Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

February 16, 2017

To: (b)(6); (b)(7)(C)
Assistant Secretary, Office of Public Affairs

(b)(6); (b)(7)(C)
Deputy Assistant Secretary, Office of Public Affairs

From: (b)(6); (b)(7)(C)
Assistant General Counsel for Strategic Oversight
Legal Counsel Division, Office of the General Counsel

Re: Interim Legal Guidance on the Disclosure of Personal Information in Light of Executive Order No. 13468

Introduction

Executive Order No. 13468 requires that "agencies shall, to the extent consistent with the applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information." The DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Information on Non-U.S. Persons ("Mixed Systems policy") dated January 7, 2009 (Policy Directive 262-12, Privacy Policy Guidance Memorandum 2007-1), is not consistent with this Executive Order. Pursuant to instructions from the Office of the Secretary, a working group has been convened to implement the Executive Order by rescinding the Mixed Systems policy and replacing it with a new policy by not later than March 15, 2017. This paper serves as interim legal guidance on the disclosure of personal information in light of Executive Order No. 13468.

I. The Privacy Act

A. United States Citizens and Lawful Permanent Residents

By its express terms, the Privacy Act applies to U.S. citizens (USCs) and lawful permanent residents (LPRs) and the Executive Order does not affect DHS's application of the Privacy Act to such individuals. Accordingly, where there is a request from the media or any third party for information pertaining to a USC or an LPR, DHS should still review the request to determine if

any of the Privacy Act exemptions would permit disclosure. In light of the civil and criminal penalties that could result from Privacy Act violations, unless and until DHS can confirm that an individual is not a USC or LPR, DHS should continue to apply Privacy Act protections to that individual's personal information. In cases where DHS is relying on the media routine use to disclose information relating to a USC or LPR, the disclosure still must be approved by the Chief Privacy Officer in consultation with counsel.

B. All Other Persons

Since the DHS Mixed Systems policy is not consistent with Executive Order No 13468, DHS may no longer use the Privacy Act or the Mixed Systems policy as a basis to deny requests for information pertaining to persons who are neither USCs nor LPRs. Instead, when evaluating requests for information pertaining to persons who are neither USCs nor LPRs, DHS should apply the Non-Privacy Act Considerations outlined below.

II. Non-Privacy Act Considerations

DHS continues to be obligated to act in accordance with other laws, regulations, and legal obligations that limit or otherwise affect its handling of information relating to persons who are neither USCs nor LPRs. These include the following laws and regulations.

A. Freedom of Information Act

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires DHS to give members of the public access to DHS records unless the information is subject one of the nine FOIA exemptions. Two of the FOIA exemptions, exemptions 6 and 7(C), protect personal information from disclosure to third party requesters. The Supreme Court has determined that the privacy interest inherent in exemptions 6 and 7(C) belongs to the individual and not the agency. Moreover, courts have recognized that foreign nationals are entitled to the same privacy considerations under the FOIA as USCs. See *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175-79 (applying the traditional analysis of privacy interests under FOIA to Haitian nationals).

It is currently the practice of DHS to treat third party requests as FOIA requests. In determining how to respond to such requests, the personal privacy interests of the subjects should be balanced against the public interest in the requested information. Under the FOIA, individuals whose personal information is maintained in federal records have privacy interests in such information. The privacy interests of the individuals are enhanced when the nature of the information contained in those records is financial, medical, or law enforcement. Only when these individuals' privacy interests are outweighed by the public interest in the information should DHS disclose the information. Under the FOIA, the only public interest to be considered is

whether the requested information will shed light on the agency's performance of its statutory duties. Information that does not reveal the operations and activities of the government does not satisfy the public interest requirement. Accordingly, when responding to third party requests for information, including requests from the media, DHS should continue to balance the privacy interests of the subject against the public interest in the information. Although not required, it is good practice to consult with the Chief Privacy Officer or the component privacy officer and counsel when making this determination.

B. Statutory Prohibitions on Disclosure

In addition to the Privacy Act, there are other statutory and regulatory restrictions on disclosure of information that continue to be binding on DHS. These restrictions are applicable regardless of the subject's immigration status. The Violence Against Women Act (VAWA), 8 U.S.C. § 1367, generally prohibits disclosure to the public of any information regarding individuals with pending or approved petitions for VAWA benefits, or holders of U or T visas.

There also continue to be restrictions on the disclosure of information relating to persons who have Temporary Protected Status (TPS), 8 U.S.C. § 1254a(c)(6), or Legalization claims, including Seasonal Agricultural Worker (SAW) claims 8 U.S.C. § 1160(b)(5) and (6). Likewise, there are statutory restrictions on the disclosure of information pertaining to battered spouses or children, 8 U.S.C. § 1186(c)(4)(C), juvenile criminal records, 18 U.S.C. § 5038, and visa information protected by Section 222(f) of the Immigration and Nationality Act.

C. Regulatory Restrictions on Disclosure

The asylum regulations at 8 C.F.R. § 208.6, generally prohibit the disclosure of information contained in or pertaining to asylum applications. DHS has extended the application of the asylum regulations to information contained in or pertaining to refugee applications. Executive Order No. 13468 does not affect that policy.

D. Other Factors

Finally, when responding to requests, DHS should consider whether disclosure of the information would interfere with ongoing litigation or a pending investigation. The Office of the General Counsel or component counsel should be consulted with respect to matters that are in litigation. The investigating component should be consulted where there is an ongoing investigation or prosecution.

Please contact me at (b)(6); (b)(7)(C) or (b)(6); (b)(7)(C) if you have any questions regarding this interim legal guidance.