

DEPARTMENT OF ENERGY**10 CFR PART 1008**

RIN 1901-AA62

Privacy Act of 1974; Records Maintained on Individuals**AGENCY:** Department of Energy.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend its Privacy Act regulations by adding a system of records to the list of systems exempted from certain subsections of the Act. Exemption from certain subsections is needed to enable the Office of Inspector General (OIG) to perform its duties and responsibilities.

The new system of records will be entitled "Allegation-Based Inspections Files of the Office of Inspector General," and will allow the Office of Inspector General to perform its functions mandated by statute, regulation or executive order. The system will maintain documents collected in the process of conducting inspections. An Office of Inspector General inspection is an examination of DOE or DOE contractor organizations, programs, projects, functions, or activities. The proposed system of records will cover only the files of inspections predicated on allegations or complaints and which identify subjects and sources of information by name. Inspections performed relate to sensitive allegations of wrongdoing received concerning certain individuals, including agency and DOE contractor employees, or other persons or entities with some relationship to the agency. Allegations include, but are not limited to, abuse of authority; misuse of government time, property, or position; conflicts of interest, or other non-criminal violations of law, rules, or regulations.

DATES: Written comments should be submitted on or before March 31, 1997.

ADDRESS: Written comments should be directed to: GayLa D. Sessoms, Director, Freedom of Information Act and Privacy Act Division, U.S. Department of Energy, HR-78, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: GayLa D. Sessoms, Director, Freedom of Information Act and Privacy Act Division, U.S. Department of Energy, HR-78, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-5955; or Jacqueline M. Becker, Office of Inspector General, U.S. Department of Energy, IG-1, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-4393; or Abel Lopez, Office of

General Counsel, U.S. Department of Energy, GC-80, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-8618.

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I. Background

The Privacy Act of 1974, as amended, at 5 U.S.C. 552a(k) provides that the head of an agency may exempt an agency system of records from certain provisions of the Act. Accordingly, this new system of records is added to the list of systems exempted by the Department of Energy from certain subsections of the Act.

The purpose of this rule is to amend the Department of Energy's Privacy Act regulations to enable the Office of Inspector General to carry out its duties and responsibilities as mandated by the Inspector General Act. The Inspector General is mandated to promote economy, effectiveness, and efficiency within the agency and to prevent and detect fraud, waste and abuse in agency programs and operations.

The Office of Inspections in the Office of Inspector General compiles various files that are collected and maintained to assist in the performance of the functions of the Office of Inspector General. The Office of Inspections performs various inspections and analyses as required by the Office of Inspector General. An inspection by the Office of Inspector General is an examination of a DOE or DOE contractor organization, program, project, function, or activity. The proposed system of records will cover only the files of inspections predicated on allegations or complaints and which identify subjects and sources of information by name. Inspections performed relate to sensitive allegations of wrongdoing received concerning certain individuals, including agency employees, or other persons or entities with some relationship to the agency and DOE contractor. Allegations include, but are not limited to, abuse of authority; misuse of government time, property, or position; conflicts of interest; or other non-criminal violations of law, rules, or regulations.

II. Analysis

The Department of Energy proposes to exempt this system of records from certain provisions of the Privacy Act pursuant to subsections (k)(1) and (k)(2) of the Act. The system of records is exempt from the following subsections:

System Exempted From Certain Provisions of the Act

Under subsections (k)(1) and (k)(2) of the Privacy Act, this system of records is exempt from the following subsections: 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d), 5 U.S.C. 552a(e)(1), 5 U.S.C. 552a(e)(4) (G) and (H), 5 U.S.C. 552a(f).

Exemption (k)(1) provides that the head of an agency may exempt an agency system of records from certain provisions of the Privacy Act if the system of records is subject to section 552(b)(1) of the Freedom of Information Act, 5 U.S.C. 552. That section of the Freedom of Information Act protects from disclosure national security information classified under an Executive Order. The proposed system of records will contain properly classified national security information in the OIG's Allegation-Based Inspections files.

The detailed reasons for exemptions under 5 U.S.C. 552a(k)(1) follow:

(1) 5 U.S.C. 552a(c)(3) requires that, upon request, an agency must give an individual named in a record an accounting which reflects the disclosure of the record to other persons or agencies. This accounting must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient. The Department of Energy has programs involving classified material which may be the subject of an Office of Inspections review. The application of these provisions to reviews involving properly classified material could disclose classified information. If this classified material were disclosed, the national security might be compromised.

An example of an issue involving classified security information would be a review of the Department's maintenance or transportation of special nuclear material. Such information could be sought by terrorist groups. Another example would be Departmental work with intelligence information obtained from other Federal agencies.

(2) 5 U.S.C. 552a(d), (e)(4)(G) and (H), and (f) relate to the following: An individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying

an individual who requests access to or amendment of records; and agency procedures relating to access to and amendment of records and the content of information contained in such records. If these provisions were applied to classified material in the Allegation-Based Inspections Files, this could (1) interfere with inspections or inquiries undertaken in connection with national security; (2) disclose the identity of sources kept secret to protect the national security; (3) reveal classified information supplied by these sources to protect the national security; or (4) generally violate the secrecy of the classification.

The Office of Inspections also conducts counterintelligence administrative inquiries and inspections. These reviews are conducted to uncover clandestine relationships, contacts with foreign intelligence services, and other hostile activities. Such actions could be directed against Departmental facilities, property, personnel, programs, and contractors and contractor employees. These hostile activities may be conducted by foreign powers, foreign organizations or their agents. In conducting these reviews, the Office of Inspections collects classified information that if disclosed could compromise Federal counterintelligence activities.

The Office of Inspections may compile information pertaining to foreign energy matters. Disclosure of this information could identify sensitive sources and methods used by the national intelligence community. The Office of Inspections also may compile information regarding classified technology being developed by the Department or other agencies. Disclosure of this information could identify sensitive Departmental projects or operations that could be targets of foreign intelligence service operations.

(3) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order. The OIG does not create the material it collects and thus has no control over the content of that material.

There are additional reasons why application of this provision could impair inspections and interfere with the statutory responsibilities of the OIG. It is not always possible to detect the relevance or necessity of specific information in the early stages of an inspection or inquiry. This applies when an inspection or inquiry uses properly classified information.

Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevancy and necessity of such information can be established. Furthermore, information outside the scope of the OIG's jurisdiction may be helpful in establishing patterns of activities or problems or in developing information that should be referred to other entities. Such information cannot always readily be segregated.

The detailed reasons for the exemptions under 5 U.S.C. 552a (k)(2) follow:

(1) 5 U.S.C. 552a(c)(3) requires that, upon request, an agency must give an individual named in a record an accounting which reflects the disclosure of the record to other persons or agencies. This accounting must state the date, nature and purpose of each disclosure of the record, and the name and address of the recipient. To apply this provision would alert those who may be the subjects of an inspection or inquiry pertaining to an allegation or complaint to the existence of the inspection or inquiry, or that they are the subjects of an inspection or inquiry. Release of information to subjects of such an inspection or inquiry could provide the subject with significant information concerning the nature of the inspection or inquiry and could result in the altering or destruction of documentary evidence, improper influencing of witnesses, and other activities that could impede or compromise the inspection or inquiry.

(2) 5 U.S.C. 552a(d), (e)(4)(G) and (H), and (f) relate to the following: An individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying an individual who requests access to or amendment of records; and agency procedures relating to access to and amendment of records and the content of information contained in such records. This system is exempt from the foregoing provisions for the following reasons: to notify an individual at the individual's request, of the existence of records in an inspection file pertaining to a complaint or allegation about the individual or to grant access to this type of inspection file could (1) interfere with inspections proceedings predicated on a complaint or allegation, (2) constitute an unwarranted invasion of the personal privacy of others, (3) disclose the identity of confidential sources and reveal confidential information supplied by those sources, or (4) disclose inspection techniques and procedures.

In addition, this system is exempt from paragraph (d)(2) of this section,

because to require the Office of the Inspector General, to amend information thought to be incorrect, irrelevant or untimely, because of the nature of the information collected and the essential length of time it is maintained, would create an impossible administrative and investigative burden by forcing the agency to continuously retrograde its investigations attempting to resolve questions of accuracy.

(3) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order. An exemption from the foregoing is needed because:

a. It is not always possible to detect relevance or necessity of specific information in the early stages of an inspection involving a complaint or allegation.

b. Relevance and necessity are questions of judgment and timing. What appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after the information is evaluated or the case is closed that the relevancy and necessity of such information can be established.

c. In any inspection involving a complaint or allegation, the Inspector General may obtain information concerning the violation of laws other than those within the scope of the Inspector General's jurisdiction. In the interest of effective law enforcement, the Inspector General should be able to retain this information to aid in establishing patterns of program violations or criminal activity, and provide leads for those law enforcement agencies charged with enforcing criminal or civil law.

d. In conducting an inspection or inquiry involving a complaint or allegation, information obtained may relate to the main purpose of the inspection or inquiry and to matters under the jurisdiction of another agency. Such information is not normally readily segregable.

III. Procedural Requirements

A. Regulatory Review

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354. The Regulatory Flexibility Act requires the preparation of a regulatory flexibility analysis for any proposed rule which is likely to have a significant economic impact on a substantial number of small entities. This rule will have no impact on interest rates, tax policies or liabilities, the cost of goods or services, or other direct economic factors. The rule will also not have any indirect economic consequences such as changed construction rates.

The Department of Energy certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. No regulatory flexibility analysis has been prepared since there is no significant impact on small entities.

D. Review Under the Paperwork Reduction Act

No new information collection or record keeping requirements are imposed by this proposed rule. As a result, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a new policy action. The proposed rule will not affect States, or the relationship between the Federal Government and the States, in any direct way.

F. Review Under the National Environmental Policy Act

The proposed rulemaking would amend the Department's regulations that implement the Privacy Act at 10 CFR part 1008, "Records Maintained on Individuals (Privacy Act)," by adding a new system of records to the list of systems exempted from certain subsections of the Privacy Act. Under the new system of records, the Department would maintain documents collected in inspections conducted by the Office of Inspector General. Implementation of the proposed rule would only affect the manner in which certain files are maintained and made accessible to the public, and would not result in environmental impacts. The Department has therefore determined that the proposed rule is covered under the Categorical Exclusion found at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to the amendment or interpretation of existing regulation that does not change the environmental effect of the rule being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

IV. Public Comments

Interested persons are invited to participate by submitting data, views, or comments with respect to the proposed amendments to the Privacy Act regulations of the Department of Energy as set forth in this notice. Those

interested in participating should submit three copies of written comments to the individual whose name is listed in the "ADDRESS" section of this notice. The regulatory action does not involve any significant issues of fact or law. 43 U.S.C. 7191(c). Therefore, DOE is conducting this proceeding under 5 U.S.C. 553 and has decided that there is no need to schedule a public hearing. All comments received will be available for public inspection in the Department of Energy's Freedom of Information Public Reading Room, 1E-190, the Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday except Federal holidays. All written comments received by the date listed in the **DATES** section of this notice will be carefully assessed and fully considered before the proposed amendment is published as a final rule. Any information considered to be confidential must be so identified and submitted in writing. Please submit only one copy of such information. The Department of Energy reserves the right to determine the confidential status of information identified as confidential.

The Department has concluded that this proposed rule does not involve a substantial issue of fact or law and that the rule should not have substantial impact on the nation's economy or on a large number of individuals or businesses. Therefore, pursuant to the Department of Energy Organization Act, Pub.L. 95-91, the Department of Energy does not plan to hold a public hearing on this proposed rule.

List of Subjects in 10 CFR Part 1008

Privacy.

Issued in Washington, DC on December 31, 1996.

Archer L. Durham,

Assistant Secretary for Human Resources and Administration.

For the reasons set forth in the preamble, 10 CFR part 1008 is proposed to be amended as set forth below:

PART 1008—RECORDS MAINTAINED ON INDIVIDUALS (PRIVACY ACT)

1. The authority citation continues to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*, Executive Order 12091, (42 FR 46267), 5 U.S.C. 552a.

2. Section 1008.12 is amended by adding paragraphs (b)(2)(ii)(M) and (b)(3)(ii)(O) to read as follows:

§ 1008.12 Exemptions.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(M) Allegation-Based Inspections
Files of the Office of Inspector General
(DOE-83).

(3) * * *

(ii) * * *

(O) Allegation-Based Inspections Files
of the Office of Inspector General (DOE-
83).

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[FR Doc. 97-2178 Filed 1-28-97; 8:45 am]

BILLING CODE 6450-01-P