
Office of Privacy and Civil Liberties
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Washington, DC 20530-0001

October 12, 2016

The World Privacy Forum welcomes the opportunity to comment on the Department of Justice's proposed rule adding a new exemption for a new Privacy Act of 1974 system of records, CPCLO Order No. 008-2016, FBI Insider Threat Program Records, JUSTICE/FBI-023. The notice appears at 81 Federal Register 64092 (September 19, 2016), <https://www.federalregister.gov/d/2016-22412>. Please be aware that we also submitted comments on the system of records notice (SORN) for the proposed system, under separate cover.

The World Privacy Forum is a non-profit public interest research and consumer education group. We publish in-depth research papers, policy comments, and consumer education focusing on privacy and security issues. Much of our work explores emerging technology and privacy issues, including health, biometrics, consent, data analytics, and many other rapidly evolving areas of privacy. You can see our publications and more information at www.worldprivacyforum.org.

I. General Comments

We do not object in principle to the exemption of this system of records from parts of the Privacy Act of 1974. The system clearly contains classified and other investigatory material collected and used to protect national security and other important governmental interests.

We also recognize and appreciate the FBI's willingness to waive an exemption "where compliance would not appear to interfere with or adversely affect the purpose of this system to detect, deter, and/or mitigate insider threats to national security or to the FBI..." We would be happier if there were a published procedure that told a data subject how to seek a waiver, and we request that the Department consider establishing such a procedure and publishing it.

Regarding some of the details of the exemptions, we do have objection to several specific aspects of the proposal, which we believe requires additional work and thought. Our comments about these particulars are below.

II. Comments about Specific Exemptions

A. Exemption from subsection (e)(4)(I)

We are not convinced that all of the claimed exemptions are justified. We note the sixth category of exemptions first, which provides for the following:

(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 been published in the Federal Register. 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. Further, greater specificity of properly classified records could compromise national security.

Subsection (e)(4)(I) requires an agency to describe the *categories* of record sources. It does not require disclosure of *actual* sources or of any classified information. We are not aware of any litigation addressing the scope of the requirement for describing categories of records sources or threatening to require greater specificity.

We are therefore at a loss to understand why there is a contingent exemption in the event that some future litigation might possibly expand upon the disclosure required here. Does someone at the FBI or Department of Justice sit around and dream up farfetched possibilities that future litigation could affect disclosures required under the Privacy Act of 1974? Even if there were litigation, would it be impossible for the FBI to cure the problem while the litigation continued?

We note further that disclosing the *categories* of record sources does not appear related to the compromise of national security because of "greater specificity of properly classified records." The last sentence of the justification seems to bear no relation to the scope or purpose of the disclosure required by subsection (e)(4)(I), which does not call for any disclosure of classified information.

We also note that the proposed system of records notice contains this description of record sources:

Information may be provided by individuals covered by this system, the FBI, DOJ and United States Government components, other domestic and foreign government entities, or obtained from private entities.

We have questioned the adequacy of this description in our separate comments on the SORN, but the point here is that the claim of exemption makes it especially challenging to interpret the proposed disclosure. Is the proposed disclosure complete? Are there other record sources not mentioned in the description?

We do not see the need for the exemption from subsection (e)(4)(I) at all, but we would be happier if the description of record sources at least said whether the notice omits other sources on the grounds that they are exempt from description. That would at least tell us whether the description of record sources was complete. Because of the exemption, it is impossible to tell from the SORN if the description is complete, and few readers would know to read the rule claiming an exemption. Further, reading the proposed rule would not be enlightening.

B. Exemption from subsection (e)(5)

We are concerned about the seventh category of exemptions, which states:

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes, including efforts to detect, deter, and/or mitigate insider threats to national security or to the FBI and its personnel, facilities, resources, and activities, due to the nature of investigations and intelligence collection, the FBI often collects information that may not be immediately shown to be accurate, relevant, timely, and complete, although the FBI takes reasonable steps to collect only the information necessary to support its mission and investigations. Additionally, the information may aid in establishing patterns of activity and providing criminal or intelligence leads. It could impede investigative progress if it were necessary to assure relevance, accuracy, timeliness and completeness of all information obtained during the scope of an investigation. Further, some of the records in this system may come from other domestic or foreign government entities, or private entities, and it would not be administratively feasible for the FBI to vouch for the compliance of these agencies with this provision.

We think that this justification fails to address all the provisions of subsection (e)(5). An exemption is not available from the general requirement to maintain records used in any determination with “accuracy, relevance, timeliness and completeness.” The words that the justification does not consider are “reasonably necessary to assure fairness to the individual.” Neither the scope of the claimed exemption nor the justification addresses the fairness element.

In our view, the *reasonably necessary* language already provides a considerable amount of leeway in applying the substantive standards. An agency seeking to go beyond that needs an additional justification. We recognize that not all collected information must be immediately

shown to be wholly accurate, relevant, timely, and complete. The obligation that arises is to have information that is reasonably necessary to assure fairness. We do not see any justification for claiming an exemption from the obligation to make determinations with accuracy, relevance, timeliness and completeness **as is reasonably necessary to assure fairness**.

The original OMB Guidelines from 1975 explain the goal of the provision and its focus on adverse determinations:

The objective of this provision is to minimize, if not eliminate, the risk that an agency will make an adverse determination about an individual on the basis of inaccurate, incomplete, irrelevant, or out-of-date records that it maintains. Since the final determination as to accuracy is necessarily judgmental, it is particularly critical that this judgment be made with an understanding of the intent of the Act.

The Act recognizes the difficulty of establishing absolute standards of data quality by conditioning the requirement with the language “as is reasonably necessary to assure fairness to the individual...” This places the emphasis on assuring the quality of the record in terms of the use of the record in making decisions affecting the rights, benefits, entitlements, or opportunities (including employment) of the individual. 40 Federal Register 28964-65 (July 9, 1975)

A system of records for insider threats has the potential to make decisions about individuals that could have very serious consequences. As the OMB Guidelines state, there are no absolute data quality standards, and a considerable amount of judgment is essential and is already built into the statute. We suggest that the exemption be dropped entirely or recast so that it does not treat the *collection of information* and the *use of that information to make a determination* in the same manner.

We do not see a justification for claiming the right to make determinations without any standards of reasonable accuracy, relevance, timeliness and completeness and without addressing the fairness obligation. This is a serious point, particularly in light of the need for decisional integrity based upon data. We do not see these provisions of subsection (e)(5) as interfering with the goals of the system of records or as hindering the nature of investigations.

The Department painted itself into a corner a few years ago by claiming an exemption from subsection (e)(5) for major systems of records that operated without it for decades and without creating any problems or limits on its activities. This is a good opportunity for the Department to begin to walk back that decision by not claiming the exemption in this new system. We do not see a good reason to continue to walk away from the fairness standard in the Privacy Act of 1974.

We appreciate the opportunity to submit these comments, and would be pleased to answer any questions you may have.

Respectfully submitted,

A handwritten signature in cursive script that reads "Pam Dixon".

Pam Dixon
Executive Director,
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