

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS—2011—0082]

Notice of Privacy Act System of Records

November 28, 2011

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By notice published on October 28, 2011, the Department of Homeland Security (“DHS”) has proposed to revise a current DHS system of records entitled, “Department of Homeland Security/United States Secret Service—003 Non-Criminal Investigation Information System of Records.”<sup>1</sup> The Electronic Privacy Information Center (EPIC) opposes many of the proposed system of records provisions. The system of records notice (“SORN”) greatly expands permissible “routine use” disclosures of personal information in the possession of the DHS. This expansion would undermine privacy safeguards set out in the Privacy Act and would unnecessarily increase privacy risks for individuals whose records are maintained by the federal government. Pursuant to the SORN in the Federal Register, EPIC submits these comments to address the substantial privacy risks the agency’s proposals raise.

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<sup>1</sup> Privacy Act of 1974; Department of Homeland Security/United States Secret Service—003 Non-Criminal Investigation Information System of Records, 76 Fed. Reg. 66937 (proposed Oct. 28, 2011).

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has a particular interest in preserving privacy safeguards established by Congress, including the Privacy Act of 1974, and routinely comments in public rulemakings on agency proposals that would diminish the privacy rights and agency obligations set out in the federal Privacy Act.<sup>2</sup>

### **The Scope of the System of Records**

The DHS' SORN revises the categories of individuals covered by the system and categories of records in the system.<sup>3</sup> The SORN also details other provisions within the 003 Non-Criminal Investigation Information System of Records, including the system's purpose and routine uses of records maintained in the system.<sup>4</sup> The record at issue in this proceeding includes "Individuals who are applicants for employment or are currently employed with the USSS or other federal or state entities and have taken a polygraph; and Qualified USSS law

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<sup>2</sup> See, e.g., Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0030 (June 8, 2011), *available at* <http://epic.org/privacy/EPIC%20E-Verify%20Comments%20Final%2006.08.11.pdf>; Comments of the Electronic Privacy Information Center to the Office of the Director of National Intelligence, Notice of Privacy Act System of Records (May 12, 2010), *available at* [http://epic.org/privacy/ODNI\\_Comments\\_2010-05-12.pdf](http://epic.org/privacy/ODNI_Comments_2010-05-12.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System, System of Records and Notice of Proposed Rulemaking: Implementation of Exemptions; Automated Targeting System (Sept. 5, 2007), *available at* [http://epic.org/privacy/travel/ats/epic\\_090507.pdf](http://epic.org/privacy/travel/ats/epic_090507.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security United States Customs and Border Protection, Docket No. DHS-2005-0053, Notice of Revision to and Expansion of Privacy Act System of Records (May 22, 2006), *available at* <http://epic.org/privacy/airtravel/ges052206.pdf>; Thirty Organizations and 16 Experts in Privacy and Technology, Comments Urging the Department of Homeland Security To (A) Suspend the "Automated Targeting System" As Applied To Individuals, Or In the Alternative, (B) Fully Apply All Privacy Act Safeguards To Any Person Subject To the Automated Targeting System (Dec. 4, 2006), *available at* [http://epic.org/privacy/pdf/ats\\_comments.pdf](http://epic.org/privacy/pdf/ats_comments.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security: Bureau of Immigration and Customs Enforcement and Bureau of Customs and Border Protection, Docket No. DHS/ICE-CBP-001, Notice of Privacy Act System of Records (Jan. 12, 2004), *available at* [http://epic.org/privacy/us-visit/ADIS\\_comments.pdf](http://epic.org/privacy/us-visit/ADIS_comments.pdf).

<sup>3</sup> 76 Fed. Reg. 66938.

<sup>4</sup> *Id.* at 66938-39.

enforcement officers and qualified USSS retired law enforcement officers who carry concealed firearms.”<sup>5</sup> The categories of records in the system include:

Individual’s name; Social Security number; Address; Date of birth; Case number; Polygraph examination reports and files; Records containing investigatory material compiled solely for the purpose of determining suitability, eligibility, and/or qualifications for federal civilian employment or access to classified information; and Any group of records which have been created by the Law Enforcement Officer Safety Act of 2004, Public Law 108–277, 1, codified at 18 U.S.C. 926 B and C, as amended.<sup>6</sup>

EPIC objects to several of the proposed changes as indicated below. The system of records’ purpose and routine uses undermine the Privacy Act, are contrary to law, and exceed the authority of the agency.

#### **I. The Agency’s Proposed Routine Uses Exceed the Authority of the Agency**

The definition of “routine use” is precisely tailored, and has been narrowly prescribed in the Privacy Act’s statutory language, legislative history, and relevant case law. By establishing an overly broad purpose for which the system of records is maintained, the DHS proposes to significant increase its power to disclose records in its possession that are inconsistent with the reasons for which the information was originally gathered and without the consent of the individual concerned.

The Privacy Act prohibits federal agencies from disclosing records it maintains “to any person, or to another agency” without the written request or consent of the “individual to whom the record pertains.”<sup>7</sup> The Privacy Act also provides specific exemptions that permit agencies to disclose records without obtaining consent.<sup>8</sup> One of these exemptions is

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<sup>5</sup> *Id.* at 66938.

<sup>6</sup> *Id.*

<sup>7</sup> The Privacy Act of 1974, 5 U.S.C. § 552a(b) (2010).

<sup>8</sup> *Id.* § 552a(b)(1) – (12).

“routine use.”<sup>9</sup> The SORN states that “all or a portion of the records or information contained in this system may be disclosed outside the Department of Homeland Security (DHS) as a routine use pursuant to 5 U.S.C. 552a(b)(3).”<sup>10</sup> That section of the Privacy Act defines “routine use” to mean “with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.”<sup>11</sup>

The Privacy Act’s legislative history and the subsequent report on the Act indicate that the routine use for disclosing records must be specifically tailored for a defined purpose for which the records are collected. The legislative history states:

[t]he [routine use] definition should serve as a caution to agencies to think out in advance what uses it will make of information. This Act is not intended to impose undue burdens on the transfer of information . . . or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency’s reasons for using and interpreting the material.<sup>12</sup>

The Privacy Act Guidelines of 1975—a commentary report on implementing the Privacy Act— interpreted the above Congressional explanation of routine use to mean that a “ ‘routine use’ must be not only compatible with, but related to, the purpose for which the record is maintained.”<sup>13</sup>

Subsequent Privacy Act case law interprets the Act’s legislative history to limit routine use disclosure based upon a precisely defined system of records purpose. In *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, the Court of

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<sup>9</sup> *Id.* § 552a(b)(3).

<sup>10</sup> 76 Fed. Reg. 66938.

<sup>11</sup> 5 U.S.C. § 552a(b)(3) referencing § 552a(a)(7).

<sup>12</sup> *Legislative History of the Privacy Act of 1974 S, 3418 (Public Law 93-579): Source Book on Privacy*, 1031 (1976).

<sup>13</sup> *Id.*

Appeals for the D.C. Circuit relied on the Privacy Act’s legislative history to determine that “the term ‘compatible’ in the routine use definitions contained in [the Privacy Act] was added in order to limit interagency transfers of information.”<sup>14</sup> The Court of Appeals went on to quote the Third Circuit as it agreed, “[t]here must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency’s purpose in gathering the information and in its disclosure.”<sup>15</sup>

The DHS’ SORN stated purpose for which the 003 Non-Criminal Investigation Information System is maintained is “to record and maintain files related to applicants for employment or current employees of the USSS or other federal or state entities who have taken a polygraph; and current and retired USSS employees who are qualified to carry a concealed weapon.”<sup>16</sup> In essence, the DHS’ purpose for maintaining records is to collect and maintain records. The DHS proposes to use this broad-based purpose to justify disclosing records as a routine use for an expansive list of scenarios detailed in the SORN. In order for the DHS to have the authority to disclose records pursuant to a routine use, the DHS would need to narrowly tailor the system of records purpose to establish a clear nexus between DHS’ gathering information and DHS disclosing information. Accordingly, the DHS would act outside of its authority if it were to disclose records as a routine use based upon the proposed SORN.

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<sup>14</sup> *U.S. Postal Serv. v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 9 F.3d 138, 144 (D.C. Cir. 1993).

<sup>15</sup> *Id.* at 145 (quoting *Britt v. Natal Investigative Serv.*, 886 F.2d 544, 549-50 (3d. Cir. 1989). *See also Doe v. U.S. Dept. of Justice*, 660 F.Supp.2d 31, 48 (D.D.C. 2009) (DOJ’s disclosure of former AUSA’s termination letter to Unemployment Commission was compatible with routine use because the routine use for collecting the personnel file was to disclose to income administrative agencies); *Alexander v. F.B.I.*, 691 F. Supp.2d 182, 191 (D.D.C. 2010) (FBI’s routine use disclosure of background reports was compatible with the law enforcement purpose for which the reports were collected).

<sup>16</sup> 76 Fed. Reg. 66938.

## **II. Proposed Routine Use H is Contrary to the Privacy Act’s Legislative Intent, and Creates Opportunities for Violations of Statutory Rights**

Under the proposed system of records, the following disclosure would be permissible outside of the DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3):

“To Federal, State, or local government agencies for the purpose of developing a relevant ongoing civil, administrative, or background investigation.”<sup>17</sup>

The proposed routine use would permit the DHS to disclose records without obtaining individual consent to government agencies at any level for the purpose of “developing”—in essence, creating—an investigation. This type of arbitrary routine use lies in direct contrast to the legislative intent of the Privacy Act. During the 1974 Congressional hearings on the Act, Congressman William Moorhead testified regarding routine use: “the [Privacy Act] bill obviously is not intended to prohibit such necessary exchanges of information, providing its rulemaking procedures are followed. It is intended to prohibit gratuitous, ad hoc, disseminations for private or otherwise irregular purposes.”<sup>18</sup>

The proposed routine use of disclosing records for the purpose of creating an investigation is precisely the type of gratuitous and ad hoc dissemination the Act’s legislative history intended to prohibit. Routine Use H would permit the DHS to disclose information to investigatory agencies that may not otherwise have a legal basis for acquiring the information. Moreover, there is not attempt to obtain the information sought by the federal agency directly from the record subject, a central purpose of the Privacy Act. This creates huge threats to civil liberties because agencies can arbitrarily gather personal records

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<sup>17</sup> *Id.* at 66939.

<sup>18</sup> *Source Book on Privacy*, 1031.

from the DHS to “develop investigations,” and subsequently use the records against the record subject.

Proposed Routine Use H should be removed from the system of records.

### **III. Proposed Routine Use I Removes Privacy Act Safeguards by Disclosing Records to Third Parties Who are Not Subject to the Privacy Act**

The DHS proposes to disclose information as a routine use pursuant to

private institutions and individuals for the purpose of confirming and/or determining suitability, eligibility, or qualification for federal civilian employment or access to classified information, and for the purposes of furthering the efforts of the USSS to investigate the activities of individuals related to or involved in non-criminal civil and administrative investigations.<sup>19</sup>

This routine use should not be adopted because the private institutions and individuals are not subject to Privacy Act safeguards against privacy abuse. The Privacy Act only applies to records maintained by government agencies.<sup>20</sup> Government agencies include “any executive department, military department, Government corporation, *Government controlled corporation*, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>21</sup>

As is, the proposed routine use would permit the DHS to disclose private information to third party entities that are not subject to the Privacy Act or its civil remedies and criminal penalties. If the DHS adopts this routine use, it should contain a provision that makes clear the obligation of private institutions and individuals who obtain information under this SORN to comply with the obligations of the Privacy Act. The DHS should use the following language from proposed Routine Use F to ensure that the private institutions and individuals to whom information is disclosed are subject to the Privacy Act: “Individuals

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<sup>19</sup> 76 Fed. Reg. 66939.

<sup>20</sup> 5 U.S.C. § 552a(b).

<sup>21</sup> *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir. 1984).

provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.”<sup>22</sup>

#### **IV. Proposed Routine Use L Removes Privacy Act Safeguards by Disclosing Records to Foreign and International Agencies That are Not Subject to the Privacy Act**

The DHS proposes to disclose information as a routine use pursuant to

To an appropriate federal, state, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the letting of a contract, or the issuance of a license, grant or other benefit when disclosure is appropriate to the proper performance of the official duties of the person making the request.<sup>23</sup>

The provision in Routine Use L which would permit the DHS to disclose information to foreign or international agencies should be removed. As mentioned above in references to proposed Routine Use I, the Privacy Act applies to records maintained by government agencies, and government controlled entities. Releasing information to foreign or international agencies does not protect individuals covered by this system of records from Privacy Act violations. Moreover, because this provision permits disclosure to foreign and international agencies, the DHS cannot simply provide that these entities would be subject to U.S. Privacy Act requirements and limitations as it proposes in Routine Use F. The DHS does not have jurisdiction over foreign agents. Therefore, the Routine Use L provision that would permit the DHS to disclose information to foreign and international agencies should be removed.

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<sup>22</sup> 76 Fed. Reg. 66939.

<sup>23</sup> *Id.*



## **Conclusion**

For the foregoing reasons, the Electronic Privacy Information Center urges the Department of Homeland Security revise the 003 Non-Criminal Investigation Information System of Records to clearly define the purpose of the system and remove or amend proposed Routine Uses H, I, L. The agency's proposal, if left unchanged, undermines the central purpose of the Privacy Act, is contrary to law, and exceeds the authority of the agency.

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