

## DEPARTMENT OF EDUCATION

## 34 CFR Part 5b

RIN 1880-AA78

## Privacy Act Regulations

**AGENCY:** Office of Inspector General, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the Department's regulations implementing the Privacy Act of 1974 (the Act). These amendments are needed to modify existing departmental regulations to exempt from certain provisions of the Act a new system of records known as the Office of Inspector General (OIG) Hotline Complaints Files (System No. 18-10-0004) (ED/OIG Hotline Complaint Files). These exemptions are needed to protect information regarding Hotline complaints from disclosure to target individuals and others who could interfere with the processing and disposition of the information and with law enforcement activities relating to the Hotline complaints.

**DATES:** Comments must be received by the Department on or before January 8, 1998.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to Dianne Van Riper, U.S. Department of Education, 600 Independence Avenue, SW., Room 4106, Switzer Building, Washington, DC 20202-1530. Comments may also be sent through the Internet to: Comments@ed.gov

You must include the term "Privacy Act" in the subject line of the electronic message.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

**FOR FURTHER INFORMATION CONTACT:** Dianne Van Riper. Telephone: (202) 205-8762. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

## SUPPLEMENTARY INFORMATION:

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**Note:** The official version of this document is the document published in the **Federal Register**.

## General

The proposed exemptions are authorized under the Privacy Act, 5 U.S.C. 552a(j)(2) and (k)(2). Under subsection (j)(2) of the Act, the Secretary through rulemaking may exempt from certain provisions of the Act those systems of records maintained by a component of the Department that performs as its principal function any activity pertaining to the enforcement of criminal laws, if the information in the system is compiled for the purpose of criminal investigation. Under 5 U.S.C. 552a(k)(2), the Secretary through rulemaking may exempt from a more limited number of Privacy Act requirements a system of records that contains investigatory materials compiled for civil and administrative law enforcement purposes.

The OIG is a component of the Department that performs as its principal function investigations into violations of criminal law in connection with the Department's programs and operations, pursuant to the Inspector General Act of 1978, as amended, 5 U.S.C. app. 3. The ED/OIG Hotline Complaint Files system of records falls within the scope of subsection (j)(2), *i.e.*, information compiled for the purpose of criminal investigation. The proposed (j)(2) exemptions for criminal law enforcement records would remove restrictions on the manner in which information may be collected and the

type of information that may be collected by OIG in processing Hotline information; would limit certain requirements regarding notice to individuals; and would exempt the system of records from civil remedies for violations of the Act. These exemptions are necessary primarily to avoid premature disclosures of sensitive information, including, but not limited to, the existence of a criminal investigation, that may compromise or impede the disposition of Hotline complaints and allegations.

The proposal to add (k)(2) exemptions reflects recognition that certain records in the Hotline system may fall outside the (j)(2) exemptions because they relate primarily to civil and administrative law enforcement, such as allegations of misconduct by Department employees in violation of the Standards of Conduct. Nevertheless, the Act recognizes that these records may also properly be exempted from certain disclosure and notice requirements, as well as restrictions on the manner in which OIG may collect information, in order to avoid compromising, impeding, or interfering with the disposition of those Hotline complaints.

A more complete explanation of each proposed exemption follows.

## A. Exemptions Pursuant to (j)(2)

The Secretary has determined that, to the extent the ED/OIG Hotline Complaint Files consist of information compiled for the purpose of criminal investigation, the system of records should be exempt from the following provisions of the Privacy Act and corresponding departmental regulations, as authorized under subparagraph (j)(2) of the Privacy Act, for the following reasons:

1. 5 U.S.C. 552a(c)(3) and 34 CFR 5b.9(a)(1) *require an agency to make the accounting of disclosures from a system of records available to the individual named in the record at the individual's request.* If the OIG made such an accounting available to target or source individuals, the availability of that information could seriously impede or compromise the processing of the Hotline complaint and any resulting criminal investigation by prematurely revealing its existence and nature, compromise or interfere with witnesses or make witnesses reluctant to cooperate with the investigators, and lead to suppression, alteration, or destruction of evidence.

2. 5 U.S.C. 552a(c)(4) and 34 CFR 5b.7(c) and 5b.8(b) *require an agency to inform parties to whom records have been disclosed about any correction of records or a subject individual's*

*statement disputing information in the record.* Because the Secretary also proposes to exempt this system of records from the requirements to correct records or to permit an individual to put in his or her records a statement disagreeing with a decision not to correct records, the requirement to inform parties who have received the record is not applicable.

3. 5 U.S.C. 552a(d)(1) through (4) and (f) and 34 CFR 5b.5(a)(1) and (c), 5b.7, and 5b.8 *require an agency to provide access to records, make corrections and amendments to records, and notify individuals of the existence of records upon their request.* Providing individuals with access to records of Hotline complaints, permitting them to contest the complaint contents, and allowing them to force changes to be made to the information contained in those records seriously interfere with and compromise the OIG's ability to conduct an orderly and unbiased processing of Hotline complaints and would impede the conduct of resulting investigations.

4. 5 U.S.C. 552a(e)(1) and 34 CFR 5b.4(a)(1) *require an agency to maintain in its records only "relevant and necessary" information about an individual.* Because it is not always possible to detect the relevance or necessity of each piece of information reported to the Hotline or collected in the preliminary phase of an investigation, this provision is inappropriate for Hotline complaints. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity is clear. In other cases, what may appear to be a relevant and necessary piece of information may become irrelevant in light of further inquiry or investigation. Also, the Hotline may obtain information that relates primarily to matters under the investigative jurisdiction of another agency (e.g., the fraudulent use of social security numbers), and that information may not be reasonably segregated. In the interest of effective law enforcement, the OIG should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

5. 5 U.S.C. 552a(e)(2) and 34 CFR 5b.4(a)(3) *require an agency to collect information from the subject individual of the investigation.* The requirement that OIG collect information "to the greatest extent practicable" from the target individual is not appropriate for the Hotline Complaint Files system of records where allegations are volunteered to OIG. To determine the

proper disposition of the complaint, it is often necessary to conduct an inquiry so that the target individual does not suspect that he or she is being investigated. The requirement to obtain information from targeted individual may alert the suspect of an investigation resulting from a Hotline complaint and thwart the investigation by enabling the suspect to destroy evidence or take another avoidance action.

6. 5 U.S.C. 552a(e)(3) and 34 CFR 5b.4(a)(3) *require an agency to provide a Privacy Act notice in the collection of information from individuals.* Giving notice to a complainant would impair the OIG's ability to collect candid and forthright information of criminal wrongdoing from Hotline sources.

7. 5 U.S.C. 552a(e)(4)(G), (H), and (I) *requires an agency to publish notice of procedures for notification, access, and correction of records and notice of the categories of sources of records in the system.* These requirements are unnecessary, since this system of records will be exempt from the underlying duties imposed by the Privacy Act. An exemption from (I) is required to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants.

8. 5 U.S.C. 552a(e)(5) *requires an agency to maintain records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness.* The OIG makes every effort to maintain records that are accurate, relevant, timely, and complete; however, it is not always possible in processing a Hotline complaint to determine with certainty that all the information collected is accurate, relevant, timely, and complete.

9. 5 U.S.C. 552a(e)(8) *requires an agency to make reasonable efforts to serve notice on an individual if any record on that individual is made available under compulsory legal process if that process becomes a matter of public record.* If the OIG complied with this provision, it could prematurely reveal and compromise an ongoing criminal investigation that resulted from a Hotline complaint.

10. 5 U.S.C. 552a(g) *requires an agency to be subjected to civil remedies from an individual for alleged violations of the Privacy Act.* Allowing civil lawsuits for alleged Privacy Act violations would compromise the orderly and objective processing of Hotline complaints and the conduct of resulting criminal investigations by subjecting the sensitive and confidential information in the ED/OIG Hotline Complaint Files to the possibility of premature disclosure under the liberal

civil discovery rules. That discovery may reveal confidential sources, the identity of informants, and investigative procedures and techniques.

#### *B. Exemptions Pursuant to (k)(2)*

The Secretary has determined that, to the extent the ED/OIG Hotline Complaint Files consist of investigatory material compiled for law enforcement purposes, the system of records should be exempt from the following provisions of the Privacy Act and corresponding departmental regulations, as authorized by subparagraph (k)(2) of the Privacy Act, for the following reasons:

1. 5 U.S.C. 552a(c)(3) and CFR 5b.9(c)(3) *require an agency to make the accounting of disclosures from a system of records available to the individual named in the record at the individual's request.* If the OIG made such an accounting available to target or source individuals, the availability of that information could seriously impede or compromise the processing of the Hotline complaint and any resulting criminal investigation by prematurely revealing its existence and nature, compromise or interfere with witnesses or make witnesses reluctant to cooperate with the investigators, and lead to suppression, alteration, or destruction of evidence.

2. 5 U.S.C. 552a(d)(1) through (4) and (f) and 34 CFR 5b.5(a)(1) and (c), 5b.7, and 5b.8 *require an agency to provide access to records, make corrections and amendments to records, and notify individuals of the existence of records upon their request.* Providing individuals with access to records of Hotline complaints, permitting them to contest the complaint contents, and allowing them to force changes to be made to the information contained therein would seriously interfere with and compromise the OIG's ability to conduct an orderly and unbiased processing of Hotline complaints and would impede the conduct of resulting investigations.

3. 5 U.S.C. 552a(e)(1) and 34 CFR 5b.4(a)(1) *require an agency to maintain in its records only "relevant and necessary" information about an individual.* Because it is not always possible to detect the relevance or necessity of each piece of information reported to the Hotline or collected in the preliminary phase of an investigation, this provision is inappropriate for Hotline complaints. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity is clear. In other cases, what may appear to be a relevant and necessary piece of information may

become irrelevant in light of further inquiry or investigation. Also, the Hotline may obtain information that relates primarily to matters under the investigative jurisdiction of another agency (e.g., the fraudulent use of social security numbers), and that information may not be reasonably segregated. In the interest of effective law enforcement, the OIG should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

4. 5 U.S.C. 552a(e)(4)(G), (H), and (I) requires an agency to publish notice of procedures for notification, access, and correction of records and notice of the categories of sources of records in the system. These requirements are unnecessary, since this system of records will be exempt from the underlying duties imposed by the Privacy Act. An exemption from (I) is required to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants.

#### Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 5b.11 *Exempt systems*.) (4) Is the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the proposed regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, S.W. (Room 5100, FB-10B), Washington, D.C. 20202-2241.

#### Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

These proposed regulations involve procedural rights of individuals under the Privacy Act. Individuals are not considered to be "entities" under the Regulatory Flexibility Act.

#### Paperwork Reduction Act of 1995

These proposed regulations have been examined under the Paperwork Reduction Act of 1995 and have been found to contain no information collection requirements.

#### Intergovernmental Review

This program is not subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79.

#### Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 5624, GSA Regional Office Building 3, Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205-8113 or (202) 260-9895. An individual who uses a TDD may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

To assist the Department in complying with the specific

requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

#### List of Subjects in 34 CFR Part 5b

Privacy.

Dated: November 18, 1997.

**Richard W. Riley,**

*Secretary of Education.*

(Catalogue of Federal Domestic Assistance Number does not apply)

The Secretary proposes to amend Part 5b of Title 34 of the Code of Federal Regulations as follows:

#### PART 5b—PRIVACY ACT REGULATIONS

1. The authority citation for Part 5b is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 552a.

2. Section 5b.11 is amended by revising paragraphs (b) introductory text and (c)(1) introductory text to read as follows:

#### § 5b.11 Exempt systems.

\* \* \* \* \*

(b) *Specific systems of records exempted under (j)(2).* The Department exempts the Investigative Files of the Inspector General ED/OIG (18-10-0001) and the Hotline Complaint Files of the Inspector General ED/OIG (18-10-0004) systems of records from the following provisions of 5 U.S.C. 552a and this part:

\* \* \* \* \*

(c) \* \* \*

(1) The Department exempts the Investigative Files of the Inspector General ED/OIG (18-10-0001) and the Hotline Complaint Files of the Inspector General ED/OIG (18-10-0004) from the following provisions of 5 U.S.C. 552a and this part to the extent that these systems of records consist of investigatory material and complaints that may be included in investigatory material compiled for law enforcement purposes:

\* \* \* \* \*

[FR Doc. 97-30716 Filed 11-21-97; 8:45 am]

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