

March 28, 2016

Secretary Jeh Johnson
U.S. Department of Homeland Security
Washington, DC 20528

Re: DHS-2015-0050, Privacy Act: Implementation of Homeland Security/ALL-038 Insider Threat Program System of Records

Dear Secretary Johnson:

OCA – Asian Pacific American Advocates, a national membership-driven organization of community advocates dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans (APAs), respectfully submits our comments for your consideration regarding the proposed rule to exempt the Department of Homeland Security (DHS) from provisions of the Privacy Act as listed in the proposed rule¹.

OCA represents over 100 chapters and affiliates throughout the continental United States, and through our chapters, provide culturally relevant trainings and programs on various policy and professional issues; multilingual support and direct services; and advocacy. OCA has a history of support for law enforcement methods that respect the civil rights and liberties of U.S. citizens, law permanent residents, and those currently residing in the states.²

Asian Pacific Americans and National Security

APAs have long history of racially biased enforcement founded on the platform of national security. When Franklin D. Roosevelt signed Executive Order 9066 in 1942, he institutionalized one of the most atrocious violations of civil liberties of U.S. citizens and permanent residents on Japanese Americans.³ It further propagated an image of Asian Americans as perpetual foreigners in the United States despite their citizenship status or place of birth, as well as furthered the concept of the yellow peril. The yellow peril stereotype paints a picture of Asian Americans as foreigners, inferior in morality and ethics, and thus a threat to American stability.⁴ It dates back to the 1800s, but continues to find life today in the profiling of Asian Americans, including but not limited to xenophobic rhetoric in political campaigns and increased security scrutiny of Muslim, Arab, Sikh, and South Asian Americans.

The adoption of the Insider Threat Policy has already created an environment of fear among many Asian American scientists in both the public and private sphere. The policy's requirement for

¹ Notice of Proposed Rulemaking, Privacy Act: Implementation of Exemptions; Department of Homeland Security/ALL-038 Insider Threat Program System of Records, Docket No. DHS-2015-0050 (Rel. February 26, 2016) (“2016 NPRM”).

² Ken Lee, OCA Condemns Calls for Muslim Exclusion (December 8, 2015). Retrieved from <http://www.oceanational.org/news/264831/OCA-Condemns-Calls-for-Muslim-Exclusion-.htm>.

³ Rhoda J. Yen, Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case (2000). Retrieved from <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1060&context=aalj>

⁴ Id. at 3.

government employees to report suspected insider threat activity is complicated by potentially unconscious, biased prejudices. Recent high profile Asian American cases have showcased the damage done to the livelihood of individuals accused of espionage found on incomplete and/or biased reporting⁵. Had Sherry Chen known about and requested data on the investigation about her, she would have been able to contest the charges and avoid over \$200,000 in legal fees after her criminal case was dropped.

In contrast to the aforementioned policy, the Privacy Act of 1974 remains a primary vehicle for fair and transparent personnel data collection and a key source of protection against unconscious and conscious racial biases in suspicion and reporting of insider threats. Because the 2014 Department of Justice Guidance for Federal Law Enforcement Agencies Regarding the use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity is not completely apply to DHS, efforts to decrease transparency within DHS' national security policies jeopardize the civil liberties of Asian Pacific Americans and other minority communities. As such, any request to exempt DHS from certain provisions of the Privacy act is of great concern to our communities. Base on the above information, we request that DHS fully reject exemption from the listed provisions of the Privacy Act:

5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12), (f)

Despite the argument that disclosure of accounting could alert the subject of an investigation to the possible existence of an investigation, individuals would have to already suspect that they are being investigated to even reasonably request a disclosure. U.S. citizens should be able to access such information at their request, in order to ensure that there is not unlawful disclosure of identifiable information by the agency.

In the wake of calls for reinstatement of internment camps for Muslim Americans similar to the policy created for Japanese Americans and increased anti-immigrant and xenophobic sentiment among the American public⁶, it is imperative that individuals are granted the authority to not only access their records but also request to amend or appeal their records. Without the ability for individuals to access and correct mistakes in their records in a timely manner, DHS would intentionally be creating an enforcement mechanism that allows for the documentation of and investigation based on falsified and/or biased data. Additionally, to ensure fairness and transparency in DHS regulations and procedures, the agency must not exempt itself from provision (e)(12). Taking away the ability of the public to receive notice and comment on such partnerships invalidates many of the original intentions of the Privacy Act.

5 U.S.C. 552a(e)(1), (e)(2), (e)(3)

Exemption from these provisions would create a chilling environment on DHS employees that would prevent them from properly collaborating with the policy to ensure the apprehension of insider threats. Transparent, relevant, and purposeful data collection within the purview of the agency prevents DHS from creating a culture creates fear among employees for reporting

⁵ New York Times, Accused of Spying for China Until She Wasn't (2015). Retrieved from <http://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html>.

⁶ Al Jazeera, A frightening proposal to intern Muslim citizens (2015). Retrieved from <http://america.aljazeera.com/opinions/2015/7/the-frightening-new-proposal-to-intern-muslim-citizens.html>

suspicious behavior. Elizabeth Stoycheff's research indicates that knowledge of government surveillance stifles minority opinions.⁷ If DHS decided to collect unnecessary data outside the bounds of its inherent authority, it could potentially decrease the active participation of government employees into the program and reduce the reporting of actual threats.

5 U.S.C. 552a(g)(1), (h)

DHS agents, particularly within Immigration and Customs Enforcement, have demonstrated time and again failure to completely comply with federal guidance⁸. Relying solely on good faith that DHS agents will use their "investigative training and exercise of good judgement to conduct and report on investigations"⁹ of insider threats places all accountability solely on the individual being investigated. Exemption of civil remedies would only serve to increase false, incomplete, or biased reporting given that the reporter does not need to shoulder any burden of proof for the report and faces no legal ramification for said report. Additionally, as mentioned above, without legal recourse, individuals wrongly accused and charged face insurmountable financial, emotional, and mental stress. Provision (g)(1) provides necessary oversight from frivolous actions without proper justification.

Conclusion

We respectfully offer these recommendations and urge the Department of Homeland Security to reject the proposed exemptions. The Privacy Act of 1974 was adopted to establish a fair and transparent collection, maintenance, use, and dissemination of information. Exemption from the above provisions violates the spirit of the Act; creates a process without legal accountability or recourse; cultivates an environment antithetical to legal cooperation; and encourages false, incomplete, or biased reporting.

Please contact OCA Policy and Communications Manager, Kham See Moua, at (202) 223-5500 x115, if you would like to discuss these recommendations or any other issues of importance to OCA.

Sincerely,



Leslie Moe-Kaiser
OCA National President

cc: Karen L. Neuman, Chief Privacy Officer, Department of Homeland Security

⁷ Elizabeth Stoycheff, Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring (2016). Retrieved from <http://m.jmq.sagepub.com/content/early/2016/02/25/1077699016630255.full.pdf?ijkey=1jxrYu4cQPtA6&keytype=ref&siteid=spjmq>

⁸ Vice News, The US Keeps Mistakenly Deporting Its Own Citizens (2016). Retrieved from <https://news.vice.com/article/the-us-keeps-mistakenly-deporting-its-own-citizens>

⁹ Id. at 1.