



U.S. SMALL BUSINESS ADMINISTRATION  
OFFICE OF GENERAL COUNSEL

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March 18, 2016

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, NW – Suite 300  
Washington, DC 20036-4505

Re: OSC File No. DI-14-3428

Dear Ms. Lerner:

This is in response to your letter of September 11, 2015, regarding a whistleblower disclosure that the U.S. Small Business Administration engaged in conduct that may constitute a violation of law, rule, or regulation. Specifically, former employee Nicholas Harrison alleged that the SBA collected and maintained personally identifiable information (PII) for the Boots to Business program in a manner that violated the Paperwork Reduction Act and the Privacy Act of 1974.

At the direction of the Office of the Administrator, SBA's Chief Operations Officer, Matthew Varilek, appointed two attorneys from the Office of General Counsel to lead an investigation into the allegations made by Mr. Harrison. Their investigative report dated March 17, 2016 is attached. It should be noted that Administrator Contreras-Sweet has delegated me authority to review and sign the report, in accordance with 5 U.S.C. 1213(d).

Sincerely,

Melvin F. Williams, Jr.  
General Counsel

Enclosures

**U.S. Small Business Administration  
Report of Investigation**

**In response to:**

**U.S. Office of Special Counsel (OSC)**

**File DI-14-3428**

**Office of General Counsel, 409 Third Street, SW,  
Washington, D.C.**

**March 17, 2016**

**Part 1 of 2**

## Table of Contents

<b>Preliminary Statement.....</b>	<b>2</b>
<b>Summary of Information for Which Investigation Was Initiated.....</b>	<b>2</b>
<b>Description of Investigation .....</b>	<b>3</b>
<b>Background: OVBD and B2B.....</b>	<b>5</b>
<b>Summary of Evidence Obtained from Investigation .....</b>	<b>8</b>
Allegation 1: The SBA collected demographic information from private citizens without proper Office of Management and Budget (OMB) approval, in violation of the Paperwork Reduction Act.....	8
<i>Discussion of Allegation.....</i>	<i>11</i>
<i>Allegation 1(A) – B2B Two-Day Course Component.....</i>	<i>11</i>
<i>Allegation 1(B) – B2B Eight-Week Course Component.....</i>	<i>13</i>
Actions Taken or Planned With Respect to Allegation 1.....	16
Allegation 2: The SBA did not provide proper notice to individuals prior to the collection of PII in violation of the Privacy Act. ....	17
<i>Discussion of Allegation.....</i>	<i>18</i>
<i>Allegation 2(A) – B2B Two-Day Course Component.....</i>	<i>19</i>
<i>Allegation 2(B) – B2B Eight-Week Course Component.....</i>	<i>21</i>
Actions Taken or Planned With Respect to Allegation 2.....	23
<b>Appendix A – Witness List.....</b>	<b>25</b>
<b>Appendix B – Index to Documents .....</b>	<b>26</b>

## **Preliminary Statement**

The Office of Special Counsel (OSC) issued a referral letter dated September 11, 2015, to Ms. Maria Contreras-Sweet, U.S. Small Business Administration (SBA) Administrator. The letter directed Administrator Contreras-Sweet to conduct an investigation and submit a written report to OSC pursuant to 5 U.S.C. § 1213.

OSC is an independent federal agency. Under 5 U.S.C. § 1213(a) and (b), OSC is authorized to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. However, OSC does not have the authority to investigate a whistleblower's disclosure. As a result, if OSC determines there is a substantial likelihood that one of the aforementioned conditions exists, OSC must advise the appropriate agency head of its determination. The agency head is then required to conduct an investigation of the allegations and submit a written report to OSC.

Reports of investigation conducted pursuant to 5 U.S.C. § 1213 must include: (1) a summary of the information for which the investigation was initiated; (2) a description of the conduct of the investigation; (3) a summary of any evidence obtained from the investigation; (4) a listing of any violation or apparent violation of law, rule, or regulation; and (5) a description of any action taken or planned as a result of the investigation, such as changes in agency rules, regulations, or practices, the restoration of any aggrieved employee, disciplinary action against any employee, and referral to the Attorney General of any evidence of criminal violation.

### **Summary of Information For Which Investigation Was Initiated**

According to OSC's September 11, 2015, referral letter, OSC received a disclosure complaint that SBA collected and maintained personally identifiable information (PII) in a manner that violated the Paperwork Reduction Act (PRA) and the Privacy Act of 1974 (Privacy Act). OSC identified the complainant as Mr. Nicholas Harrison (Complainant), a former Veterans Affairs Specialist in SBA's Office of Veterans Business Development (OVBD), and advised that he had consented to the release of his name. The OSC referral letter provided the following additional information about Complainant's contentions, stating:

Mr. Harrison explained that he worked on the SBA's Boots to Business Program, an entrepreneurial education and training program offered to transitioning service members exploring business ownership or other self-employment opportunities by teaching them business concepts and foundational business planning knowledge. The program is divided into three components, a short informational video, a two-day in-person course, and an eight week online training module. He noted that the video and online training components were developed in a SBA partnership with Syracuse University, whereas the two-day course is taught by SBA employees. Mr. Harrison asserted that prior to the start of each component, the SBA collected demographic information from individuals including:

[n]ame, [g]ender, [r]ace, [m]ilitary rank, [d]isability status, [and] [d]ischarge information.

He noted that unless this information was provided, individuals could not participate in the program. Mr. Harrison further explained that since the program's inception in 2012, the SBA collected this information from approximately 25,000 participants. He explained that this information was maintained in spreadsheets used by the SBA to measure program participation and performance. He also noted that Syracuse University used this information to send marketing materials to the Boots to Business Program participants.

Mr. Harrison alleged that SBA failed to obtain OMB approval for the collection of this information. He noted that paper forms and online information submission pages did not feature OMB control numbers, and that the collection of the information appeared to be in violation of 5 C.F.R. §1320.5. In addition, Mr. Harrison noted that because the SBA was collecting what appeared to be PII, relevant requirements of the Privacy Act were triggered. Mr. Harrison asserted that the SBA was required to provide a Privacy Act Statement, which would specify the authority authorizing the solicitation of information, note whether the disclosure of such information is mandatory or voluntary, and explain the principal use or purpose for which the information will be used. He noted that despite maintaining this information in a database, the SBA also failed to provide notice or the opportunity to comment on the collection or the existence of an associated system of records. See OSC referral letter, pgs. 2-3.

Based upon the above, OSC determined there was "a substantial likelihood" that the information disclosed a violation of law, rule, or regulation. As a result, OSC referred the following two allegations to Administrator Contreras-Sweet for investigation: "(1) The SBA collected demographic information from private citizens without proper Office of Management and Budget (OMB) approval, in violation of the Paperwork Reduction Act; and (2) The SBA did not provide proper notice to individuals prior to the collection of PII in violation of the Privacy Act." See OSC referral letter, pgs. 1 & 3. OSC directed Administrator Contreras-Sweet to complete the investigation and report its findings within 60 days after the date on which the information was transmitted. Id. at pg. 3.

### **Description of Investigation**

On November 2, 2015, SBA's Office of the Administrator authorized the Office of General Counsel, Office of General Law, to investigate Complainant's disclosures and report the Agency's findings in accordance with OSC's referral letter, pursuant to 5 U.S.C. § 1213(c).

The Office of General Counsel, Office of General Law received authorization to: (1) conduct interviews with all appropriate Agency officials, employees, or other individuals who have

knowledge of any facts concerning the allegations; (2) require that statements of witnesses be in writing and made under oath or affirmation; (3) review any files pertinent to the allegations; and (4) collect any evidence deemed pertinent to the allegations. The Office of General Law assigned two attorneys, Ms. Sherrie Abramowitz and Ms. Ashley Obando (Investigators), to conduct the investigation.

On October 18, 2015, OSC granted the Investigators' request for an extension of time until January 19, 2015, to complete the investigation and report. The Investigators' requested a second 60-day extension of time to complete the investigation and report on December 11, 2015, and on December 16, 2015, OSC granted the extension request and specified that the due date for the report is on or before March 21, 2016.

The Investigators initiated the fact finding investigation by conducting preliminary research on both the PRA and the Privacy Act and gathering relevant documents related to OVBD's Boots to Business program ("B2B" or "the program"). The Investigators then conducted a series of in-person interviews to flesh out the details surrounding Complainant's allegations. Prior to each in-person interview, the Investigators sent the witnesses an email indicating the authority upon which the investigation was being conducted (5 U.S.C. § 1213), the allegations to be investigated, and the letter of authority authorizing the Investigators to conduct the investigation. Each in-person interview was conducted according to the following protocol:

- Formal in-person interview;
- One Investigator asked the witness questions, while the other Investigator captured the witness' responses by typing their responses in a Word document;
- After each interview, a summary affidavit that the Investigators produced from the fact finding interview was provided to the witness for his/her review;
- The witness was permitted to make corrections to the summary affidavit by notifying the Investigators via telephone, on a hard copy of the transcript, on a separate sheet, or in an email response;
- After the witness noted any corrections, the Investigators revised the summary affidavit and sent a final version to the witness to be signed and notarized.

Between December 18, 2015 and February 22, 2016, the Investigators conducted seven in-person interviews with seven different witnesses, including the Complainant. The Investigators also had informal conversations with SBA personnel to learn more about the Federal Register process. These informal discussions were not captured in a summary affidavit. A complete list of witnesses is included in Appendix A. A list of witnesses who were interviewed and who produced summary affidavits is included in Appendix B, identified as Attachments 1-7. Additionally, each witness was asked to submit any relevant documentation pertaining to the allegations at issue and/or the B2B program along with his/her summary affidavit.

During the course of the fact-finding investigation, numerous documents and emails related to the B2B program and/or the Complainant's allegations were also obtained and reviewed by the Investigators, including pertinent SBA Standard Operating Procedures (SOPs), Federal Register Notices, and the Notice of Award of grant received by Syracuse University (SU). Additionally, the Investigators submitted two formal requests for information; one to SBA's Office of the

Chief Information Officer and another to an employee in SBA's Office of General Counsel. A list of all documents relied upon in the investigation report is included in Appendix B.

### **Background: OVBD and B2B**

B2B is an entrepreneurial development program for transitioning service members administered by the SBA's OVBD. It is implemented through the Department of Defense (DOD) as the Entrepreneurship Career Track of the Transition Assistance Program (TAP).

B2B is authorized both in statute and by Executive Order and flows from law that directs DOD to provide "information concerning veterans small business ownership and entrepreneurship programs of the Small Business Administration" (10 U.S.C. § 1142(b)(13)) as a component of benefits authorized by 10 U.S.C. §§ 1141-1154 for separating military service members.

The program was piloted by SBA in July 2012 at the direction of the Veterans Employment Initiative Task Force (VEI) formed by Executive Order 13518. SBA's FY 2014 Congressional Budget Justification and FY 2012 Annual Performance Report stated that the initial rollout of the pilot was being implemented by the Marines. B2B became a "program of record" for the fiscal year 2014 subsequent to funding in the Federal budget.<sup>1</sup> The FY 2014 Budget of the U.S. Government provided \$7 million for B2B.<sup>2</sup>

B2B is both an inter-agency and an intra-agency effort. Within SBA, B2B relies on the collaborative efforts of OVBD, the Office of Entrepreneurial Development ("OED"), and the Office of Field Operations ("OFO") to deliver the program through SBA resource partners on over 165 military installations worldwide. SBA's B2B SOP 90 71 (effective June 8, 2015) sets forth the roles and responsibilities of all parties engaged in delivering B2B with an emphasis on the requisite SBA offices, as well as operation procedures and emerging best practices for the program. (Attachment 17).

#### **B2B Program Components**

B2B is a combination of a two-day Introduction to Entrepreneurship course taught in classrooms on military installations, followed by an eight-week online Foundations of Entrepreneurship course taught by a consortium of entrepreneurship professors and practitioners. The B2B curriculum includes:

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<sup>1</sup> Program of Record ("POR") is defined in the 13th Edition of the Defense Acquisition University Glossary as: "Program as recorded in the current Future Years Defense Program (FYDP) or as updated from the last FYDP by approved program documentation (e.g., Acquisition Program Baseline (APB), acquisition strategy, or Selected Acquisition Report (SAR)). If program documentation conflicts with latest FYDP, the FYDP takes priority. 2.) May also refer to a program having successfully achieved formal program initiation, normally Milestone B."

<sup>2</sup> President Obama submitted the FY 2014 budget proposal on April 10, 2013, two months after the legal deadline due to negotiations over the implementation of the sequester cuts mandated by the Budget Control Act of 2011. In early January of 2014, the Consolidated Appropriations Act, 2014 (H.R. 3547) was passed by Congress and signed by the President.

- 1) Introductory Video – used to introduce entrepreneurship as a post-service career vocation to service members with content on the benefits and challenges of business ownership, an outline of the components of the program, testimonials from veteran business owners, and highlights of SBA resources.
- 2) Introduction to Entrepreneurship (two-day) course – live training provided by subject matter experts from SBA and SBA’s resource partners (Small Business Development Centers, SCORE, Veteran Business Outreach Centers, and Women Business Centers), focusing on: 1) articulating the opportunities and challenges of entrepreneurship/business ownership; 2) providing practical steps for starting a business; 3) developing a feasibility analysis that helps the participants evaluate their business concepts; and 4) providing information on additional support from SBA, its partners network, and other business assistance services.

SBA’s OFO leads the operations for delivering the two-day course at assigned installations in their District Office territories. It is responsible for collecting any course documentation and report metrics. OED and the resource partners collaborate with and support OFO as needed. The Veterans Business Development Officers (VBDOs) schedule classes through an automated B2B SharePoint database. Classes should have a maximum of 50 participants and a minimum of 10 participants.

- 3) Foundations of Entrepreneurship (eight-week) course – allows participants the opportunity for further study through an instructor-guided eight-week online course taught by entrepreneurship practitioners and professors. This course shall lead participants through the components of an actionable business plan.

The Institute for Veterans and Military Families (IVMF) at SU provides the eight-week online interactive instructor-led course. SU received its Notice of Award of the grant to produce the course on or about April 1, 2014. (Attachment 11). SU is responsible for producing and distributing all course materials, leading curriculum development, maintaining a process for receiving and documenting feedback on the curriculum, and assessing and reporting program outcomes and performance metrics to OVBD. Participants register for the course via a form that they access via a password through the B2B website.

#### SBA OVBD B2B Leadership

Several individuals in OVBD were responsible for managing the B2B program during the time period relevant to Complainant’s allegations, and were interviewed for this report. Their summary of testimony affidavits are included in Appendix B. They are:

*M. Rhett Jeppson*

Associate Administrator for OVBD, April 2012 – September 2014  
Acting SBA Chief Operating Officer, September 2014 – January 2015  
Principal Deputy Director of the United States Mint - January 2015 – present

*Barbara Carson*

Deputy Associate Administrator for OVBD, June 3, 2013 – October 1, 2014  
Acting Associate Administrator for OVBD, October 1, 2014 – November 1, 2015  
Associate Administrator for OVBD, November 1, 2015 - present

*Craig Heilman*

Supervisory Veterans Affairs Specialist, OVBD, August 2013 – present

Complainant was hired as a Veterans Affairs Specialist, GS-1101-11, in OVBD on June 25, 2013. Complainant was employed at SBA from July 2013 - June 11, 2014. Consequently, Complainant's observations of B2B operations occurred during a limited and finite time period. He mostly worked on B2B during that time, though Complainant said that he "pulled away" from B2B during the "last month or two" of his employment. While Complainant worked on the B2B pilot program from the start of his tenure, his exposure to B2B operations as a "program of record" was limited to a four-month period. B2B did not become a federally funded program until January 2014. His exposure to the eight-week component was limited to a one-month period because SU received its Notice of Award of the grant on or about April 1, 2014.

Memorandum of Understanding (MOU)

The Secretary of Labor, in conjunction with the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of Veterans Affairs is required by 10 U.S.C. § 114(b)(5) to establish and maintain a program to "provide information and other assistance to such members in their efforts to obtain loans and grants from the Small Business Administration and other Federal, State and local agencies." To that end, the Secretary of Defense and the Secretary of Labor maintain an agreement with SBA.

The MOU among DOD, Department of Veterans Affairs (VA), Department of Labor (DOL), Department of Education (ED), Department of Homeland Security (DHS), SBA, and the United States Office of Personnel Management (OPM) regarding the TAP for separating service members, was executed on January 31, 2014. (Attachment 10). Mr. Jeppson was the approving official for SBA that signed the MOU.<sup>3</sup>

The MOU supersedes the September 19, 2006, TAP MOU and includes additional parties, SBA, to implement the redesigned TAP for the benefit of eligible service members.<sup>4</sup> To aid in the

<sup>3</sup> See the MOU for the legal authorities that pertain to the MOU.

<sup>4</sup> Section 502 of the National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, amended title 10, U.S.C. by adding chapter 58, which authorized comprehensive transition assistance benefits and services for separating service members and their spouses.

successful transition of service members from military to civilian life, and at the direction of the President of the United States, DOD, VA, DOL, DHS, ED, OPM and SBA redesigned the TAP to enhance its focus on making service members career ready.

The MOU outlines how SBA provides services to separating service members through the redesigned TAP. Included within the scope of the MOU is that local installations within the continental United States will coordinate with SBA District Offices to deliver the Entrepreneurship Track. Program policy and coordination is governed by the VEI, which is co-chaired by DOD, DOL, and the VA.

SBA's responsibilities in the MOU include monitoring SBA curriculum delivery annually or as needed to maintain a high quality program. Monitoring will include evaluations of the approved SBA curriculum and a standardized participant assessment of Transition GPS and SBA two-day Entrepreneurship Track. The data and feedback will be used to improve the program at the local level and elevate the participants' issues of a broad scope to the national level. SBA also must inform service members who complete the two-day entrepreneurship training how to access the on-line eight-week course.

#### B2B Data Collection and Reporting

The MOU states that the parties participating in TAP intend to enter into an Information Sharing/Security Agreement that will specify how the parties intend to maintain, collect, use and disseminate information on individual program participants in accordance with the Privacy Act and established DOD and DHS requirements for collecting, sharing, storing and maintaining PII.

OVBD's intention as stated in SBA's B2B SOP is to collect sufficient information to support its stakeholders' goals and program objectives without duplication of efforts: "Continuously improving the processes and procedures utilized in the field for coordinating classes, ordering and receiving materials, and collecting and reporting program performance data is a priority of the Boots to Business Program." (Attachment 17, pg. 19).

Approved registration forms for the two-day course are located on the B2B website. Registration forms are to be filled out by participants and collected by SBA or its resource partners and returned to the district office so the information can be reported on the B2B SharePoint database.

### **Summary of Evidence Obtained From the Investigation**

Allegation 1: The SBA collected demographic information from private citizens without proper Office of Management and Budget (OMB) approval, in violation of the Paperwork Reduction Act.

The PRA requires that agencies obtain OMB approval before requesting most types of information from the public.<sup>5</sup> Before requiring or requesting information from the public, the PRA requires Federal agencies (1) to seek public comment on proposed collections and (2) to submit proposed collections for review and approval by OMB. OMB has issued regulations and guidance to promote agency compliance with the PRA.<sup>6</sup>

OMB regulations define “information” as “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.”<sup>7</sup> OMB regulations also specify categories of items that are generally not “information” under the PRA.<sup>8</sup>

For the purposes of implementing the PRA, a “collection of information” is “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.”<sup>9</sup> It includes “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.”<sup>10</sup> It refers to “the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate.”<sup>11</sup>

The PRA applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, “ten or more persons” within any 12-month period.<sup>12</sup> For the purposes of defining “ten or more persons,” “persons” does not include “...current employees of the Federal government (including military reservists and members of the National Guard while on active duty) when acting within the scope of their employment, but it does include retired and other former Federal employees.”<sup>13</sup>

A “collection of information” includes questions posed to agencies, instrumentalities, or employees of the United States, if the results are to be used for general statistical purposes, that is, if the results are to be used for statistical compilations of general public interest, including compilations showing the status or implementation of Federal activities and programs.<sup>14</sup> The requirements of the PRA apply to voluntary collections as well as to mandatory collections.<sup>15</sup>

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<sup>5</sup> 44 U.S.C. §§ 3501 et seq.; 5 C.F.R. Part 1320.

<sup>6</sup> See the Office of Information and Regulatory Affairs’ website at [http://www.whitehouse.gov/omb/inforeg\\_default/](http://www.whitehouse.gov/omb/inforeg_default/).

<sup>7</sup> 5 C.F.R. § 1320.3(h).

<sup>8</sup> 5 C.F.R. § 1320.3(h).

<sup>9</sup> 5 C.F.R. § 1320(c).

<sup>10</sup> 5 C.F.R. § 1320(c).

<sup>11</sup> 5 C.F.R. § 1320(c)(3).

<sup>12</sup> 44 U.S.C. § 3502(3)(A)(i).

<sup>13</sup> 5 C.F.R. § 1320.3(c)(4).

<sup>14</sup> 5 C.F.R. § 1320.3(c)(3).

<sup>15</sup> 44 U.S.C. § 3502(3); 5 C.F.R. § 1320(c).

Agency collections from “agencies, instrumentalities, or employees of the United States” in their official capacities are generally not subject to the PRA, unless those collections are for “general statistical purposes.”<sup>16</sup>

A federal agency is considered to “conduct or sponsor” a collection of information that triggers PRA requirements under certain circumstances.<sup>17</sup> An agency “sponsors” a collection if the agency (1) causes another agency to collect the information, (2) contracts or enters into a cooperative agreement with a person to collect the information, (3) requires a person to provide information to another person, or (4) in similar ways causes another agency, contractor, partner in a cooperative agreement, or person to obtain, solicit, or require the disclosure to third parties or the public of information by or for an agency.<sup>18</sup>

A collection of information undertaken by a recipient of a federal grant is considered to be “conducted or sponsored” by an agency only if (1) the recipient of a grant is “conducting the collection of information at the specific request of the agency” or (2) the “terms and conditions of the grant require specific approval by the agency of the collection of information or collection procedures.”<sup>19</sup>

The PRA mandates that all federal government agencies receive approval from OMB—in the form of a “control number”—before promulgating a paper form, website, survey or electronic submission that will impose an information collection burden on the general public.<sup>20</sup> The term “burden” is defined as anything beyond “that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument.”<sup>21</sup>

The PRA generally requires an agency to publish a 60-day notice in the Federal Register to obtain the public's input on an agency's proposal to collect information.<sup>22</sup> After the conclusion of the 60-day comment period and the agency's internal consideration of the public's comments, the agency submits the collection to OMB and publishes a second Federal Register notice to announce the start of OMB review.<sup>23</sup> The second notice informs the public about how to submit comments to OMB and informs the public that OMB may act on the agency's request only after the 30-day comment period has closed. Under certain circumstances, an agency head or designee may request that it be permitted to seek expedited, or “emergency,” OMB review of an information collection request.<sup>24</sup>

Following OMB approval, the agency must display the OMB control number on the information collection. OMB may approve a collection for up to three years at one time.<sup>25</sup>

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<sup>16</sup> 44 U.S.C. § 3502(3)(A).

<sup>17</sup> 5 C.F.R. § 1320.3(d).

<sup>18</sup> 5 C.F.R. § 1320.3(d).

<sup>19</sup> 5 C.F.R. § 1320.3(d).

<sup>20</sup> 44 U.S.C. § 3507(a)(3).

<sup>21</sup> 5 C.F.R. § 1320.3(h)(1).

<sup>22</sup> 44 U.S.C. § 3506(c)(2)(A).

<sup>23</sup> 44 U.S.C. § 3507(a)(1)(D).

<sup>24</sup> 5 C.F.R. § 1320.13.

<sup>25</sup> 44 U.S.C. § 3507(g).

SBA SOP 00 30 2, Forms Management Program (December 27, 2006), outlines the Agency's forms management and information collection program. (Attachment 18).

*Discussion of Allegation*

The OSC referral letter states that Complainant alleged that SBA was collecting information during B2B in violation of 5 C.F.R. § 1320.5 because SBA failed to obtain OMB approval for the collection of information contained in "paper forms and online information pages," which did not feature OMB control numbers. The OSC referral letter did not attach copies of said "paper forms and online information pages," though Complainant confirmed during his interview with the Investigators that the Sign-In Sheet (Attachment 8) and the online information pages from SU's website (Attachment 9) are the bases for his PRA allegations.

The OSC referral letter is based on the premise that SBA was unlawfully collecting demographic information from private citizens during all three components (short informational video, two-day course, eight-week course) of the B2B program. Contrary to Complainant's initial allegations to OSC, Complainant acknowledged during his interview with the Investigators, that no information was collected for the Introductory Video component:

No information is collected for that. It's a ten minute video, sometimes it's shown to service members and they show it, and sometimes they give them a link to watch the video. Nothing is specifically collected.

Several witnesses corroborated Complainant's statement. Therefore, as no information was collected for this component, the Investigators concluded that Complainant was no longer alleging a violation of the PRA in this component. As a result, this report separately addresses the findings, analyses and conclusions for the remaining two components as Allegation 1(A) and Allegation 1(B).

*Allegation 1(A) – B2B Two-Day Course Component*

Complainant bases Allegation 1(A) on the Sign-In Sheet (Attachment 8) for the B2B two-day course. It was distributed to participants before or during the two-day course, returned to SBA District Offices, and finally sent back to OVBD for collection and maintenance. It contains spaces for nine names and email addresses, and includes fields for gender, ethnicity, military branch and civilian status, pay grade/spouse/dependent. There is no visible OMB control number.

Complainant believes that the information B2B collected via the Sign-In Sheet required clearance by OMB:

The Paperwork Reduction Act is triggered when involving ten or more people. The fact that there were only nine blanks on the sign in sheets, that doesn't get around it. It's cumulative. If you collect nine on one sheet and nine on another, it triggers the Paperwork Reduction Act and

they have to go through the clearance process. Any time you have a defined set of information you have to go through the process.

The Sign-In Sheet is undated. Complainant stated that it predated him; meaning, it was created prior to June 2014. There was at least one other version (undated) prior to May 6, 2015, though its use was not substantiated.<sup>26</sup> Most witnesses confirmed that Attachment 8, or a similar iteration of it, was used during Complainant's tenure in OVBD.

Mr. Jeppson acknowledged that he created the Sign-In Sheet, "to get some detail about who was coming to the class, because I knew I would be asked. I was the one that said let's do a sign in sheet." He did not view it as a collection requiring compliance with the PRA:

These are a very common set of questions for military personnel; nothing outside the norm. And I knew I was going to be asked to report on these things. Other than rank, the information we were requesting was already on an approved form [sic] at SBA, DOD, and the rest of government... We didn't feel the need to do anything else, especially understanding the culture in the Services.

Both Mr. Jeppson and Mr. Heilman discussed the importance of knowing who was participating in the course to identify participation trends and evaluate the value of the training. Mr. Heilman stated:

It was nothing beyond being able to identify who was participating. We needed to have knowledge of who was participating. There is roughly 250 thousand transitioning service members. Many come from the US army. We need to know things like: what percentage of transitioning service members attending the course are from the Army, what are the trends, what do we need to deliver?

Mr. Heilman stated that participants were not required to provide their demographic information prior to the two-day course. Yet, he and the B2B staff in Washington, D.C. were not present at most, if any, of the courses that were delivered on military installations around the country to personally observe how the Sign-in Sheet was presented to participants. Complainant also stated, "It wasn't clear whether they had to fill it out or not... We are not clear across all the different places whether they were required or not to fill it out."

The Investigators did not locate any attempts to receive OMB approval prior to the Agency's proposal for the current Sign-In Sheet being used for B2B, OMB 3245-0384. (Attachment 15).

### **Analysis for Allegation 1(A)**

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<sup>26</sup> On May 6, 2015, SBA received OMB control number for the form currently being used, OMB-3245-0384. (Attachment 15).

The Sign-In Sheet meets the criteria for a “collection of information” under the PRA. While there are some factual discrepancies surrounding the form, the PRA must be complied with regardless of the origin, mode, or reason for the collection.

The Sign-In Sheet was a data collection from ten or more persons in a year, even though each individual Sign-In Sheet contained nine spaces for signatures. It recorded nine signatures per form, not nine signatures in total throughout the entire year. Any information requirement in a “rule of general applicability” is presumed to affect or potentially affect at least ten respondents, even if the agency expects there to be fewer respondents. A rule should be considered to have general applicability unless you can demonstrate that it would be impossible for there to ever be ten respondents. In accordance with the PRA, OMB approval must be obtained prior to collecting information in any situation where ten or more respondents are involved and the questions are standardized in nature, as was the case here.

B2B participants who were using the Sign-In Sheet were “eligible separating and retiring Service members, and their spouses”.<sup>27</sup> (Attachment 10). As such, the collection is not subject to any exceptions, such as those for military personnel or federal employees.<sup>28</sup> Even if some of the participants were federal employees (i.e. the spouse of a service member), the number was de minimis, as the program was targeted to veterans. Further, the collection was not within the scope of their employment; and there was no discernable sorting mechanism that excluded them from using the Sign-In Sheet. Whether participants were required to complete the Sign-In Sheet cannot be determined by comparing the number of participants who completed the Sign-In Sheet to the number of participants who actually attended the courses. Thus, it is inconclusive whether participants were told or believed that completion of the Sign-In Sheet was mandatory. Regardless of that conclusion, the requirements of the PRA apply to voluntary collections as well as to mandatory collections.<sup>29</sup>

### **Conclusion for Allegation 1(A)**

The evidence substantiated the allegation that it collected demographic information from private citizens without proper OMB approval in violation of the PRA. Specifically, SBA was not in compliance with the PRA when it used the Sign-In Sheet during the two-day component of the B2B pilot program and until it received OMB clearance for the current form.

#### *Allegation 1(B) – B2B Eight-Week Course Component*

Complainant’s basis for Allegation 1(B) is the online registration (Attachment 9) for B2B’s eight-week component. Complainant explained why he believes Attachment 9 was a collection that did not comply with the PRA:

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<sup>27</sup> The Transition Assistance Program (TAP) provides assistance to eligible separating service members and their spouses. SBA was responsible for creating a multi-phased Entrepreneurship Curriculum for the Transition GPS (Goals, Plans, Success). (Attachment 10). B2B is a component of the benefits and services authorized for separating military service members by 10 U.S.C. §§ 1141-1154.

<sup>28</sup> 5 C.F.R. § 1320.3(c)(4).

<sup>29</sup> 44 U.S.C. § 3502(3); 5 C.F.R. § 1320(c).

In order to enroll in that course there is a website that you go to and enter a code that you can access the registration form. And that registration form is a lot more detailed and in depth. They track names, phone numbers, status, ranks, more specifically, what is your rank. They have some interesting disability information that triggered some warnings in people that I've talked to about this situation. They wanted to know whether they were service disabled, and may ask the percentage of disability.

Mr. Heilman recognized Attachment 9 as the form that SU used for "some period of time," though it is no longer being used and he did not know when SU ceased using it. Mr. Heilman stated that a program management team at SU created the website content, but SBA reviewed it as part of their collaboration with the program. Mr. Jeppson did not recall that OVBD collaborated with SU in developing the online registration form. Mr. Jeppson believed that the data collected during the eight-week course registration was the same as collected for the two-day course.

Complainant concluded that Attachment 9 did not comply with the PRA because it was a collection of information by SU that SBA directed it to collect:

That's done by Syracuse, the grantee, which poses an interesting legal question. Because whenever the government outsources, that falls outside of the PRA. But what brings it back under the rules and regulations is that Syracuse wasn't doing this on their own. They were doing it upon very specific guidance from OVBD. I sat on a call with Barb Carson, Brian Goodrow, and Stan Fujii and Syracuse, and we were specifically going through the information being collected; what fields they had to fill out and what they could omit. And so it was the data being collected by Syracuse was being driven by SBA and OVBD. The government was actually telling the grantee this is the information we want you to collect, these will be mandatory and optional. There are court cases out there that say they are an instrument of the government.

Based upon Complainant's statements, the Investigators examined the relationship between SBA and SU during the grant period to determine whether SBA was a "sponsor" of the collection that triggered the PRA. Underlying the collection is the Notice of Award to SU of a grant for work on B2B. (Attachment 11). The base and options period for the Award run from April 1, 2014 - March 31, 2017. Among SU's responsibilities in the Notice of Award are to "Report quarterly on the number of anticipated beneficiaries trained during the 8-week online course annually." The operative clause in the Notice of Award provides that SU must attach a narrative statement to its Performance Progress Reports produced quarterly that includes: "A report on the number of candidates enrolling in and completing the 2-day Introductions to Entrepreneurship course and the 8-week online Foundations Course."

The Investigators did not locate any grant or other formal arrangement between SBA and SU prior to the Notice of Award. There were also no formal legal opinions issued from SBA's Office of General Counsel on B2B and SU related to the PRA. Kevin Harber, attorney in the

Office of General Counsel, Office of Procurement Law, provided advice and counsel to OVBD on the Notice of Award. He advised on an early draft of the Notice and alerted OVBD to OMB rules for collecting demographic data; however, he did not issue a formal legal opinion on whether SBA was sponsoring SU's data collection, and there was no demographic language included in the final version of the Notice of Award.

The witnesses mostly corroborated Complainant's assessment of SU's collection of information; however, they did not clarify the amount of control and direction SBA exerted over Attachment 9. Ms. Carson did not know the "technicalities" surrounding SU's collection; and she did not recognize Attachment 9. Mr. Heilman stated that SBA generally did not then dictate the terms or methods under which SU collected and/or stored the registration information. SBA did not create the website content, but SBA reviewed it.

The Investigators asked Complainant about SBA's maintenance and use of the information. He stated, "All handled by Syracuse University. At the time I left the Agency, he had not secured information from Syracuse. Syracuse had it all in a database on their site." The Investigators also asked him whether he had any knowledge as to how SU used the demographic information they collected. He stated, "It went into a database and they prepared similar reports about demographics and passed onto Capitol Hill. They didn't share the raw data with SBA. And so they couldn't do any of the follow up. They did some marketing materials to Syracuse's listservs so that they could solicit other programs to these individuals."

Mr. Heilman stated that, "Syracuse reported [aggregate data] to SBA. We never asked for names. We asked for demographic information." Mr. Jeppson similarly recalled that SU did not share the demographic information collected from the eight-week registration form with OVBD: "They would give us total numbers."

Brian Goodrow, a Field Operations Specialist in OFO, believed that SBA would have had "total control" over the information collected by SU; however, that was his opinion of activity in 2013, and he had no evidence that was the case except for that there was no agreement between SU and SBA at that time.

### **Analysis for Allegation 1(B)**

Attachment 9 was a collection of information under the PRA because it met the criteria in the definition for "collection of information" under the PRA. SU was collecting the information during the time period it was awarded the grant; however, SU's information collection was subject to the PRA only if SU was conducting the information at the specific request of SBA (i.e., the grant is awarded to collect information or conduct a survey), or the terms and conditions of the grant required that SBA specifically approve the collection of information or the collection procedures.<sup>30</sup>

The Investigators found insufficient evidence to support Complainant's claim that SU was collecting the information "upon very specific guidance from OVBD." Instead, witnesses consistently stated that SU, not SBA, collected, maintained and used the demographic

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<sup>30</sup> 5 C.F.R. § 1320.3(d).

information. Further, several witnesses stated that SBA did not receive demographic information from SU, only aggregate participant numbers. Complainant confirmed that SU did not share the raw data with SBA.

The Notice of Award supports the witnesses' account of SU's narrow exchange of information. The grant was awarded to SU to provide the eight-week B2B course to participants according to the responsibilities outlined in the Notice of Award, not to collect information or conduct a survey. Reporting participant data was but one condition of the award contract. The Notice of Award did not specify that SU was to report all of the information contained within Attachment 9's online registration fields (i.e. name, contact information, race, gender, date of birth, marital status, education, military service, disability status). There is no evidence that SBA received that information after SU collected it.

Finally, the Notice of Award did not require that SBA specifically approve the collection of information or SU's collection procedures. It provides that SU must maintain a website "for the purpose of publicizing and conducting project activities." Whether SU directed the collection of information was incidental to the purpose of the grant. The information collected through Attachment 9 is similar to the Sign-In Sheet to reasonably conclude that SBA advised during its creation; however, the amount of control and participation SBA had in the actual data collection by SU through the website is inconclusive.

### **Conclusion for Allegation 1(B)**

The Investigators could not conclude whether SU collected information at the specific request of SBA based upon the evidence gathered of SBA's grantee relationship with SU during the B2B pilot program and until it received OMB clearance for the form currently in use. Therefore, the evidence does not substantiate the allegation that it collected demographic information from private citizens during the eight-week component of B2B without proper OMB approval in violation of the PRA.

### Actions Taken or Planned With Respect to Allegation 1

Complainant's concerns were primarily about collections during B2B's pilot program and immediately after it received federal funding. After the program became a federally funded "program of record," SBA took immediate and appropriate measures to ensure compliance with the PRA for its collection of information related to B2B.

SBA published a 60-day notice in the Federal Register on December 5, 2014 (FR Doc. 2014-28512), Title: Boots to Business Registration. (Attachment 12). Thereafter, SBA published a 30-day notice in the Federal Register on April 1, 2015, Title: Boots to Business Registration (Attachment 13), and submitted it to OMB for a control number on May 5, 2015. (Attachment 14).<sup>31</sup> The form was approved by OMB on May 6, 2015. (Attachment 15). It expires May 31, 2018. OMB 3245-0384 is currently being used for collections during the 2-day and 8-week components. Subsequently, other B2B forms have received OMB approval, demonstrating

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<sup>31</sup> Ms. Jessica Congemi was hired as an Associate Consultant/Contractor for B2B in November 2014 and was immediately tasked with navigating the PRA process for B2B information collections. (Attachment 3).

SBA's continued commitment to compliance with the PRA.<sup>32</sup> The Investigators found no intent by anyone to circumvent the PRA.

Complainant's PRA concerns have been adequately addressed by SBA's actions. Therefore, no further Agency action is required.

Allegation 2: The SBA did not provide proper notice to individuals prior to the collection of PII in violation of the Privacy Act.

The Privacy Act regulates the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies.<sup>33</sup> The Privacy Act requires any agency which maintains a "system of records" to notify the public of the establishment or maintenance of such systems by publication in the Federal Register at least annually.<sup>34</sup> Similarly, individuals are entitled to notice—typically referred to as a Privacy Act Statement—prior to submitting information to an agency *if* that information will be maintained in a system of records.<sup>35</sup> In other words, both the public notice requirement and the individual notice requirement are implicated whenever an agency establishes or maintains a system of records.

The Privacy Act defines a system of records as "a group of any records under the control of any agency from which information *is retrieved* by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."<sup>36</sup> As the agency charged with the administration of the Privacy Act,<sup>37</sup> OMB has issued implementation guidelines that help clarify the retrieval requirement within the Act's "system of records" definition.<sup>38</sup> The OMB Guidelines explain that a system of records exists if:

- (1).there is an "indexing or retrieval capability using identifying particulars [that is] built into the system"; and
- (2).the agency "does, in fact, retrieve records about individuals by reference to some personal identifier."<sup>39</sup>

The Guidelines state that the "is retrieved by" criterion "implies that the grouping of records under the control of an agency *is accessed* by the agency by use of a personal identifier; not

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<sup>32</sup> These forms were not examined in this report as they are outside the scope of this investigation.

<sup>33</sup> 5 U.S.C. § 552a.

<sup>34</sup> Such notice must include, among other things, "the name and location of the system," the "categories of individuals on whom records are maintained in the system," the "categories of users and purposes of their use," and "the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records." 5 U.S.C. § 552a(e)(4).

<sup>35</sup> Such notice must "inform each individual [asked] to supply information, on the form [used] to collect the information or on a separate form that can be retained by the individual..."the authority [behind the information collection," the "principal purpose or purposes for which the information is intended to be used," the "routine uses which may be made of the information," and "the effects on him, if any, of not providing all or any part of the requested information. 5 U.S.C. § 552a(e)(3).

<sup>36</sup> 5 U.S.C. § 552a(a)(5) (emphasis added).

<sup>37</sup> 5 U.S.C. § 552a(v).

<sup>38</sup> OMB Guidelines, 40 Fed. Reg. 28,948 (July 9, 1975), *available at*

[http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/implementation\\_guidelines.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/implementation_guidelines.pdf).

<sup>39</sup> *Id.* at 28,952.

merely that a capability or potential for retrieval exists.”<sup>40</sup> The D.C. Circuit Court has also weighed in on the retrieval requirement within the Act’s “system of records” definition and found that “the OMB guidelines make it clear that it is not sufficient that an agency has the *capability* to retrieve information indexed under a person’s name, but the agency must *in fact* retrieve records in this way in order for a system of records to exist.”<sup>41</sup> The Court further held that “in determining whether an agency maintains a system of records keyed to individuals, the court should view the entirety of the situation, including the agency’s function, the purpose for which the information was gathered, and the agency’s actual retrieval practice and policies.”<sup>42</sup>

Finally, the Privacy Act states that “[w]hen an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system.”<sup>43</sup> The Federal Acquisition Regulation (FAR) sets forth the language that must be inserted in solicitations and contracts “[w]hen the design, development, or operation of a system of records on individuals is required to accomplish an agency function.”<sup>44</sup> The FAR defines “operation of a system of records” as “performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.”<sup>45</sup>

#### *Discussion of Allegation*

The OSC referral letter states that Complainant alleged that SBA did not provide proper notice to individuals participating in the B2B program prior to the collection of PII in violation of the Privacy Act. As previously stated, the B2B curriculum is comprised of three components: an Introductory Video, an Introduction to Entrepreneurship two-day course, and a Foundations of Entrepreneurship eight-week online course. However, Complainant acknowledged during his interview that “[n]o information [was] collected for [the introductory video].” This statement was corroborated by other witnesses. Therefore, the Investigators concluded that Complainant was no longer alleging that SBA violated the Privacy Act during the Introductory Video

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Henke v. Commerce*, 83 F.3d 1453, 1460 n. 12 (D.C. Cir. 1996); *see also Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011) (“Even if . . . the TSA has the ability to combine various sources of information and then to link names to the images produced using [advanced imaging technology], [the petitioners’] Privacy Act claim still fails because they offer no reason to believe the TSA has in fact done that.” (citing *Henke*)); *Chang v. Navy*, 314 F. Supp. 2d 35, 41 (D.D.C. 2004) (“[A]n agency’s failure to acknowledge that it maintains a system of records will not protect the agency from statutory consequences if there is evidence that the agency in practice retrieves information about individuals by their names or personal identifiers. . . . [H]owever, mere retrievability – that is, the capability to retrieve – is not enough.”).

<sup>42</sup> *Henke* at 1461; *see also Smith v. Henderson*, No. C-99-4665, 1999 WL 1029862, at \*5 (N.D. Cal. Oct. 29, 1999) (applying *Henke* and finding that “locked drawer containing a file folder in which [were] kept . . . notes or various other pieces of paper relating to special circumstances hires” did not constitute a system of records because the agency “did not utilize the drawer to systematically file and retrieve information about individuals indexed by their names”), *aff’d sub nom. Smith v. Potter*, 17 F. App’x 731 (9th Cir. 2001).

<sup>43</sup> 5 U.S.C. § 552a(m)(1).

<sup>44</sup> 48 C.F.R. § 24.104 (2012); *see also Id.* § 52.224-1 to -2.

<sup>45</sup> *Id.* at § 52.224-2(c)(1). *But cf. Koch v. Schapiro*, 777 F. Supp. 2d 86, 91 (D.D.C. 2011) (concluding that “a contract to investigate complaints of discrimination by employees of the agency on behalf of the [agency’s] EEO Office” is “not a contract for the design or development of a system of records” and therefore is “not the type of contract covered by 48 C.F.R. pt. 24”).

component of B2B; which is contrary to his initial allegation to OSC. As a result, the investigation focused on whether any Privacy Act violations occurred during the Introduction to Entrepreneurship two-day course and the Foundations of Entrepreneurship eight-week online course.

*Allegation 2(A) – B2B Two-Day Course Component*

Complainant alleged that the SBA was violating the Privacy Act through its use of a Sign-In Sheet (Attachment 8) given to participants. Most of the witnesses confirmed that Attachment 8, or something similar was used during the two-day Introduction to Entrepreneurship course while Complainant worked at SBA. Witness interviews indicated that the Sign-In Sheet was distributed to participants during the two-day course and contained various fields, including: name, email address, gender, ethnicity, military branch, civilian status, pay grade, and spouse/dependent.<sup>46</sup> At the time relevant to Complainant's allegations, Attachment 8 did not appear to include a Privacy Act statement.

During the investigation, various witnesses offered explanations for why SBA was collecting the information. Mr. Heilman stated that OVBD collected the information in order "to identify who was participating." He further stated that "[t]here [were] roughly 250 thousand transitioning service members...[SBA wanted] to know things like: what percentage of transitioning service members attending the course are from the Army, what are the trends, what do we need to deliver?" Mr. Jeppson confirmed Mr. Heilman's statements, stating that the SBA "needed to know what our participation rate was" in order to "allow [the SBA] to tailor the class for them and determine whether [the Agency] needed to do more outreach."

In addition to exploring the purpose behind the Sign-In Sheet, the Investigators interviewed Complainant and several witnesses to identify the SBA's actual retrieval practices and policies related to the Sign-In Sheets. According to Complainant, the Sign-In Sheet data was "compiled" to identify the "total number of people who attended each" two-day course.<sup>47</sup> Complainant also stated that they would retain "the actual sign in sheets" and that they would be "either mailed or transmitted" to SBA OVBD staff located in headquarters. He further stated "[t]here was talk at one point about OVBD wanting to take the information and put it into a database," but that the Agency "had not created [such] a database." Rather, according to Complainant, it was the Agency's "intention to do it at some point." (emphasis added).

Interviews with other witnesses revealed that there was not a consistent practice for how OVBD stored the Sign-In Sheets during the eleven months in which Complainant worked at SBA.<sup>48</sup> According to Mr. Heilman, the Sign-In Sheets "got collected and remitted to the District Office and then faxed or mailed to OVBD." Mr. Heilman further explained that the Sign-In Sheets "were stored in boxes" that could be accessed by himself, the District office and OVBD. Mr. Heilman also explained that if the Sign-In Sheets were faxed, they would be in an online file. Other witnesses, including Complainant, confirmed that the hard copies of the Sign-In Sheets were stored in boxes or in a filing cabinet and some were saved onto a shared file system on a

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<sup>46</sup> As such, a completed Sign-In Sheet would constitute a "record" under the Privacy Act.

<sup>47</sup> In fiscal year 2013, approximately 3,900 transitioning service members attended the B2B two-day course.

<sup>48</sup> Complainant worked at SBA from July 1, 2013 – June 11, 2014.

hard drive. Ms. Carson and Mr. Jeppson both stated that they did not know how the Sign-In Sheets were stored.

With respect to actual retrieval practices, Mr. Heilman was specifically asked whether he had ever retrieved information by individual identifiers from the Sign-In Sheets. He replied, “No.” When asked whether he ever looked up a person’s name for any purpose he replied, “No.” Mr. Jeppson added that SBA just wanted “aggregates of who [participants] were – Army, males, females” because the Agency just wanted “to get a sense of how the program was doing.”

Additionally, Mr. Goodrow testified that as far as he was aware, the only use of the Sign-In Sheet information was “to track data.” That is, “[h]ow many males, females, per district office, by region.” Mr. Goodrow further explained that this was the only way he was aware of the information being used until “OVBD got some contractors on board.” According to Mr. Goodrow, the contractors were going to use the information to “reach out to participants and either ask them questions or status.” However, before the contractors did so “they had to get OMB approval for the sign in sheet.” Lastly, Mr. Goodrow mentioned that he helped the District Offices set up a SharePoint so that Sign-In Sheets did not have to be sent back and forth. He explained that the SharePoint system only collected “demographics - none of the columns with names and email addresses.” In other words, District Offices were only reporting summary information (e.g., gender, ethnicity) through SharePoint.

#### **Analysis for Allegation 2(A)**

Attachment 8 did not include a Privacy Act Statement. However, such notice would only be required under the Privacy Act if the SBA were collecting personally identifiable information in *a system of records*. Thus, whether the Privacy Act was violated with respect to the two-day “Introduction to Entrepreneurship” course Sign-In Sheets depends on whether the Sign-In Sheets were ever maintained in a system of records.

The evidence indicates that the information was never entered into a system of records. In fact, Complainant admitted that “[t]here was also talk at one point about OVBD wanting to take this information and put it into a database.” In other words, Complainant admitted that the information collected from the Sign-In Sheets never actually made it into a system of records. Furthermore, no evidence or information gathered through the fact finding interviews indicated that any of the information contained on the Sign-In Sheets beyond high-level demographic data was ever retrieved by SBA personnel, let alone retrieved using a participant’s name or other personal identifier.

#### **Conclusion for Allegation 2(A)**

The Investigators did not find evidence indicating that data collected from the Sign-In Sheets was retrieved by name or other personal identifier during the time period at issue. Therefore, the Investigators did not substantiate Allegation 2(A). Although witness interviews revealed there was not a consistent practice for how OVBD stored the Sign-In Sheets, no witness indicated that information from the Sign-In Sheets was ever retrieved beyond broad demographic data. As a result, the Investigators believe that SBA complied with the letter of law with respect to the

Privacy Act. Although OVBD was collecting PII from participants, a System of Records Notice (SORN) and Privacy Act Statement was not required.

*Allegation 2(B) – B2B Eight-Week Course Component*

Complainant alleged that the SBA was violating the Privacy Act based on Attachment 9 that SU used to register participants in the Foundations of Entrepreneurship eight-week online course. According to Complainant, the registration form was created “upon very specific guidance from OVBD” to SU.<sup>49</sup> In addition, it was “a lot more detailed and in depth” than the Sign-In Sheet used for the two-day course component.<sup>50</sup>

During the investigation, the Investigators confirmed that SU received a grant from the SBA to work on the B2B program. (Attachment 11).<sup>51</sup> The Investigators found no evidence of a grant or other formal arrangements between SBA and SU prior to SU’s receipt of the Notice of Award on April 1, 2014. The Notice of Award states that, among other things, SU was responsible for “report[ing] quarterly on the number of anticipated beneficiaries trained during the 8-week online course.” The operative clause states that SU must attach a narrative statement to its performance progress reports produced quarterly that includes “a report on the number of candidates enrolling in and completing the 2-day introductions to entrepreneurship course and the 8-week online foundations course.”

The Investigators spoke to several witnesses to further understand who was responsible for creating the registration form. Mr. Heilman recognized Attachment 9 as the form that SU used for “some period of time.” He explained that SBA did not then dictate the terms or methods under which SU collected and/or stored the registration information. According to Mr. Heilman, a program management team at SU created the website content and SBA simply reviewed it.

During his interview, Mr. Jeppson did not recall OVBD collaborating with SU in developing the online registration form. According to Mr. Jeppson, SU “kind of created it on their own.” Ms. Carson was unable to provide any further details related to the creation of the registration form. She indicated that she did not know the technicalities surrounding SU’s collection, nor did she recognize Attachment 9. Finally, Mr. Goodrow believed that SBA would have had “total control” over the information collected by SU.

The Investigators also questioned several witnesses about how the information collected from Attachment 9 was maintained and retrieved. According to Complainant, it was “[a]ll handled by Syracuse University.” This was because, as Complainant explained, “[a]t the time I left the Agency, he had not secured information from SU. SU had it all in a database on their site.” When asked how SU used the demographic information they collected, Complainant stated that “[i]t went into a database” from which SU prepared “reports about demographics and passed

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<sup>49</sup> Complainant alleged that he participated on a phone call with several SBA officials and SU during which they went “through the information being collected; what fields [participant’s] had to fill out and what they could omit.”

<sup>50</sup> Complainant alleged that the registration form had fields for “names, phone numbers, status, ranks” as well as “disability information...and may ask the percentage of disability.” As such, a completed registration form—Attachment 9 or something similar—would constitute a “record” under the Privacy Act.

<sup>51</sup> The Notice of Award of grant was not issued to SU until April 1, 2014, and the options period for the Award run from April 1, 2014 – March 31, 2017. (Attachment 11).

onto Capitol Hill.” Complainant further explained that SU “didn’t share the raw data with SBA,” and, as a result, SBA “couldn’t do any of the follow up.”

Mr. Heilman explained that SU “reported [] [aggregate data] to SBA” and that SBA “never asked for names.” According to Mr. Heilman, SBA only “asked for demographic information.” In contrast, Mr. Jeppson recalled that SU did not share the demographic information collected from the registration form, but rather only gave SBA “total numbers.”

### **Analysis for Allegation 2(B)**

Witness interviews confirmed that SU collected information from B2B participants via Attachment 9 during the time period it was awarded the grant. On its face, Attachment 9 did not include a Privacy Act Statement. However, such notice would only be required if the grant to SU constitutes a “contract for the design, development, or operations of a system of records on individuals on behalf of the [SBA] to accomplish an agency function.”<sup>52</sup>

Based on witness interviews and the Notice of Award, the Investigators concluded that the grant from SBA to SU was not the type of contractual arrangement covered by 48 C.F.R. pt. 24. The Notice of Award indicates that the grant was not for the design or development of a system of records; it was a grant to provide the eight-week B2B course to participants, not to collect information or conduct a survey. Reporting participant data was but one condition of the grant award. The Notice of Award did not specify that SU was to collect or report all of the information contained within Attachment 9. Furthermore, there is no evidence that SBA received that information after SU collected it.

Additionally, Investigators found insufficient evidence to support Complainant’s claim that SU was collecting the information “upon very specific guidance from OVBD.” Instead, witnesses consistently stated that SU, not SBA, collected, maintained and used the demographic information. Further, several witnesses stated that SBA did not receive demographic information from SU, only aggregate participant numbers. Finally, Complainant confirmed that SU didn’t share the raw data with SBA.

### **Conclusion for Allegation 2(B)**

The Investigators concluded that the grant to SU did not constitute a “contract for the design, development, or operations of a system of records on individuals on behalf of the [SBA] to accomplish an agency function.”<sup>53</sup> The terms of the grant and witness interviews strongly indicate that the grant to SU was made simply to provide the eight-week Foundations of

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<sup>52</sup> 48 C.F.R. § 24.102(a) (emphasis added); *see also id.* § 24.102(b), (c); International Union, Security, Police, and Fire Prof’ls of America v. U.S. Marshal’s Service, 350 F.Supp.2d 522, 535 (S.D.N.Y.2004) (“48 C.F.R. § 24.102 ... merely states that an agency must apply the Privacy Act when it contracts for the development or operation of a system of records...”).

<sup>53</sup> 48 C.F.R. § 24.102(a) (emphasis added); *see also id.* § 24.102(b), (c); International Union, Security, Police, and Fire Prof’ls of America v. U.S. Marshal’s Service, 350 F.Supp.2d 522, 535 (S.D.N.Y.2004) (“48 C.F.R. § 24.102 ... merely states that an agency must apply the Privacy Act when it contracts for the development or operation of a system of records...”).

Entrepreneurship online course. Whether a system of records was created by SU was entirely incidental to the purpose of the grant. As such, SBA was not required to incorporate the requirements of the Privacy Act into the grant award. Consequently, SBA did not substantiate Complainant's allegation that it violated the Privacy Act due to the registration form SU used to register participants in the Foundations of Entrepreneurship eight-week online course.

Actions Taken or Planned With Respect to Allegation 2

As required by the Privacy Act and the OMB Circular A-130, SBA published a "Notice of Revision of Privacy Act System of Records" in the Federal Register on August 10, 2015. (Attachment 16, pgs. 1-3). The notice of revision was published in order to change the title of an existing system of records, SBA-5, from SBA's "Business and Continuity Initiatives Resource Files" to "Business and Entrepreneurial Initiatives for Small Businesses." Additionally, it amended the categories of individuals and categories covered to specifically include transitioning service members, military dependents and veterans who register to attend or otherwise participate in B2B. Mr. Heilman and Ms. Carson indicated during their interviews that the change was made so that the system of records would more accurately describe why OVBD was collecting data and who OVBD was collecting data from. Ms. Jessica Congemi, Associate Contractor/Consultant for B2B explained that the process to amend systems of record, SBA-5 began around January 2015.

OVBD also proposed to make a new system of record specific to veterans. As required by the Privacy Act and the OMB Circular A-130, SBA published a Notice of New Privacy Act System of Records in the Federal Register on October 27, 2015. (Attachment 16, pgs. 4-5). The Notice advised that SBA "proposes to make a new system of records titled, Veteran Programs Training and Counseling Records," to its inventory of records systems subject to the Privacy Act..." The system of records Notice clearly identified the system of records name, location, categories of individuals covered by the system, categories of records in the system, authority for maintenance of the system, the purpose of the system, the routine uses of records maintained in the system - including categories of users and the purposes of such uses, and finally, the policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system. This action became effective on December 11, 2015.

Mr. Heilman explained that OVBD decided it would be helpful to survey OVBD participants and that creating a new system of records would ensure compliance with the Privacy Act for future surveys. Mr. Heilman explained that OVBD was involved in this SORN process, and Ms. Congemi was assigned to handle the day-to-day work. Ms. Congemi stated: "We created a new SORN to better encompass all collections of information related to veterans."

There is now a Privacy Act Statement on both the current Sign-In Sheet used for the two-day course and the eight-week registration form. The Sign-In Sheet that is currently being used for the two-day course component of B2B is located in Attachment 15. It contains the following Privacy Act statement:

**Use of information:** This information collection (form) is to be completed by individuals seeking to participate in the Boots to Business courses

offered by the Small Business Administration (SBA). Disclosure of the information requested on this form is voluntary. The information is collected to help SBA's continuing improvement of business counseling programs, to ensure effective oversight and management of entrepreneurial development programs and grants. All information provided is protected to the extent permitted by law, including the Privacy Act of 1974, 5 U.S.C. 552a and the Freedom of Information Act (FOIA), 5 U.S.C. 552. SBA maintains your personal information in the agency's Privacy Act Systems of Records, SBA 5-- Business and Entrepreneurial Initiatives for Small Businesses. This system of record notice (SORN) identifies why and to whom SBA will routinely disclose the information that you provide. **Select 'Do Not Contact' if you do not wish for SBA to use your name and contact information for SBA surveys and information mailings regarding SBA products and services as part of the Boots to Business alumni network.**

Similarly, when B2B participants register for the eight-week online course by completing the registration form, they are presented with the following Privacy Act Statement:

Disclosure of the information requested on this form is voluntary; however, if you fail to provide the information we will not be able to register you for the Boots to Business courses and you may not be able to participate in the training. The information is collected to help SBA's continuing improvement of business counseling programs, to ensure effective oversight and management of entrepreneurial development programs and grants. All information provided is protected to the extent permitted by law, including the Privacy Act of 1974, 5 U.S.C. 552a and the Freedom of Information Act (FOIA), 5 U.S.C. 552. SBA maintains your personal information in the agency's Privacy Act Systems of Records, SBA 5-- Business and Community Initiatives Resource Files. This system of record notice (SORN) identifies why and to whom SBA will routinely disclose the information that you provide.

In addition to those routine uses, **please select yes or no below** to indicate whether you authorize SBA or its agent to also use your name and contact information for SBA surveys and information mailings regarding SBA products and services as part of the Boots to Business alumni network. SBA will not provide your personal information to commercial entities.

Complainant's Privacy Act concerns have been adequately addressed by SBA's actions. Therefore, no further Agency action is required.

### **Appendix A – Witness List**

The following individuals provided signed and notarized statements following in-person interviews, background information, and/or produced pertinent documents for the investigation.

1. Erin Andrew, Assistant Administrator for the Office of Women’s Business Ownership
2. Keith Bluestein, Deputy Chief Information Officer, Office of the Chief Information Officer
3. Barbara Carson, Associate Administrator for the Office of Veterans Business Development
4. Jessica Congemi, Associate Consultant/Contractor for the Boots to Business Program
5. David De Leva, Office of Grants Management
6. Darryl Farmer, IT Network Specialist, Office of the Chief Information Officer
7. Brian Goodrow, Field Operations Specialist, Office of Field Operations
8. Kevin Harber, Attorney, Office of General Counsel
9. Nicholas Harrison, Complainant
10. Craig Heilman, Director of Veterans Programs, Office of Veterans Business Development
11. Rhett Jeppson, Principal Deputy Director of the United States Mint
12. Curtis Rich, Records Management Division
13. Yvonne Walters, Attorney, Office of General Counsel
14. David De Leva, Office of Grants Management

**Appendix B – Index to Documents**

The investigation report is supported by the following documents.

- Attachment 1: Summary of Testimony Affidavit for Erin Andrew, February 29, 2016
- Attachment 2: Summary of Testimony Affidavit for Barb Carson, January 14, 2016
- Attachment 3: Summary of Testimony Affidavit for Jessica Congemi, March 3, 2016
- Attachment 4: Summary of Testimony Affidavit for Brian Goodrow, February 29, 2016
- Attachment 5: Summary of Testimony Affidavit for Nicholas Harrison, February 11, 2016
- Attachment 6: Summary of Testimony Affidavit for Craig Heilman, February 25, 2016
- Attachment 7: Summary of Testimony Affidavit for Rhett Jeppson, March 9, 2016
- Attachment 8: Boots to Business Two Day Course Sign-In Sheet
- Attachment 9: Boots to Business Eight-Week Online Course Component Registration
- Attachment 10: Memorandum of Understanding Among the Department of Defense, Department of Veterans Affairs, Department of Labor, Department of Education, Department of Homeland Security (United States Coast Guard), United States Small Business Administration, and United States Office of Personnel Management regarding the Transition Assistance Program for Separating Service Members, was executed on January 31, 2014 (“MOU”)
- Attachment 11: Notice of Award to Syracuse University, April 1, 2015
- Attachment 12: Federal Register Doc. 2014-28512, Title: Boots to Business Registration, December 5, 2014 (60-day notice)
- Attachment 13: Federal Register Doc. 2015-07410, Title: Boots to Business Registration, April 1, 2015 (30-day notice)
- Attachment 14: SBA submission to OMB, May 5, 2015
- Attachment 15: OMB 3245-0384, approved on May 6, 2015
- Attachment 16: Privacy Act System of Records Notice in the Federal Register on April 10, 2015 and October 27, 2015
- Attachment 17: SBA SOP 90 71, Boots to Business (June 8, 2015)
- Attachment 18: SBA SOP 00 30 3, Forms Management Program (December 27, 2006)