



DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 5

[Docket No. USCBP-2019-0040]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Customs and Border Protection-009 Electronic System for Travel Authorization (ESTA) System of Records

AGENCY: U.S. Department of Homeland Security, U.S. Customs and Border Protection.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is issuing a final rule to amend its regulations to exempt portions of a newly updated system of records titled, “Department of Homeland Security/U.S. Customs and Border Protection-009 Electronic System for Travel Authorization (ESTA) System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Debra L. Danisek (202) 344-1610, CBP Privacy Officer, Privacy and Diversity Office, 1300 Pennsylvania Ave. NW, Washington, D.C. 20229. For privacy issues please

contact: Jonathan R. Cantor (202) 343-1717, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking in the Federal Register, (84 FR 30634 June 27, 2019), proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. DHS issued the “DHS/CBP-009 Electronic System for Travel Authorization (ESTA) System of Records” in the Federal Register at 84 FR 30746 on June 27, 2019, to provide notice to the public that (1) DHS/CBP is expanding the categories of individuals to clarify the use of ESTA at all ports of entry; (2) to clarify that this system covers records obtained on the Form I-94W “Nonimmigrant Visa Waiver Arrival/Departure Record,” the paper version of ESTA; (3) to clarify that the ESTA application includes questions about travel to any Department of State-designated state sponsor of terrorism, and that DHS/CBP will no longer list the specific countries; (4) to specify that all ESTA vetting results and derogatory information in the Automated Targeting System (ATS); (5) to clarify and expand several previously issued routine uses; (6) to clarify that this system contains records or information recompiled from or created from information contained in other systems of records that are exempt from certain provision of the Privacy Act; and (7) to expand the applicability of the previously issued exemptions from the Privacy Act.

DHS/CBP invited comments on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

Public Comments

DHS received one comment on the NPRM and no comments on the SORN.

NPRM

CBP received one comment on the published NPRM regarding the collection of biometrics by the U.S. Government generally, and not specific to the ESTA system of records. CBP appreciates the public comment and strives to be transparent regarding all traveler operations. After consideration of the public comment, CBP has determined that the exemptions should remain in place and will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 et seq.; Pub. L. 107-296, 116 Stat. 2135; 5 U.S.C. 301.

Subpart A also issued under 5 U.S.C. 552.

Subpart B also issued under 5 U.S.C. 552a.

2. In Appendix C to Part 5, revise paragraph 20 to read as follows:

Appendix C to Part 5 - DHS Systems of Records Exempt From the Privacy

Act

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20. The Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP)-009 Electronic System for Travel Authorization (ESTA) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP-009 Electronic System for Travel Authorization (ESTA) System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities. This system of records covers information collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. As part of the process of determining ESTA eligibility or admissibility to the United States under the Visa Waiver Program, CBP collects two types of data for which it claims different exemptions.

(a) CBP will not assert any exemption to limit an individual from accessing or amending his or her record under subsection 552a(d) with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States and crosses the border, nor shall an exemption be asserted with respect to the resulting determination (approval or denial). However, pursuant to 5 U.S.C. 552a(j)(2), CBP will not disclose the fact that a law enforcement or intelligence agency has sought particular records because it may affect ongoing law enforcement activities, and thus, the Secretary of Homeland Security has exempted such records covered by this system from sections (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as is necessary and appropriate to protect this information. Further, DHS will claim exemption

from section (c)(3) of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(k)(2) as is necessary and appropriate to protect this information.

(b) Additionally, this system contains law enforcement and other derogatory records or information recompiled from or created from information contained in other systems of records that are exempt from certain provisions of the Privacy Act. For these records or information only, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (c)(4); (d)(1)-(4); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), and (e)(8); (f); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2), has exempted this system from the following provisions of the Privacy Act, 5 U.S.C. 552a(c)(3); (d)(1)-(4); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

Exemptions from these particular subsections cited above under (a) and (b) are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

- (i) From subsection (c)(3) and (c)(4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or

evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(ii) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(iii) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be 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 unlawful activity.

(iv) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would

alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

- (v) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.
- (vi) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, potential witnesses, and confidential informants.
- (vii) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.
- (viii) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and

other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(ix) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

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Department of Homeland Security.
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