

## Environmental Protection Agency

## § 16.11

EPA's General Counsel under this section; however, if the Counsel to the Inspector General has signed the initial adverse determination, the General Counsel, or his or her designee, will act on the appeal.

(b) EPA's General Counsel, or his or her designee, will make final decisions on PA appeals within 30 working days from the date on which the appeal is properly received in the Office of General Counsel, unless, for good cause shown, the 30-day period is extended and the requester is notified of the extension in writing. Such extensions will be utilized only in exceptional circumstances.

(c) In conducting PA appeals, the General Counsel, or his or her designee, will be guided by the requirements of 5 U.S.C. 552a(e)(1) and (e)(5).

(d) If an appeal is granted in whole or in part, the requester will be notified, in writing, and access to the record will be granted, or the correction or amendment of the record will be made. In all such cases, the Privacy Act Officer will ensure that § 16.7(d) is complied with.

(e) If the General Counsel or the Counsel to the Inspector General decides not to grant all or any portion of an appeal, the requester will be informed:

- (1) Of the decision and its basis;
- (2) Of the requester's right to file a concise statement of reasons for disagreeing with EPA's decision;
- (3) Of the procedures for filing such statement of disagreement;
- (4) That such statements of disagreements will be made available in subsequent disclosures of the record, together with an agency statement (if deemed appropriate) summarizing its refusal;
- (5) That prior recipients of the disputed record will be provided with statements as in paragraph (e)(4) of this section, to the extent that an accounting of disclosures is maintained under 5 U.S.C. 552a(c); and
- (6) Of the requester's right to seek judicial review under 5 U.S.C. 552a(g).

### § 16.8 Special procedures: Medical Records.

Should EPA receive a request for access to medical records (including psy-

chological records) disclosure of which the system manager decides would be harmful to the individual to whom they relate, EPA may refuse to disclose the records directly to the individual and instead offer to transmit them to a physician designated by the individual.

### § 16.9 Fees.

No fees will be charged for providing the first copy of a record or any portion of a record to an individual to whom the record pertains. The fee schedule for reproducing other records is the same as that set forth in 40 CFR 21.07.

### § 16.10 Penalties.

The Act provides, in pertinent part: "Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000." (5 U.S.C. 552a(i)(3))

### § 16.11 General exemptions.

(a) *Systems of records affected.* EPA-17 OCEFT Criminal Investigative Index and Files.

EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files.

EPA-46 OCEFT/NEIC Master Tracking System.

(b) *Authority.* Under 5 U.S.C. 552a(j)(2), the head of any Federal agency may by rule exempt any PA system of records within the agency from certain provisions of the Act, if the system of records is maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws and which consists of:

(1) 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;

(2) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(3) 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.

(c) *Qualification for exemption.* (1) The Agency's system of records, EPA-17 system of records is maintained by 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.

(2) The Agency's system of records, EPA-40 system of records is maintained by the Office of Investigations of the Office of Inspector General (OIG), a component of EPA that performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities of the OIG's Office of Investigations is the Inspector General Act of 1978, as amended, 5 U.S.C. app. 3.

(3) The Agency's system of records, EPA-46 system of records is maintained by the National Enforcement Investigations Center, 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 criminal law enforcement activities comes from Reorganization Plan No. 3 of 1970 (5 U.S.C. app. 1), effective December 2, 1970; Powers of Environmental Protection Agen-

cy, 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; 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, and 46 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, and 46 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). For Agency's system of records, EPA system 40, an exemption is separately claimed under 5 U.S.C. 552(k)(5) from (c)(3), (d), (e)(1), (e)(4)(G), (4)(H), and (f)(2) through (5).

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

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record upon request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families,

and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, this section is inapplicable and is exempted to the extent that these systems of records are exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him or her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in these systems of records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by Executive order of the President. The application of this provision could impair investigations and law enforcement, because it is not al-

ways possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his jurisdiction. In the interest of effective law enforcement, the EPA investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation of the existence of the investigation, enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances, the subject of an investigation cannot be required to provide information to investigators, and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure

is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation, which could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4) (G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him or her, how to gain access to such a record, and how to contest its content. Since EPA is claiming that these systems of records are exempted from parts of subsection (f)(2) through (5) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, the Agency has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of the individual's records in these systems of records.

(8) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines *maintain* to include the collection of information, complying with this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the

moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material that may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(9) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(10) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him or her. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that these systems of records are exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f)(2) through (5) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in these systems of records. These procedures are described elsewhere in this part.

(11) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply

with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since EPA is claiming that these systems of records are exempt from subsections (c)(3) and (4), (d), (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act are inapplicable and are exempted to the extent that these systems of records are exempted from those subsections of the Act.

(f) *Exempt records provided by another agency.* Individuals may not have access to records maintained by the EPA if such records were provided by another Federal agency which has determined by regulation that such records are subject to general exemption under 5 U.S.C. 552a(j). If an individual requests access to such exempt records, EPA will consult with the source agency.

(g) *Exempt records included in a non-exempt system of records.* All records obtained from a system of records that has been determined by regulation to be subject to general exemption under 5 U.S.C. 552a(j) retain their exempt status even if such records are also included in a system of records for which a general exemption has not been claimed.

#### § 16.12 Specific exemptions.

(a) *Exemption under 5 U.S.C. 552a(k)(2)—(1) Systems of records affected.* EPA-17 OCEFT Criminal Investigative Index and Files.

EPA-21 External Compliance Program Discrimination Complaint Files.

EPA-30 OIG Hotline Allegation System.

EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files.

EPA-41 Inspector General's Operation and Reporting (IGOR) System Personnel Security Files.

EPA-46 OCEFT/NEIC Master Tracking System.

(2) *Authority.* Under 5 U.S.C. 552a(k)(2), the head of any Federal agency may by rule exempt any PA

system of records within the agency from certain provisions of the Act, if the system of records is investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of the Act. However, if any individual is denied any right, privilege, or benefit that the individual would otherwise be entitled to by Federal law, or for which he or she would otherwise be eligible, as a result of the maintenance of the material, the material must be provided, except to the extent that the disclosure would reveal the identify of a confidential source.

(3) *Qualification for exemption.* All of the affected PA systems of records contain investigatory material compiled for law enforcement purposes, material which is not within the scope of subsection (j)(2) of the Act.

(4) *Scope of exemption.* (i) EPA systems of records 17, 30, 40, 41, and 46 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). EPA system of records 21 is exempt 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), and (e)(1).

(ii) An individual is "denied any right, privilege, or benefit that he or she would otherwise be entitled by Federal law, or for which he or she would otherwise be eligible, as a result of the maintenance of such material," only if EPA actually uses the material in denying or proposing to deny such right, privilege, or benefit.

(iii) EPA-17 OCEFT Criminal Investigative Index and Files, EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files, and EPA-46 OCEFT/NEIC Master Tracking System are exempted under 5 U.S.C. 552a(j)(2), and these systems are exempted under 5 U.S.C. 552a(k)(2) only to the extent that the (j)(2) exemption is held to be invalid.

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