



6450-01-P

## **DEPARTMENT OF ENERGY**

### **48 CFR Parts 904, 952 and 970**

#### **Acquisition Regulation: Access to and Ownership of Records**

**RIN: 1991-AB85**

**AGENCY:** Department of Energy

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is publishing a final rule amending the Department of Energy Acquisition Regulation (DEAR) to ensure the access to and ownership of records generated during contract performance for its contractors and subcontractors performing potentially hazardous work and clarifies management, retention and disposal of records after contract termination. This final rule: ensures that records generated on individuals that meet the requirements of the Privacy Act are operated and maintained as Privacy Act SORs; clarifies that Privacy Act SORs are Government-owned records, not contractor-owned, even though they are created by the contractor; ensures the inclusion of this clause in contracts where work activities could involve exposure to potentially hazardous substances; and, ensures that DOE has consistent records maintenance, retention, and disposal requirements in accordance with Federal laws, regulations and DOE Directives and updates thereto.

**DATES:** *Effective Date:* **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].**

**FOR FURTHER INFORMATION CONTACT:** Jason Taylor, U. S. Department of Energy, Office of Procurement, MA-61, 1000 Independence Avenue, SW., Washington, DC 20585; 202-287-1560 or [jason.taylor@hq.doe.gov](mailto:jason.taylor@hq.doe.gov).

## **SUPPLEMENTARY INFORMATION**

- I. Background.
- II. Section-by-Section Discussion of Comments and Rule Provisions.
- III. Section-by-Section Analysis.
- IV. Procedural Requirements.
  - A. Review Under Executive Order 12866.
  - B. Review Under Executive Order 12988.
  - C. Review Under the Regulatory Flexibility Act.
  - D. Review Under the Paperwork Reduction Act.
  - E. Review Under the National Environmental Policy Act.
  - F. Review Under Executive Order 13132.
  - G. Review Under the Unfunded Mandates Reform Act of 1995.
  - H. Review Under the Treasury and General Government Appropriations Act, 1999.
  - I. Review Under Executive Order 13211.
  - J. Review Under the Treasury and General Government Appropriations Act, 2001.
  - K. Congressional Notification
  - L. Approval by the Office of the Secretary of Energy.

### **I. Background**

Historically, DOE's Management and Operating (M&O) contractors were tasked with performing functions that could involve exposure to radioactive and other hazardous materials. Because of the possible long-term effects of exposure, DOE contractors and subcontractors must create and maintain records documenting the potentially hazardous work activities performed by their personnel. For example, the *Occupational Radiation Protection* program at 10 Code of

Federal Regulations (CFR) Part 835 and the *Chronic Beryllium Disease Prevention Program* at 10 CFR Part 850 both require the creation, maintenance and disposition of records on contractor and subcontractor personnel. These records include, but are not limited to: certain personnel records, medical, and occupational safety and health records. DOE's M&O contractors already provide for DOE ownership and/or access to these types of records. However, DOE now also utilizes other types of contracts to perform many agency functions. Therefore, DOE is making this revised clause applicable to both M&O as well as non-M&O contracts and subcontracts to ensure that records are managed and retained in accordance with Federal laws (including the Privacy Act), applicable regulations and DOE requirements. To provide relevant information for processing of claims under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA; 42 USC 7385s-10) and for other similar issues, DOE must ensure government-ownership of not only records documenting agency functions, but records documenting potential exposure to hazardous substances. These records are needed for processing claims and provide documentation that otherwise protects the financial and legal obligations of both individuals and the Government. These records include, but are not limited to: personnel, medical and exposure records listed as privacy act systems of records, facility, environmental and other project related records, as well as, occupational safety and health records. Personnel records are also needed to allow DOE to identify and contact individuals in the future for participation in the DOE Federal Worker Medical Screening Program (FWP), to comply with other, future records requests, and to meet the requirement to retain the records in accordance with Federal laws and regulations.

The National Archives and Records Administration's (NARA) regulation at 36 Code of Regulations (CFR), Chapter XII, Subchapter B, "*Records Management*" requires agencies to ensure contractors performing agency functions create and maintain records that document these

activities and specify government ownership of documents within the contract. For the Department of Energy, Title 42 USC section 7101(b)(1) defines function as any duty, obligation, power, authority, responsibility, right, privilege and activity. Performance of those functions is defined in 42 USC section 7101(b)(2). Throughout its history, DOE has been tasked by Congress to perform certain functions related to research, operations, and environmental clean-up that could cause potential exposure to hazardous substances.

On January 9, 2009, DOE published a System of Records Notice (SORN) in the Federal Register (74 FR 994) describing DOE's Privacy Act systems of records (SOR) in accordance with the Privacy Act of 1974 (5 USC 552a). For example, the SOR for EEOICPA files is located at DOE-10 (74 FR 1,008), and includes such records as: employment records, exposure records, medical reports, personnel security questionnaires, safety records or other incident reports. The Personnel Medical Records SOR at DOE-33 (74 FR 1,302) includes the following types of records: medical histories on contractor employees resulting from medical examination, medical records of periodic physical examinations and psychological testing, records on the results of workplace and medical monitoring of individuals for exposure to chemical and physical agents (not covered in DOE-35), and related work history data, including drug testing information and results, contractor employee-completed health questionnaires not resulting from a medical examination. Lastly, the Personnel Radiation Exposure Records at DOE-35 (74 FR 1,037) includes: DOE contractor personnel and other individuals' radiation exposure records, social security numbers, and other records, in connection with registries of uranium, transuranic, or other elements encountered in the nuclear industry.

Privacy Act SORs are defined within the Privacy Act (5 USC 552a(a)(5)) as a group of records under the control of an agency from which information is retrieved by the name of the

individual, some identifying number, symbol or other particular identifying characteristic. The authority of DOE to assert Government ownership over Privacy Act SORs, whether generated by a prime or subcontractor, is set forth in 44 U.S.C. 2104(a). This statute requires the National Records and Archives Administration (NARA) to prescribe such regulations as deemed necessary to effectuate their functions, and the head of each executive agency to issue such orders and directives deemed necessary to carry out those regulations. In 36 CFR 1222.32(b), NARA's Records Management regulations expressly state that all data created for Government use and delivered to, or falling under the legal control of, the Government are Federal records. This includes records created/received by contractors that document the work specified within the contract and are generated or received during the performance of the contract.

DOE's M&O contracts currently provide for DOE ownership and/or access to these types of records because of the inclusion of the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3, and specifically 970.5204-3(b)(1), which excepts Privacy Act SORs from the list of contractor-owned records, even though they are contractor-generated records. Additionally, in accordance with 10 CFR Part 835, *Occupational Radiation Protection* and 10 CFR Part 850, *Chronic Beryllium Disease Prevention Program*, certain DOE contractors are required to create and maintain individual exposure and workplace monitoring records that document exposure to these potentially hazardous substances during work activities performed by their personnel. These regulatory provisions currently require turnover of the exposure records to DOE upon cessation of work activities, ensuring DOE's control over these records on a long-term basis in accordance with Federal laws and regulations.

DOE contracting officers generally insert the clauses at 48 CFR 52.224-1 and 52.224-1 when the design, development, or operations of a system of records on individuals is required and

when the contract specifically identifies the system(s) of records that must be managed in accordance with the Privacy Act. The contract will contain a clause that describes which Privacy Act SORs, by records series, are specifically required to be managed as a Privacy Act SOR. By amending the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3(b) and (b)(1), and requiring inclusion of the clause in certain non-M&O contracts, DOE is ensuring that not only are Privacy Act SORs consistently and properly classified as Government-owned under 48 CFR 970.5204-3(a) turned over to DOE on contract termination for maintenance and disposition, but records generated/received in the performance of the contract, other than those set forth within the contract as Contractor-owned, are managed and dispositioned by DOE on contract termination.

This final rule stresses the importance of complete and accurate documentation and proper recordkeeping to adequately document Government-funded activities, preserve institutional memory, protect the legal and financial rights of the Government, preserve applicable worker, facility, and environmental records, and ensure availability of those records when they are needed. The rule requires inclusion of the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3 in contracts, not just M&O contracts, when the contract contains the *Integration of Environment, Safety, and Health into Work Planning and Execution* (ISM) clause at 970.5223-1, as prescribed by 952.223-71, or the *Radiation Protection and Nuclear Criticality* clause at 952.223-72. The revisions also add clarifying language to ensure consistent maintenance, retention, and disposal of records in accordance with NARA's Records Management regulations.

Further, this rule clarifies the distinction between contractor-owned and Government-owned records and emphasizes contractor and subcontractor records management responsibilities consistent with NARA's Records Management regulations, including maintaining certain records

as DOE Privacy Act SORs (48 CFR 52.224-2). This rule also ensures preservation and appropriate ownership of personnel, facility, occupational safety and health, environmental, medical, facility and other records generated during contract performance. A notice of proposed rulemaking was published at 75 FR 28772 on May 24, 2010 and twenty-one (21) comments were received from six (6) individuals/entities.

## **II. Section-by-Section Discussion of Comments and Rule Provisions.**

DOE carefully reviewed the proposed regulation in light of the comments received during the public comment period and has attempted to address those requesting clarification or further detail through either revisions to the text of the final rule or through clarification in this preamble discussion.

This “Response to Comments” addresses issues raised by commenters during the public comment period. Every comment has been analyzed and the following discussion provides responses organized by issue.

### **Scope and Reach of Rule**

Two commenters expressed concern that the rule is potentially overreaching and overbroad which has negative consequences. They also asserted that it may place undue burden on small businesses.

DOE disagrees. The only change to the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3 is to clarify that records series specified within the contract as Privacy Act SORs are Government-owned records even if the records are contractor-generated. The revisions do not expand the breadth of the *Access to and Ownership of Records* clause. The revisions do, however, expand the applicability of the clause to certain non-M&O contracts and subcontractors when that contract contains the ISM clause at 970.5223-1, as prescribed by

952.223-71, or the radiation protection and nuclear criticality clause at 952.223-72. The revisions are made to ensure records generated on individuals that meet the requirements of the Privacy Act are maintained in a Privacy Act SOR as required under existing laws and regulations, as opposed to any new procedure established by this regulation. The revisions also add clarifying language to ensure consistent maintenance, retention and disposal of records in accordance with NARA's Records Management regulations. DOE believes that the additional requirements of this rule will have a minimal burden on small businesses.

### **Possible Freedom of Information Act (FOIA) Implications**

Two commenters suggested that revising the ownership of medical/health related records to make them Government-owned would subject such records to requests by third parties under FOIA. The commenters recommend that DOE abandon the requirement that contractor-owned records be maintained as a Privacy Act SOR.

DOE agrees that medical/health related records created, operated and maintained as a Privacy Act SOR will no longer be contractor-owned but rather Government-owned records. As such, they will be subject to the FOIA, which does permit release of Government-owned records to FOIA requestors. However, records requested under FOIA are subject to certain exemptions set forth in 5 U.S.C. 552(b). In particular, FOIA Exemption 6, 5 U.S.C. 552 (b)(6), permits withholding personnel, medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Unless otherwise required by law, DOE will adhere to the statutory requirements of the FOIA and the Privacy Act to protect contractor and subcontractor employee personal, medical/health-related and similar records from release and disclosure.

### **Privacy Act SOR (Government vs. Contractor)**



One commenter expressed concern that the change to 48 CFR 970.5204-3 would allow private “personnel” records of private sector, non-government employees, previously not held by the Government, to be turned over to the Government. Several other commenters expressed concern that converting medical records into a Privacy Act SOR would be an improper Government appropriation of privately-owned and managed personal information. Furthermore, they question the ethics of a wholesale “taking” by the Federal Government of records currently under the explicit ownership of the M&O contractor.

DOE disagrees. The revisions to the DEAR ensure records generated in the performance of the contract containing personal information that are retrieved by name or other personal identifier are classified and maintained in Privacy Act SORs in accordance with the Privacy Act and NARA records management regulations. This rule does not extend Government ownership to the entirety of personnel or other records generated and maintained by the contractor as set forth in 48 CFR 970.5204-3(b), but to those records series that are generated and received that document work performed under the contract. As discussed above, DOE categorized certain contractor and subcontractor personnel, employment, medical, occupational health and exposure records as Privacy Act SORs in the SORN published on January 9, 2009, (74 FR 994). These records series currently contain routine use exceptions as to whom and when these particular records may be released. Additionally, DOE disagrees that the Federal Government is taking records under the explicit ownership of the M&O contractor. The regulations in 10 CFR parts 835 and 850 requiring contractors to create and maintain exposure, medical and occupational health records as part of the Occupational Radiation Program and the Chronic Beryllium Disease Prevention Program currently require transfer of those records to DOE on cessation of work activities.

DOE acknowledges this may be a new requirement for non-M&O contractors, but a requirement that is necessary to address records ownership issues and establish consistent records maintenance, retention and disposition requirements in accordance with DOE's NARA-approved Records Management schedules.

### **Privacy Act and Ownership of Records Considerations**

One commenter expressed concern that having two Privacy Act clauses would create a conflict. Since M&O contracts already include the Privacy Act clause (48 CFR 52.224-2), the commenter asserted that the *Access to and Ownership of Records* clause would create redundancy and inconsistency.

DOE disagrees. There is no redundancy or inconsistency between the Privacy Act clause at 48 CFR 52.224-2 and the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3. Language has been added to 48 CFR 970.0407-1-2 to clarify the link between the two clauses; however, no additional requirements have been added; the revisions are for clarity.

### **Health Insurance Portability and Accountability Act (HIPAA) Liability**

One commenter expressed concern that the transfer of ownership of privately-owned medical records to the government would create potential conflicts with HIPAA and could result in HIPAA litigation. The commenter claims that it may also impede normal functions of a medical provider.

DOE disagrees. DOE must comply with the statutory requirements of HIPAA and the Privacy Act; these requirements will not impede the normal functions of a medical provider. The Privacy Act does not apply to all categories of records; it only applies to a SOR, paper based or electronic, under the control of DOE. Accordingly, a record that contains personal information about an individual but is not retrieved by a personal identifier does not qualify as a

SOR under the Privacy Act. Under 48 CFR 52.224-2(a), the Privacy Act applies to contractors and subcontractors that develop or use a SOR under contract with DOE to collect, maintain or disseminate personal information within a SOR. Additionally, under 48 CFR 52.224-2(b), the contractor and its employees are considered employees of DOE for purposes of the sanction provisions of the Privacy Act during the performance of the contract. Thus, records created based on the contract (e.g., medical records, exposure records, etc.) would be required to be maintained under a SOR.

### **Integrated Safety Management System (ISMS)**

One commenter stated that the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 48 CFR 970.5223-1, which is also known as Integrated Safety Management (ISM) clause has been an effective framework for integrating safety or a Safety Management System (SMS) into work planning activities at DOE Sites. Under this clause, contractors must provide a documented system for DOE approval, verify effectiveness through periodic validation, and continually monitor safety performance and improvement. The commenter expressed that there are difficulties in achieving required ISM flow down clauses to subcontractors performing work at DOE sites.

The commenter also asserted that the application of the records retention requirements across the DOE complex would lead to a chaotic mosaic of practices as is already evidenced by the variety of ISM clauses and 10 CFR part 850 flow down practices by M&O contractors and the wide variety of Privacy Act SORs now required in existing M&O contracts.

DOE disagrees. The terms of the ISM clause and its prescription are not affected by this rulemaking, and by revising 48 CFR 952.223-75, 904.702(b) and 970.5204-3(g) DOE is

clarifying and streamlining the flow down requirements of the *Access to and Ownership of Records* clause.

**Other Comments:**

One commenter expressed concern that the application of the proposed changes are applied indiscriminately across all forms of contracts and will yield unintended and negative consequences due to over breadth.

DOE disagrees. This rule does not require any changes for DOE M&O contractors who are already covered by the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3. For DOE's non-M&O contractors, this rule affects contracts by requiring inclusion of the *Access to and Ownership of Records* clause when the contract contains the ISM clause at 970.5223-1, as prescribed by 952.223-71, or the *Radiation Protection and Nuclear Criticality* clause at 952.223-72 to ensure proper ownership of records, including records series described within the contract as Privacy Act SORs, are properly defined within the contract as Government-owned records. Records management requirements and responsibilities have not changed, but clarifying language and revisions to referenced requirements were added for consistency across contracts (48 CFR 970.0407-1-1 and 970.5204-3(a), (c), (e) and (f)).

One commenter expressed the view that DOE should use the Notice of Proposed Rulemaking (NPR) process as an opportunity to revisit and revise DOE Order 206.1 "Department of Energy Privacy Program."

DOE disagrees. Revising DOE Order 206.1 is outside the scope of this rulemaking.

One commenter stated that that the records ownership clause should be applied only to contracts (prime and subcontractors) where the scope of work clearly includes potential for

exposure to radiation or other hazardous substances. The current clause does not specify what constitutes a “contract with potential for exposure.”

DOE disagrees. DOE will retain the proposed language in the final rule because the revisions to the DEAR include amending 48 CFR 904.702(b), which clearly establishes that the presence of the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 48 CFR 952.223-71 or the *Radiation Protection and Nuclear Criticality* clause at 48 CFR 952.223-72 is the criterion used to identify contracts with the potential for exposure to radiological or other hazardous substances. If either of those two clauses is included, the contract is considered a contract with the potential for exposure and the *Access to and Ownership of Records* clause is included in the contract.

One commenter expressed concern that the applicability in 48 CFR 904.702(b), and *Preservation of Individual Occupational Radiation Exposure Records* clause at 48 CFR 952.223-75 do not specify that the clause is to be flowed down to subcontractors, even though the Background section of the NOPR indicates DOE is concerned about "medical records on contractors and subcontractors." The commenter argued that if the *Preservation of Individual Occupational Radiation Exposure Records* is not a mandatory flow-down to the subcontracts, DOE may not still have adequate access to the information (at the subcontractor level) that it seeks.

DOE agrees. DOE has revised the final rule to require contractors to include the requirements of the *Preservation of Individual Occupational Radiation Exposure Records* clause at 48 CFR 952.223-75 and the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3 in all subcontracts that contain either the *Integration of Environment, Safety and*

*Health into Work Planning and Execution* clause at 48 CFR 970.5223-1, or the *Radiation Protection and Nuclear Criticality* clause at 48 CFR 952.223-72.

One commenter stated that the proposed revisions to 48 CFR 970.5204-3(b)(1), Section II.5 of the NOPR did not elaborate on why this change is being proposed and it was not apparent how the proposed change would improve the ability to provide contract-related medical/health records as needed to support EEOICPA and other worker claims.

DOE disagrees that the rule does not improve the ability to provide contract-related medical/health records as needed to support EEOICPA and other work claims. DOE's NARA-approved Records Management Schedules require that DOE maintain certain personnel, exposure, medical and occupational records for extended periods of time to support the EEOICPA and other similar programs by providing records that could support claims (42 USC 7385s-10). To avoid a potential loss or misplacement of records and remove uncertainty regarding ownership of these types of records, the amendments and clarifications within the *Access to and Ownership of Records* clause clarify that Privacy Act SORs are Government-owned and not contractor owned clearly establishes that on contract termination the aforementioned Privacy Act SORs containing the records needed to support the EEOICPA are transferred to DOE (or to a location directed by the contracting officer). This will ensure that DOE can support the EEOICPA and similar programs, respond to future records requests by officials and individuals, and protect the financial and legal interests of individuals and the Government.

### **III. Section-by-Section Analysis.**

**Section 904.702. – Applicability.** The clause applicability specification for Contractor Records Retention at 48 CFR 904.702(b) was revised to update the name of the *Integration of*

*Environment, Safety and Health into Work Planning and Execution* clause, delete the reference to the obsolete Nuclear Safety clause, add a requirement to include the *Access to and Ownership of Records* clause at 48 CFR 970.5204-3, and reference the “National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules” in applicable DOE Directives to ensure Government ownership and access to these records and to establish consistent records management practices in the retention of records.

**Section 952.223-75—Preservation of individual occupational radiation exposure records.** DOE added language to preserve individual occupational radiation exposure records that requires such records be operated and maintained by contractors and subcontractors as a DOE Privacy Act system of records (i.e., as DOE-35 Personnel Radiation Exposure Records) and to emphasize the requirement to maintain these records in accordance with Subchapter B of 36 CFR, Chapter 12, National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules and the Privacy Act.

**Section 970.0407-1-1—Alternate retention schedules.** The clause was updated to replace a guide “DOE G 1324.5B, Records Management Program,” with “Subchapter B of 36 CFR Chapter 12 – Records Management” to ensure records retentions are managed in accordance with the regulations. The words “National Archives and Records Administration (NARA)-approved” were added before “DOE Records,” “Disposition” was added between “Records” and “Schedules” and “(see current version)” was replaced with “(consult current schedule)” for consistency.

**Section 970.0407-1-2—Access to and Ownership of Records.** The words “the records do not fall within a DOE Privacy Act system of record and” were added to the first sentence and the Privacy Act was added to the list of requirements to ensure contracting officers do not agree to

contractor ownership of Privacy Act system of records that are generated during the performance of the contract. In accordance with 48 CFR 52.224-2(b), contractors and their employees are considered employees of DOE for purposes of the Privacy Act during the performance of the contract.

**Section 970.0407-1-3—Contract clause.** The prescription of the *Access to and Ownership of Records* clause has been expanded to require inclusion, in addition to M&O contracts, in contracts that contain the *Integration of Environment, Safety, and Health into Work Planning and Execution* clause at 48 CFR 952.223-71 or 48 CFR 970.5223-1, or the *Radiation Protection and Nuclear Criticality* clause at 48 CFR 952.223-72. This change is made to ensure that the *Access to and Ownership of Records* clause is included consistently in all applicable contracts based on the type of work being performed (e.g., work that exposes personnel to hazardous material, radiation or long-term health issues), in addition to M&O contracts. The change is also to meet the requirements of 36 CFR 1222.32(a)(1) requirements that requires Agencies to specify Government ownership and delivery of records into contracts to ensure contractors performing Federal government agency functions create and maintain records that document these activities.

**Section 970.5204-3(a) —Government-owned records.** Language pertaining to records turnover was relocated from 48 CFR 970.5204-3(a) to 970.5204-3(c) and 970.5204-3(a) was expanded to include the requirements of 36 CFR, Chapter XII, -- Subchapter B, “Records Management” and FAR 52.224-2 “Privacy Act.”

**Section 970.5024-3(b).** The words “excluding records operated and maintained in DOE Privacy Act system of record” were added to the last sentence in brackets.



**Section 970.5204-3(b)(1) —Contractor-owned records.** The words “operated and maintained by the Contractor” were added to replace “described by the contract as being maintained.”

**Section 970.5204-3(b) (2).** The words “internal corporate governance records” were added to the list of confidential contractor financial information to make it clear that these types of records are contractor-owned records. Internal corporate governance records may include processes and policies affecting the way the corporate office is directed, administered or controlled.

**Section 970.5204-3(c)—Contract completion or termination.** Language was added to clarify the disposition of both Government-owned and contractor-owned records at contract completion or termination. An option was added to allow contractors to deliver “original” contractor-owned records to the Government in lieu of copying these records with assurance that the contractor will have rights to access and copy the records as needed.

**Section 970.5204-3(e)—Applicability.** DOE modified the applicability of the *Access to and Ownership of Records* clause to make it clear that records created, received, and maintained by the contractor, whether they be Government-owned or contractor-owned, includes all records in the possession of the contractor regardless of the date of origin and includes those records acquired from a predecessor contractor.

**Section 970.5204-3(f)—Records retention standards.** The title of this section has been modified to read “Records maintenance and retention” and the section has been expanded to specify the contractor’s records management responsibilities for the creation, maintenance, and disposition of records in accordance with applicable Federal laws, regulations and DOE

Directives. The revisions provide clear direction to the contractor and subcontractor on their records management responsibilities, particularly the maintenance, disposition and ownership of records. The language was also revised to clearly link retention of records to the NARA-approved DOE Records Disposition Schedules. DOE removed language that previously singled out individual radiation exposure records because these records shall be operated and maintained by the contractor as Government-owned DOE Privacy Act SOR. The last sentence was also modified to clarify when application of the NARA-approved record schedules may be waived.

**Section 970.5204-3(g)—Subcontracts.** This paragraph is revised to eliminate the \$2 million dollar threshold requirement for flow down of the *Access to and Ownership of Records* clause because applicability of the clause is more appropriately determined by the nature of the work rather than cost of the contract (i.e., subcontracts in which contract performance exposes personnel to hazardous material, radiation, or long-term health issues). The paragraph was also expanded to require inclusion in subcontracts containing the *Integration of Environment, Safety and Health into work Planning and Execution* clause at 48 CFR 952.223-71 or the *Radiation Protection and Nuclear Criticality* clause at 48 CFR 952.223-72, consistent with the prescription for prime contracts in 48 CFR 970.0407-1-3, and the contractor records retention applicability in 48 CFR 904.702. This paragraph was also modified to include flow down of the Privacy Act clause into subcontracts.

#### **IV. Procedural Requirements.**

##### **A. Review Under Executive Orders 12866 and 13563.**

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735, September 30, 1993. Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

#### **B. Review Under Executive Order 12988.**

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 5, 1996), imposes on executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by Section 3(a), Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to

review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or that it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law; this final rule meets the relevant standards of Executive Order 12988.

### **C. Review Under the Regulatory Flexibility Act.**

This final rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities. DOE recognizes that a burden may be placed on small businesses performing these applicable work scopes, but it is a burden that is imposed under existing regulations (Subchapter B of 36 CFR, Chapter 12), not by revisions to these clauses.

Accordingly, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

### **D. Review Under the Paperwork Reduction Act.**

This rule does not impose any new information collection or recordkeeping requirements. Existing information collections imposed by the Department of Energy Acquisition Regulation are covered by OMB Control Number 1910-4100. Public reporting burden for these collections is estimated to average 119 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to Chad\_S.\_Whiteman@omb.eop.gov.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### **E. Review Under the National Environmental Policy Act.**

DOE has concluded that this final rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021, Subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments to the DEAR are strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

#### **F. Review Under Executive Order 13132.**

Executive Order 13132, "Federalism," (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of

government. No further action is required by Executive Order 13132.

#### **G. Review Under the Unfunded Mandates Reform Act of 1995.**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA; Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b).) UMRA also requires Federal agencies to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate.” In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820). Today’s rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, therefore these requirements do not apply.

#### **H. Review Under the Treasury and General Government Appropriations Act, 1999.**

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

## **I. Review Under Executive Order 13211.**

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001), requires federal agencies to prepare and submit to the OIRA, OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute.

DOE has determined that the rule published today does not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

## **J. Review under the Treasury and General Government Appropriations Act, 2001.**

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516, note, provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final



rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

**K. Congressional Notification.**

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rule. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**L. Approval by the Office of the Secretary of Energy.**

The Office of the Secretary of Energy has approved publication of this final rule.

**List of Subjects in 48 CFR Parts 904, 952 and 970**

Government procurement.

Issued in Washington, DC, on September 10, 2014.

---

Paul Bosco,  
Director  
Office of Acquisition and  
Project Management  
Department of Energy

---

Joseph Waddell,  
Deputy Associate Administrator  
Acquisition and  
Project Management  
National Nuclear Security Administration

For the reasons set out in the preamble, DOE amends Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below:

#### **PART 904—ADMINISTRATIVE MATTERS**

1. The authority citation for part 904 continues to read as follows:

**Authority:** 42 U.S.C. 7101, *et seq.* and 50 U.S.C. 2401, *et seq.*

2. Section 904.702 is revised to read as follows:

##### **904.702 Applicability.**

(b) Contracts containing the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 970.5223-1, as prescribed by 952.223-71, or the *Radiation Protection and Nuclear Criticality* clause at 952.223-72 must also include the *Preservation of Individual Occupational Radiation Exposure Records* clause at 952.223-75, and the *Access to and Ownership of Records* clause at 970.5204-3, which will necessitate retention of records in accordance with the National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules, rather than those found at FAR Subpart 4.7.

#### **PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. The authority citation for part 952 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

4. In section 952.223-75, the clause text is revised to read as follows:

##### **952.223-75 Preservation of individual occupational radiation exposure records.**

\* \* \* \* \*

Individual occupational radiation exposure records generated in the performance of work under this contract shall be generated and maintained by the contractor in accordance with 36 CFR Chapter XII, Subchapter B, “Records Management,” the National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules, and shall be operated as a DOE Privacy Act system of records, in accordance with the Privacy Act.

## **PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

5. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101, *et. seq.*;  
50 U.S.C. 2401, *et seq.*

6. Revise section 970.0407-1-1 to read as follows:

### **970.0407-1-1 Alternate retention schedules.**

Records produced under the Department's contracts involving management and operation responsibilities relative to DOE-owned or -leased facilities are to be retained and disposed of in accordance with the requirements contained in 36 CFR Chapter XII, Subchapter B, “Records Management” and National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules (consult current schedule), rather than those set forth at 48 CFR subpart 4.7, Contractor Records Retention.

### **970.0407-1-2 [Amended]**

7. Section 970.0407-1-2 is amended by adding in the first sentence the words “the records do not fall within a DOE Privacy Act system of record and” after “provided” and adding in the last sentence the words “the Privacy Act” before “requirements.”

8. Revise section 970.0407-1-3 to read as follows:

### **970.0407-1-3 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5204-3, *Access to and Ownership of Records*, in management and operating contracts and other contracts and resulting subcontracts that contain the clause at 48 CFR 970.5223-1, *Integration of Environment, Safety, and Health into Work Planning and Execution* clause, or the clause at 48 CFR 952.223-72, *Radiation Protection and Nuclear Criticality*.

9. Amend section 970.5204-3 by:

- a. Revising the clause date; and
- b. Revising paragraphs (a), (b), (c), (e), (f) and (g);

The revisions read as follows:

**970.5204-3 Access to and ownership of records.**

\* \* \* \* \*

**ACCESS TO AND OWNERSHIP OF RECORDS**

**[(INSERT MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE  
*FEDERAL REGISTER*)]**

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the Government and shall be maintained in accordance with 36 CFR, Chapter XII, Subchapter B, “Records Management.” The contractor shall ensure records classified as Privacy Act system of records are maintained in accordance with FAR 52.224.2 “Privacy Act.”

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer

shall identify which of the following categories of records will be included in the clause, excluding records operated and maintained in DOE Privacy Act system of records].

(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, excluding records operated and maintained by the Contractor in Privacy Act system of records. Employee-related systems of record may include, but are not limited to: Employee Relations Records (DOE-3), Personnel Records of Former Contractor Employees (DOE-5), Payroll and Leave Records (DOE-13), Report of Compensation (DOE-14), Personnel Medical Records (DOE-33), Employee Assistance Program (EAP) Records (DOE-34) and Personnel Radiation Exposure Records (DOE-35).

(2) Confidential contractor financial information, internal corporate governance records and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor's corporate headquarters);

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232-3 are described as the property of the Government; and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:

(i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

(ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.

(iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.

(c) Contract completion or termination. Upon contract completion or termination, the contractor shall ensure final disposition of all Government-owned records to a Federal Record Center, the National Archives and Records Administration, to a successor contractor, its designee, or other destinations, as directed by the Contracting Officer. Upon the request of the Government, the contractor shall provide either the original contractor-owned records or copies of the records identified in paragraph (b) of this clause, to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act) as appropriate. If the contractor chooses to provide its original contractor-owned records to the Government or its designee, the contractor shall retain future rights to access and copy such records as needed.

\* \* \* \* \*

(e) Applicability. This clause applies to all records created, received and maintained by the contractor without regard to the date or origination of such records including all records acquired from a predecessor contractor.

(f) Records maintenance and retention. Contractor shall create, maintain, safeguard, and disposition records in accordance with 36 CFR Chapter XII, Subchapter B, “Records Management” and the National Archives and Records Administration (NARA)-approved Records Disposition Schedules. Records retention standards are applicable for all classes of records, whether or not the records are owned by the Government or the contractor. The Government may waive application of the NARA-approved Records Disposition Schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies of records described in paragraph (b) and delivery of records described in paragraph (a) of this clause.

(g) Subcontracts. The contractor shall include the requirements of this clause in all subcontracts that contain the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 952.223-71 or, the *Radiation Protection and Nuclear Criticality* clause at 952.223-72.

(End of Clause)

[FR Doc. 2014-22283 Filed 09/18/2014 at 8:45 am; Publication Date: 09/19/2014]