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PROGRAM ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Revisions to the Governmentwide Systems of Records Covering Ethics Records

The U.S. Office of Government Ethics (OGE) recently revised its two governmentwide systems of records under the Privacy Act of 1974, which cover public and confidential financial disclosure reports and other ethics program records.<sup>1</sup> This Program Advisory discusses the major changes made to the two systems of records and how they may impact agency ethics programs. The information contained in most executive branch ethics records is collected, maintained, used, and disseminated pursuant to these two governmentwide systems of records.<sup>2</sup> The revisions, effective November 8, 2019, include several new and modified routine uses, which impact how and when agencies may disclose ethics records.<sup>3</sup> The revisions incorporate feedback received from executive branch agencies during the Office of Management and Budget (OMB) clearance process.<sup>4</sup>

**Changes to OGE/GOVT-1 and OGE/GOVT-2**

OGE's recent changes to OGE/GOVT-1 and OGE/GOVT-2 added two new routine uses

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<sup>1</sup> See OGE/GOVT-1, Executive Branch Personnel Public Financial Disclosure Reports and Other Name-Retrieved Ethics Program Records, and OGE/GOVT-2, Executive Branch Confidential Financial Disclosure Reports.

<sup>2</sup> The Privacy Act requires that, upon establishing or revising a system of records, an agency must publish in the Federal Register, subject to comment, a "system of records notice" or "SORN" describing the system of records. The SORN contains all relevant information about the system of records, including the categories of individuals on whom records are maintained, the categories of records maintained, and each routine use of the records contained in the system. When one agency has regulatory authority over records in the custody of multiple agencies, the agency with regulatory authority may publish a governmentwide SORN that applies to all of the records, regardless of their custodial location. See 5 U.S.C. § 552a(e)(4); Office of Management and Budget Circular A-108, "Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act," page 9.

<sup>3</sup> See 84 FR 47301 and 84 FR 47303. A "routine use" describes additional circumstances, beyond those set forth in the Privacy Act itself, under which the records may be disclosed outside the agency maintaining the records. Note that nothing in the Privacy Act compels the disclosure of records, except (in some circumstances) to the individual who is the subject of the record.

<sup>4</sup> All new or modified SORNs are subject to review by the Office of Management and Budget (OMB) prior to publication. OMB's review involves an interagency review process that allows other affected agencies to review the proposal and provide comments. OGE received and responded to comments from 12 agencies regarding the two SORNs. Accordingly, the final versions include not only changes initiated by OGE but also changes incorporated as a result of the interagency review process and changes mandated by OMB as a result of its review.



related to breaches required by OMB<sup>5</sup> and further modified OGE/GOVT-1 to clarify some existing routine uses and to add routine uses to increase transparency into executive branch ethics records.

### **1. New Breach Routine Uses**

The two new routine uses, which were added to both OGE/GOVT-1 and OGE/GOVT-2, allow agencies to disclose information from these systems of records when necessary to respond to a suspected or confirmed breach or to prevent, minimize, or remedy harm resulting from such a breach.<sup>6</sup>

### **2. Modified Litigation Routine Uses**

Prior to the recent changes, each of the two governmentwide SORNs had two litigation-related routine uses.<sup>7</sup> As a result of agency questions raised during the OMB interagency review process, each SORN now has one modified litigation-related routine use.<sup>8</sup> This routine use allows an agency to disclose records when it determines that the records are arguably relevant to a proceeding before a court, grand jury, or administrative or adjudicative body. The routine use also allows disclosure in a proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

OGE cautions that, although the new litigation-related routine use appears broad, this routine use, as with all routine uses, must be compatible with the purpose for which the record was collected. Likewise, all disclosures an agency makes pursuant to a routine use must be compatible with the purpose for which the record was collected. For example, financial disclosure reports are collected for the purpose of identifying and preventing conflicts of interest. If the litigation at issue has little or no connection to that purpose, it may be a violation of the Privacy Act to disclose the record, even if the routine use appears on its face to apply to the disclosure.<sup>9</sup> For this reason, OGE recommends that all such disclosures be cleared with your agency's privacy office and/or agency counsel to ensure that a particular disclosure is compatible with the purposes for which the record was collected.

### **3. Changed Public Posting of Ethics Records**

OGE modified OGE/GOVT-1 to allow for greater transparency into executive branch ethics records.<sup>10</sup> OGE modified routine use (k.) to clarify that certifications of ethics agreement

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<sup>5</sup> OMB Memorandum M-17-12 "Preparing for and Responding to a Breach of Personally Identifiable Information," (Jan. 3, 2017).

<sup>6</sup> Please consult your agency's privacy office for more information on responding to suspected or confirmed breaches from these systems of records.

<sup>7</sup> The original routine uses were designated (d.) and (h.) in OGE/GOVT-1 and (b.) and (e.) in OGE/GOVT-2.

<sup>8</sup> Routine use (g.) in OGE/GOVT-1 and (e.) in OGE/GOVT-2.

<sup>9</sup> See, e.g., *Doe v. Stephens*, 851 F.2d 1457, 1467 (D.C. Cir. 1988) (finding a litigation routine use invalid to the extent that it authorized disclosure of medical records pursuant to a subpoena).

<sup>10</sup> In the supplementary information published with the SORN, OGE confirmed that it will continue to release documents only to the extent consistent with 5 C.F.R. § 2634.603(b), notwithstanding any of the changes described in this advisory.

compliance may be disclosed in the same manner as ethics agreements.<sup>11</sup> Additionally, new routine use (l.) permits Certificates of Divestiture (CDs) to be made public, although individuals must still comply with OGE’s regulations requiring a written request (known as an OGE Form 201 request).<sup>12</sup> Finally, new routine use (m.) permits ethics pledge waivers to be made public without restriction.

#### **4. Clarified Routine Use Regarding Notifications of Commencement of Employment Negotiations**

OGE revised routine use (h.) in OGE/GOVT-1 to clarify that notifications regarding commencement of employment negotiations can be forwarded to a filer’s new agency, along with the filer’s financial disclosure report.<sup>13</sup> This disclosure was previously permitted by routine use (d.), but was modified for clarity.<sup>14</sup>

#### **5. Clarified Routine Uses Regarding Congressional Inquiries Concerning Constituents**

OGE revised the routine uses in both OGE/GOVT-1 and OGE/GOVT-2 that permit agencies to respond to a Member of Congress making an inquiry about a constituent who has sought the Member’s intervention with the agency.<sup>15</sup> OGE modified these routine uses to make them more consistent with OMB guidance that requires the inquiry be both on behalf of, and at the request of, the person who is the subject of the record. OGE recommends that agency ethics officials contact their legislative affairs offices before making disclosures to Members of Congress.

#### **6. Streamlining and Other Changes**

OGE streamlined the language in a number of sections in both OGE/GOVT-1 and OGE/GOVT-2 in accordance with plain language principles.<sup>16</sup> No substantive change was intended by any of these revisions. Lastly, OGE updated references to OGE officials in accordance with the agency’s current organizational structure.

### **Importance of Directing Employees to Most Recent Forms for Correct Privacy Act Statements**

It is important to always direct employees to the most recent version of OGE forms on OGE’s website because they include correct Privacy Act statements. These statements provide required information to those using the forms including the purpose for which the information being collected will be used, the consequences of not providing the requested information, and

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<sup>11</sup> Note that current routine use (k.) was formerly routine use (l.) prior to the recent amendments.

<sup>12</sup> See 5 C.F.R. § 2634.1008. OGE has no immediate plans to amend section 2634.1008.

<sup>13</sup> Note that current routine use (h.) was formerly routine use (i.) prior to the recent amendments.

<sup>14</sup> Note that current routine use (d.) was formerly routine use (e.) prior to the recent amendments.

<sup>15</sup> The routine uses in question are routine use (i.) in OGE/GOVT-1 (formerly routine use (j.)) and routine use (g.) in OGE/GOVT-2 (formerly routine use (h.)).

<sup>16</sup> The bulk of these changes are in the sections titled “Purpose of the System” and “Categories of Individuals” in OGE/GOVT-1 and the section titled “Categories of Individuals” in OGE/GOVT-2.

the routine uses that may be made of the information.<sup>17</sup> Moreover, agencies should ensure that all electronic filing systems and alternative forms that collect information being maintained pursuant to OGE/GOVT-1 or OGE/GOVT-2 have updated Privacy Act statements.<sup>18</sup>

OGE has updated the Privacy Act statements on all five forms it sponsors based on the recent changes to the governmentwide SORNs. The five forms are:

- the OGE Form 450;
- the OGE Form 278e;
- the OGE Form 278T;
- the OGE Form 201; and
- the Qualified Trust Model Certificates and Model Trust Documents.

The OGE Form 450 is subject to OGE/GOVT-2 and the rest are subject to OGE/GOVT-1.

### **Importance of Consultations and Accounting of Disclosures**

This Program Advisory is intended to provide an overview of the recent changes to OGE's governmentwide systems of records; it is not a definitive resource for resolving Privacy Act questions that arise at individual agencies. OGE recommends that agency ethics officials always consult their privacy office and/or agency counsel before taking action with regard to Privacy Act-protected information. In addition, OGE recommends that agency ethics officials coordinate with their agency's privacy office and/or agency counsel to ensure a proper accounting of disclosures whenever making disclosures from OGE/GOVT-1 or OGE/GOVT-2.<sup>19</sup>

### **Conclusion**

OGE provides this Program Advisory to assist ethics officials in carrying out their programs after recent changes OGE made to two systems of records governing executive branch ethics records, OGE/GOVT-1 and OGE/GOVT-2. The advisory summarizes and describes how those changes may impact agency ethics programs. Questions regarding this advisory may be directed to OGE's Privacy Officer, Jennifer Matis, [jmatis@oge.gov](mailto:jmatis@oge.gov), 202-482-9216.

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<sup>17</sup> See 5 U.S.C. § 552a(e)(3). The responsibility for providing a Privacy Act statement rests on the agency collecting the information. This requirement is applicable to both written and oral (i.e. interview) solicitations of personal information. See OMB Guidelines, 40 FR 28948, 28961 (July 9, 1975).

<sup>18</sup> OGE also recommends that agency ethics officials consult with their privacy office and/or agency counsel about whether Privacy Act statements are necessary when collecting information from individuals in other situations, including through oral exchanges.

<sup>19</sup> See 5 U.S.C. § 552a(c)(1).