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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2024-OS-0049]

RIN 0790-AL30

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-0020, “Military Human Resource Records” system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of this system of records from certain provisions of the Privacy Act because of national security requirements, and to prevent the undermining of evaluation materials used to determine potential for promotion.

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: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number 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. Rahwa Keleta, (703) 571-0070, OSD.DPCLTD@mail.mil.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, the DoD is establishing a new DoD-wide system of records titled “Military Human Resource Records,” DoD-0020. This system of records describes DoD’s collection, use, and maintenance of records about members of the armed forces, including active duty, reserve, and guard personnel. Records support Department requirements and individual Service members’ careers, through the collection and management of personnel and employment data. This information includes individual’s pay and compensation, education, assignment history, rank and promotion determinations, separation and retirement actions, and career milestones.

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 pursuant to 5 U.S.C. 553(b)(1)-(3), (c), and (e). 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-0020, Military Human Resource Records system of records. The DoD proposes this exemption because some of its military personnel 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 and certain disclosure accounting 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.

In addition, the DoD proposes an exemption for this system of records because the records may contain evaluation material, including from other systems of records, that is used to determine potential for promotion in the armed services within the scope of 5 U.S.C. 552a(k)(7). In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). The DoD therefore is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent disclosure of any information that would compromise the identity of confidential sources who might not have otherwise provided information to assist the Government.

Records in this 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-0020, “Military Human Resource 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, distributive 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 rule is not a significant regulatory action under these Executive Orders.

Congressional Review Act (5 U.S.C. 804(2))

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the *Federal Register*, whichever is later. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

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

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local, and tribal governments in the aggregate, or by the

private sector, in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601 et seq.)

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency has certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule is concerned only with the administration of Privacy Act systems of records within the DoD. Therefore, the Regulatory Flexibility Act, as amended, does not require DoD to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. 3501 et seq.)

The Paperwork Reduction Act (44 U.S.C. 3501 et seq.) was enacted to minimize the paperwork burden for individuals; small businesses; educational and nonprofit institutions; Federal contractors; State, local and tribal governments; and other persons resulting from the collection of information by or for the Federal Government. The Act requires agencies to obtain approval from the Office of Management and Budget before using identical questions to collect information from 10 or more persons. This rule does not impose reporting or recordkeeping requirements on the public.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that has federalism implications, imposes substantial direct compliance costs on State and local governments, and is not required by statute, or has federalism implications and preempts State law. This rule will not have a substantial effect on State and local governments.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, the Department of Defense proposes to amend 32 CFR part 310 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. Amend § 310.13 by adding paragraph (e)(15) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(15) *System identifier and name.* DoD-0020, “Military Human Resource Records.”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(3); (d)(1)-(4); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (k)(7).

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

(A) *Subsection (c)(3), (d)(1), and (d)(2).*

(1) *Exemption (k)(1).* Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) 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)(7)*. Records in this system of records may contain evaluation material, including from other systems of records, used to determine potential for promotion in the Armed Forces of the United States. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(7) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise provided information to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (d)(3) and (4)*. These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2).

(C) *Subsection (e)(1)*. In the collection of information for evaluation material used to determine potential for promotion in the Military Services, which may be incorporated into and/or maintained in military personnel records, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the evaluation process. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective decision-making can be assessed. Collection of such information may permit more informed decision-making by the Department when making required disciplinary or personnel determinations. Additionally, the information collected may be properly classified pursuant to executive order. Accordingly, application of exemptions (k)(1) or (k)(7) may be necessary.

(D) *Subsection (e)(4)(G) and (H)*. These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(E) *Subsection (e)(4)(I)*. To the extent that this provision is construed to require more detailed disclosure than the broad information currently published in the system notice concerning categories of sources of records in the system, an exemption from this provision is necessary to protect the confidentiality of sources of information, the privacy and physical safety of witnesses and informants, and testing or examination material used solely to determine individual qualifications for appointment of promotion in the Federal service. Additionally, records in this system may be properly classified pursuant to executive order. Accordingly, application of exemptions (k)(1) and (k)(7) may be necessary.

(F) *Subsection (f)*. To the extent that portions of the system are exempt from the provisions of the Privacy Act concerning individual access and amendment of records, DoD is not required to establish rules concerning procedures and requirements relating to such provisions. Accordingly, application of exemptions (k)(1) and (k)(7) may be necessary.

Dated: May 2, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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