



9110-04

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2016-0044]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/United States Coast Guard-029 Notice of Arrival and Departure System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is issuing a final rule to extend the exemptions from certain provisions of the Privacy Act to the updated and reissued system of records titled “Department of Homeland Security/United States Coast Guard-029 Notice of Arrival and Departure System of Records.”

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Marilyn Scott-Perez, (202) 475-3515, Privacy Officer, Commandant (CG-61), United States Coast Guard, 2703 Martin Luther King Jr. Ave. S.E., Mail Stop 7710, Washington, D.C. 20593. For privacy questions, please contact: Jonathan R. Cantor, (202) 343-1717, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528-0655.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) and the United States Coast Guard (USCG) are updating applicable regulations to exempt portions of a system of records from certain provisions of the Privacy Act. Specifically, this rule exempts portions of the “DHS/USCG-029 Notice of Arrival and Departure System of Records” from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements, pursuant to 5 U.S.C. 552a(j)(2) and (k)(2). Furthermore, to the extent certain categories of records are ingested from other systems, the exemptions applicable to the source systems will remain in effect.

Concurrent with this document, DHS/USCG is updating and reissuing a system of records notice titled “DHS/USCG-029 Notice of Arrival and Departure (NOAD) Systems of Records.” The collection and maintenance of this information assists DHS/USCG in meeting its statutory obligation to assign priorities while conducting maritime safety and security missions in accordance with U.S. regulations.

Privacy Act

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USCG-029 Notice of Arrival and Departure System of Records. Some information may be used to support DHS national security or law enforcement activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to protect information relating to DHS/USCG law enforcement investigations from disclosure to subjects of investigations and others

who could interfere with investigatory and law enforcement activities. The exemptions are required to preclude subjects of these activities from frustrating the investigative process; to avoid disclosure of investigative techniques; to protect the identities and physical safety of confidential informants and of law enforcement personnel; to ensure DHS's and other federal agencies' ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard sensitive information. The exemptions also preclude the subject from using the information to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system, and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

DHS will not assert any exemption with respect to information maintained in the system that is collected from a person at the time of arrival or departure, if that person, or his or her agent, seeks access or amendment of such information. The DHS/USCG-029 Notice of Arrival and Departure System of Records Notice is also published in this issue of the Federal Register.

Public Comments

DHS received one comment on the NPRM (80 FR 74018, Nov. 27, 2015) and one comment on the SORN (80 FR 74116, Nov. 27, 2015). The commenter expressed concern that DHS will exempt this database, which contains detailed, sensitive personal information, from the Privacy Act's well-established safeguards, specifically the ability for individuals to access and amend their information to ensure accurate and reliable data

is maintained and used in Government databases. DHS disagrees. First, this system is not exempt from the access and amendment provisions of the Privacy Act, thereby permitting individuals the ability to seek access and correction to data that is inaccurate. Second, this system collects and retains only information necessary to permit screening of personnel and vessels entering the United States. Third, these exemptions are narrowly tailored for use only when necessary to protect the enforcement of criminal laws or when part of investigatory material compiled for law enforcement purposes. Fourth, and finally, this narrower Final Rule replaces a previous broader Final Rule for this system (74 FR 45086, Aug. 31, 2009) that had originally exempted this system from numerous subsections of the Privacy Act, including the access and amendment provisions of subsection (d). Thus, DHS has in fact gone to great lengths to ensure and protect the Privacy Act's safeguards.

The commenter also noted that DHS's proposal for broad exemptions for this system contravenes the intent of the Privacy Act by creating a large database of personal information with no accountability. DHS disagrees. This system collects and retains only information necessary to permit screening of personnel and vessels entering the United States. As a matter of general policy, DHS will not apply these exemptions unless disclosure to the subject individual could reveal investigative interest on the part of DHS as well as the recipient agency and present an impediment to law enforcement efforts and/or efforts to preserve national security. This Final Rule replaces a previous Final Rule that was broader and permitted to DHS to exempt this system from more subsections of the Privacy Act's requirements.

The commenter also noted that when an investigation is complete or has been made public, the information should no longer be exempt from the Privacy Act;

individuals have a right to know about disclosures of their personal information held by the agency. DHS concurs in part with the comment and has adjusted the Final Rule and SORN accordingly. When an investigation is complete, the agency will make a case-by-case determination whether providing an accounting of disclosures would undermine the investigative process and present an impediment to law enforcement efforts and/or efforts to preserve national security. There may be circumstances in which information will continue to be exempted if the fact that an investigation occurred remains sensitive after completion. Nonetheless, excluding accounting of disclosures, individuals have the ability to request and be granted both access to and amendment of, if legally authorized, categories of records from this system contained on them pursuant to subsection (d) of the Privacy Act.

Except as noted above, the Department will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS amends chapter I of title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. Revise the authority citation for part 5 to read as follows:

Authority: 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 301; 6 U.S.C. 101 et seq.; E.O. 13392, 70 FR 75373, 3 CFR, 2005 Comp., p. 216.

2. In appendix C to part 5, revise paragraph 34 to read as follows:

Appendix C to Part 5 – DHS Systems of Records Exempt From the Privacy Act

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34. The DHS/USCG-029 Notice of Arrival and Departure System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCG-029 Notice of Arrival and Departure System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under. The DHS/USCG-029 Notice of Arrival and Departure System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), exempted this system from the following provisions of the Privacy Act: Sections (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as is necessary and appropriate to protect this information. Further, DHS has exempted section (c)(3) of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(k)(2), as is necessary and appropriate to protect this information.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency.

Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process. When an investigation has been completed, information on disclosures made may continue to be exempted if the fact that an investigation occurred remains sensitive after completion.

(b) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(c) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

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Dated: July 10, 2017.

Jonathan R. Cantor,
Acting Chief Privacy Officer,
Department of Homeland Security.

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