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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID DoD-2020-OS-0094]

RIN 0790-AL17

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: The Department of Defense (Department or DoD) is giving concurrent notice of a new Department-wide system of records pursuant to the Privacy Act of 1974 for the DoD 0005 “Defense Training Records” system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the Defense Training Records system of records from certain provisions of the Privacy Act because of national security requirements and to preserve the objectivity and fairness of testing and examination material.

DATES: Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods.

* Federal eRulemaking Portal: <https://www.regulations.gov>.

Follow the instructions for submitting comments.

* Mail: The DoD cannot receive written comments at this time due to the COVID-19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this *Federal Register* document. The

general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Lyn Kirby, Defense Privacy, Civil Liberties, and Transparency Division, Directorate for Oversight and Compliance, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700; OSD.DPCLTD@mail.mil; (703) 571-0070.

SUPPLEMENTARY INFORMATION:

I. Background

The DoD 0005, “Defense Training Records” system of records describes training records created and maintained by all component parts of the DoD, wherever they are maintained. The system consists of both electronic and paper records and will be used by DoD components and offices to maintain records about training provided to DoD-affiliated individuals, including Military Service members, civilian employees, dependents and family members, contractors, and other individuals enrolled in courses administered by the DoD. These records may include information pertaining to class schedules, enrollment, participation, programs, and instructors; training trends and needs; testing and examination materials; and assessments of training efficacy. The collection and maintenance of this information will assist the DoD in meeting its obligations under law, regulation, and policy to provide training on various subjects to ensure that the agency mission can be successfully accomplished.

II. Privacy Act Exemption

The Privacy Act allows federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including those that provide individuals with a right to request access to and amendment of their own records. If an agency intends to

exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption. This proposed rule explains why an exemption is being claimed for this system of records and invites public comment, which DoD will consider before the issuance of a final rule implementing the exemption.

The DoD proposes to modify 32 CFR part 310 to add a new Privacy Act exemption rule for the DoD 0005 “Defense Training Records” system of records. The DoD proposes this exemption because some of its training records may contain classified national security information and disclosure of those records to an individual may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to executive order. The DoD is proposing to claim an exemption from the access and amendment requirements of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), to prevent disclosure of any information properly classified pursuant to executive order, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3.

The DoD also proposes an exemption for DoD 0005 “Defense Training Records” because these records contain testing and examination material, the release of which could undermine the objectivity and fairness of the testing and examination process. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(6), authorizes agencies to claim an exemption for systems of records that contain examination and testing material used solely to determine individual qualification for appointment or promotion in the Federal service. The DoD is proposing to claim an exemption from the access and amendment requirements of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(6), to prevent disclosure of any information that would compromise the objectivity or fairness of testing and examination material.

If implemented, this rule will deny an individual access under the Privacy Act to only those portions of records for which one or more claimed exemptions apply. In addition, records in the DoD 0005 “Defense Training Records” system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

A notice of a new system of records for DoD 0005 “Defense Training Records” is also published in this issue of the *Federal Register*.

REGULATORY ANALYSIS

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this proposed rule is not a significant regulatory action.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This proposed rule has been deemed not significant under Executive Order (EO) 12866, “Regulatory Planning and Review,” therefore, the requirements of EO 13771, “Reducing Regulation and Controlling Regulatory Costs” do not apply.

Congressional Review Act

This proposed rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)

It has been certified that Privacy Act rules for the DoD do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the DoD.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this proposed rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

It has been determined that this proposed rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that it will not significantly or uniquely affect small governments.

Executive Order 13132, “Federalism”

It has been determined that this proposed rule does not have federalism implications.

This rule does not have substantial direct effects 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.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is proposed to be amended as follows:

**PART 310 - PROTECTION OF PRIVACY AND ACCESS TO AND
AMENDMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF
1974**

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.13 is amended by adding paragraph (e)(3) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(3) *System identifier and name:* DoD-0005, “Defense Training Records.”

(i) *Exemptions:* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (d)(1), (2), (3), and (4).

(ii) *Authority:* 5 U.S.C. 552a(k)(1) and (6).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2) –*

(1) *Exemption (k)(1).* Training records in this system of records may contain information concerning DoD personnel or training materials that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(2) *Exemption (k)(6).* Training records in this system of records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(B) *Subsections (d)(3) and (4).* These subsections are inapplicable to the extent an exemption is claimed from (d)(2). Moreover, applying the amendment appeal procedures

to training and examination materials could impose a highly impractical administrative burden by requiring testing and examinations to be continuously re-administered.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: November 25, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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