



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 16

[EPA-HQ-OEI-2014-0849; FRL-9941-44-OEI]

Revision of the Agency's Privacy Act Regulations for EPA-63

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action on revisions to the Agency's Privacy Act regulations in order to exempt a new system of records, EPA-63, the eDiscovery Enterprise Tool Suite, from certain requirements of the Privacy Act because records in EPA's eDiscovery Enterprise Tool Suite are maintained for use in civil and criminal actions. A notice has been published in the **Federal Register** on July 27, 2018 for the creation of this new system of records that will contain information collected using the Agency's suite of tools that search and preserve electronically stored information (ESI) in support of the Agency's eDiscovery (electronic discovery) and Freedom of Information Act processes.

DATES: This rule is effective on **[Insert date 90 days after date of publication in the Federal Register]** without further notice, unless EPA receives adverse comment by **[Insert date 30 days after date of publication in the Federal Register]**. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OEI-2014-0849, at <https://www.regulations.gov/>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish

any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Brian K. Thompson, Acting Director, eDiscovery Division, Office of Enterprise Information Programs, U.S. Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; email: thompson.briank@epa.gov; telephone number: 202-564-4256.

SUPPLEMENTARY INFORMATION:

I. Why is EPA Using a Direct Final Rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the “Proposed Rules” section of the **Federal Register**, we are publishing a separate document that will serve as the proposed rule to exempt a new system of records, EPA-63, the eDiscovery Enterprise Tool Suite, from certain requirements of the Privacy Act if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. General Information

The EPA published a Privacy Act system of records notice for information collected using the eDiscovery Enterprise Tool Suite. Depending on the specific need, the Agency will use a combination of several electronic tools that together assist with the preservation, search, processing, review and production of electronically stored information (ESI). The tool suite will be used to preserve, search, collect, sort and review ESI including email messages, word processing documents, media files, spreadsheets, presentations, scanned documents and data sets in support of legal discovery. The Agency will also use these tools to search for ESI that is responsive to requests for information submitted under the Freedom of Information Act (FOIA), or other formal information requests.

The records in EPA's eDiscovery Enterprise Tool Suite are maintained for use in civil and criminal actions. The Agency's system of records, EPA-63, is maintained by the Office of Environmental Information, Office of Enterprise Information Programs, eDiscovery Division, on behalf of Agency offices that will require use of the eDiscovery tool suite for both civil and criminal actions. When information is maintained for the purpose of civil actions, the relevant provision of the Privacy Act is 5 U.S.C. § 552a(d)(5) which states "nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5).

The system is also maintained for support of criminal enforcement activity by the EPA. In those cases, the system is maintained on behalf of the Criminal Investigation Division, Office

of Criminal Enforcement, Forensics, and Training, Office of Enforcement and Compliance Assurance - a component of EPA that performs as its principal function, activities pertaining to the enforcement of criminal laws. When information is maintained for the purpose of criminal cases, the relevant provision of the Privacy Act is 5 U.S.C. § 552a(j)(2), which states that the head of an agency may promulgate regulations to exempt the system from certain provisions of the Act if the system is “maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of: (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.” 5 U.S.C. § 552a(j)(2).

Accordingly the EPA-63 is exempt from 5 U.S.C. § 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8) and (f)(2)-(f)(5) and (g):

- 1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her could reveal investigative interest on the part of EPA and/or the Department of Justice. 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. Further, making

available to a record subject the accounting of disclosures could reveal the identity of a confidential source.

- 2) From subsection (c)(4) because no access to these records is available under subsection (d) of the Privacy Act.
- 3) From subsection (d) because the records contained in these systems relate to official federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records in either of these systems would interfere with ongoing law enforcement proceedings and impose an unworkable administrative burden by requiring law enforcement investigations to be continuously reinvestigated.
- 4) From subsections (e)(1) and (e)(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 that may aid in establishing patterns of criminal activity. Moreover, it would impede any investigative process, whether civil or criminal, if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.
- 5) From subsection (e)(2) 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.

- 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 no access to these records is available under subsection (d) of the Privacy Act.
- 8) From subsection (e)(8) because complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.
- 9) From subsection (f)(2), (f)(3), (f)(4) and (f)(5) because this system is exempt from the access and amendment provisions of subsection (d).
- 10) From subsection (g) because EPA is claiming that this system of records is exempt from subsections (c)(3) and (4), (d), (e)(1), (2), (3), (4)(G) and (H), (5), and (8), and (f)(2), (3), (4) and (5) of the Act, the provisions of subsection (g) of the Act are inapplicable and are exempted to the extent that this system of records is exempted from those subsections of the Act.

A final relevant provision of the Privacy Act is 5 U.S.C. § 552a (k)(2), which states that the head of an agency may promulgate regulations to exempt the system from certain provisions of the Act if the system “contains investigatory material compiled for law enforcement purposes other than material within the scope of subsection (j)(2)” of 5 U.S.C. § 552a. Accordingly EPA-63 is exempt from 5 U.S.C. § 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H) and (f)(2)-(f)(5):

- 1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her could reveal investigative interest on the part of EPA and/or the Department of Justice. 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. Further, making available to a record subject the accounting of disclosures could reveal the identity of a confidential source.

- 2) From subsection (d) because the records contained in these systems relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records in either of these systems would interfere with ongoing law enforcement proceedings and impose an impossible administrative burden by requiring law enforcement investigations to be continuously reinvestigated.
- 3) From subsection (e)(1) 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 that may aid in establishing patterns of criminal activity. Moreover, it would impede any investigative process, whether civil or criminal, if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.
- 4) From subsections (e)(4) (G) and (H), because no access to these records is available under subsection (d) of the Privacy Act.
- 5) From subsection (f)(2), (f)(3), (f)(4) and (f)(5) because this system is exempt from the access and amendment provisions of subsection (d).

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA. This action contains no provisions constituting a collection of information under the PRA.

D. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

F. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not 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.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

L. The Congressional Review Act

This rule is exempt from the CRA because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 40 CFR Part 16

Environmental protection, Administrative practice and procedure, Confidential business information, Privacy, Government employees.

Dated: November 14, 2018.

Vaughn Noga,
Principal Deputy Assistant Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 16 of the Code of Federal Regulations is amended as follows:

PART 16 — IMPLEMENTATION OF PRIVACY ACT OF 1974

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552a (as revised).

2. Amend §16.11 by:

- a. Adding the system number and name, EPA-63 eDiscovery Enterprise Tool Suite, at the end of the list in paragraph (a);
- b. Adding paragraph (c)(4);
- c. Revising the first two sentences of paragraph (d); and
- d. Revising the introductory text of paragraph (e).

The additions and revisions read as follows:

§16.11 General exemptions.

(a) * * *

EPA-63 eDiscovery Enterprise Tool Suite.

* * * * *

(c) * * *

(4) The Agency's system of records, EPA-63 system of records is maintained by the Office of Environmental Information, Office of Enterprise Information Programs, on behalf of the Criminal Investigation Division, Office of Criminal Enforcement, Forensics, and Training, a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the Division's criminal law enforcement activities comes from Powers of Environmental Protection Agency, 18 U.S.C. 3063; Comprehensive

Environmental Response, Compensation and Liability Act, 42 U.S.C. 9603; Resource Conservation and Recovery Act, 42 U.S.C. 6928; Federal Water Pollution Control Act, 33 U.S.C. 1319, 1321; Toxic Substances Control Act, 15 U.S.C. 2614, 2615; Clean Air Act, 42 U.S.C. 7413; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136j, 136l; Safe Drinking Water Act, 42 U.S.C. 300h-2, 300i-1; Noise Control Act of 1972, 42 U.S.C. 4912; Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11045; and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415.

(d) *Scope of Exemption.* EPA systems of records 17, 40, 46 and 63 are exempted from the following provisions of the PA: 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (2), (3), (4)(G), and (H), (5), and (8); (f)(2) through (5); and (g). To the extent that the exemption for EPA systems of records 17, 40, 46 and 63 claimed under 5 U.S.C. 552a(j)(2) of the Act is held to be invalid, then an exemption under 5 U.S.C. 552a(k)(2) is claimed for these systems of records from (c)(3), (d), (e)(1), (e)(4)(G), (H), and (f)(2) through (5). * * *

(e) *Reasons for exemption.* EPA systems of records 17, 40, 46 and 63 are exempted from the above provisions of the PA for the following reasons:

* * * * *

3. Amend §16.12 by:

- a. Adding the system number and name, EPA-63 eDiscovery Enterprise Tool Suite, at the end of the list in paragraph (a)(1);
- b. Revising the first sentence in paragraph (a)(4)(i); and
- c. Revising the introductory text in paragraph (a)(5).

The addition and revisions read as follows:

§16.12 Specific exemptions.

(a) * * *

(1) * * *

EPA-63 eDiscovery Enterprise Tool Suite.

* * * * *

(4) * * * (i) EPA systems of records 17, 30, 40, 41, 46 and 63 are exempted from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2); 5 U.S.C. 552a(c)(3); (d); (e)(1), (4)(G) and (4)(H); and (f)(2) through (5). * * *

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(5) *Reasons for exemption.* EPA systems of records 17, 21, 30, 40, 41, 46 and 63 are exempted from the above provisions of the PA for the following reasons:

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