

A notice of system of records for External Investigations is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph “14”:

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

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14. The DHS/ICE Enforcement External Investigations system of records consists of electronic and paper records and will be used by DHS and its components. External Investigations 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 thereunder; and national security and intelligence activities. External Investigations 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. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), and (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). 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) and (4) (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 the 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.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could 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. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish

requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' 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.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 2, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–29394 Filed 12–10–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket Number DHS–2008–0122]

Privacy Act of 1974: Implementation of Exemptions; United States Coast Guard Notice of Arrival and Departure System

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing to amend its regulations to exempt portions of a system of records from certain provisions of the Privacy Act. Specifically, the Department proposes to

exempt portions of the United States Coast Guard Notice of Arrival and Departure System from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Written comments and related material must be submitted on or before January 12, 2009.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0122 by one of the following methods:

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 1–866–466–5370.

- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS), elsewhere in this edition of the **Federal Register**, published a Privacy Act system of records notice describing records for Notice of Arrival and Departure (NOAD). This information is maintained within the Ship Arrival Notification System (SANS), as well as other USCG systems charged with screening and vetting of vessels, primarily, but not exclusively, through Marine Information for Safety and Law Enforcement (MISLE, DOT/CG 679, April 11, 2002, 67 FR 19612) and the Maritime Awareness Global Network (MAGNet, DHS/USCG–061, May 15, 2008, 73 FR 28143). SANS retrieves information by vessel and not by a personal identifier; however, USCG uses the information in other systems to conduct screening and vetting pursuant to its mission for protecting and securing the maritime sector.

The information that is required to be collected and submitted through Electronic Notice of Arrival and Departure (eNOAD) can be found on routine arrival/departure documents that passengers and crewmembers must provide to DHS, when entering or departing the United States.

This system, however, may contain records or information recompiled from

or created from information contained in other systems of records, which are exempt from certain provisions of the Privacy Act. For these records or information only, in accordance with 5 U.S.C. 552a (j)(2), and (k)(2), DHS would also claim the original exemptions for these records or information from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G) through (I), (5), and (8); (f), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information. Moreover, DHS would add these exemptions to Appendix C to 6 CFR Part 5, DHS Systems of Records Exempt from the Privacy Act. Such exempt records or information may be law enforcement or national security investigation records, law enforcement activity and encounter records, or terrorist screening records.

DHS needs these exemptions in order to protect information relating to law enforcement investigations from disclosure to subjects of investigations and others who could interfere with investigatory and law enforcement activities. Specifically, the exemptions are required to: Preclude subjects of investigations from frustrating the investigative process; avoid disclosure of investigative techniques; protect the identities and physical safety of confidential informants and of law enforcement personnel; ensure DHS's and other federal agencies' ability to obtain information from third parties and other sources; protect the privacy of third parties; and safeguard sensitive information. The exemptions proposed here are standard law enforcement exemptions exercised by a large number of federal law enforcement agencies.

Nonetheless, DHS would examine each request on a case-by-case basis, and, after conferring with the appropriate component or agency, may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained.

Regulatory Requirements

A. Regulatory Impact Analyses

Changes to Federal regulations must undergo several analyses. In conducting these analyses, DHS has determined:

1. Executive Order 12866 Assessment

This proposed rule is not a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review" (as amended). Accordingly, this proposed rule has not been

reviewed by the Office of Management and Budget (OMB). Nevertheless, DHS has reviewed this rulemaking, and concluded that there will not be any significant economic impact.

2. Regulatory Flexibility Act Assessment

Pursuant to section 605 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), DHS certifies that this rule will not have a significant impact on a substantial number of small entities. The proposed rule would impose no duties or obligations on small entities. Further, the exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the RFA.

3. International Trade Impact Assessment

This proposed rule would not constitute a barrier to international trade. The exemptions relate to criminal investigations and agency documentation and, therefore, do not create any new costs or barriers to trade.

4. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4, 109 Stat. 48), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule would not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DHS consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. DHS has determined that there are no current or new information collection requirements associated with this proposed rule.

C. Executive Order 13132, Federalism

This action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore will not have federalism implications.

D. Environmental Analysis

DHS has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

E. Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). This proposed rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 6 CFR Part 5

Privacy, Freedom of information.

For the reasons stated in the preamble, DHS proposes to amend 6 CFR chapter I as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135, (6 U.S.C. 101 *et seq.*); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. At the end of Appendix C to Part 5, add the following new paragraph 14:

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

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14. DHS/USCG–029, Notice of Arrival and Departure Information. A portion of the following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G) through (I), (5), and (8); (f), and (g); however, these exemptions apply only to the extent that information in this system of records is recompiled or is created from information contained in other systems of records subject to such exemptions pursuant to 5 U.S.C. 552a(j)(2), and (k)(2). After conferring with the appropriate component or agency, DHS may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained. Exemptions from the above particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, when information in this system of records is recompiled or is created from information contained in other systems of records subject to exemptions for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosure) because making available to a record subject the accounting of disclosures from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise

ongoing efforts to investigate a violation of U.S. law, including investigations of a known or suspected terrorist, by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(b) From subsection (c)(4) (Accounting for Disclosure, notice of dispute) because portions of this system are exempt from the access and amendment provisions of subsection (d), this requirement to inform any person or other agency about any correction or notation of dispute that the agency made with regard to the record, should not apply.

(c) From subsections (d)(1), (2), (3), and (4) (Access to Records) because these provisions concern individual access to and amendment of certain records contained in this system, including law enforcement, counterterrorism, and investigatory records. Compliance with these provisions could alert the subject of an investigation to the fact and nature of the investigation, and/or the investigative interest of intelligence or law enforcement agencies; compromise sensitive information related to law enforcement, including matters bearing on national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of these records would interfere with ongoing counterterrorism or law enforcement investigations and analysis activities and impose an impossible administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(d) From subsection (e)(1) (Relevancy and Necessity of Information) because it is not always possible for DHS or other agencies to know in advance what information is relevant and necessary for it to complete screening of passengers and crew. Information relating to known or suspected terrorists is not always collected in a manner that permits immediate verification or determination of relevancy to a DHS purpose. For example, during the early stages of an investigation, it may not be possible to determine the immediate relevancy of information that is collected—only upon later evaluation or association with further information, obtained subsequently, may it be possible to establish particular relevance to a law enforcement program. Lastly, this exemption is required because DHS and other agencies may not always know what information about an encounter with a known or suspected terrorist will be relevant to law enforcement for the purpose of conducting an operational response.

(e) From subsection (e)(2) (Collection of Information from Individuals) because

application of this provision could present a serious impediment to counterterrorism or law enforcement efforts in that it would put the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct designed to frustrate or impede that activity. The nature of counterterrorism, and law enforcement investigations is such that vital information about an individual frequently can be obtained only from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely solely upon information furnished by the individual concerning his own activities.

(f) From subsection (e)(3) (Notice to Subjects), to the extent that this subsection is interpreted to require DHS to provide notice to an individual if DHS or another agency receives or collects information about that individual during an investigation or from a third party. Should the subsection be so interpreted, exemption from this provision is necessary to avoid impeding counterterrorism or law enforcement efforts by putting the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede that activity.

(g) From subsections (e)(4)(G), (H) and (I) (Agency Requirements) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(h) From subsection (e)(5) (Collection of Information) because many of the records in this system coming from other systems of records are derived from other domestic and foreign agency record systems and therefore it is not possible for DHS to vouch for their compliance with this provision; however, the DHS has implemented internal quality assurance procedures to ensure that data used in its screening processes is as complete, accurate, and current as possible. In addition, in the collection of information for law enforcement and counterterrorism purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. The restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts.

(i) From subsection (e)(8) (Notice on Individuals) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on DHS and other agencies and could alert the subjects of counterterrorism or law enforcement investigations to the fact of those investigations when not previously known.

(j) From subsection (f) (Agency Rules) because portions of this system are exempt from the access and amendment provisions of subsection (d).

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

Dated: December 2, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8-29285 Filed 12-10-08; 8:45 am]

BILLING CODE 4410-10-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MM Docket No. 93-177; FCC 08-228]

An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission requests comment on proposed new rules to protect AM stations from the potential effects of nearby tower construction. The Commission seeks comment on new rules that consolidate disparate rules in separate sections regarding tower construction near AM stations, and also update these rules by incorporating computer modeling techniques.

DATES: Submit comments on or before January 12, 2009 and reply comments on or before February 9, 2009.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554, <http://www.fcc.gov>.

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Audio Division, Media Bureau (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice of Proposed Rule Making (Second FNPRM)* in MM Docket No. 93-177, adopted September 24, 2008, and released September 26, 2008. The Commission adopted the Second FNPRM in response to comments received regarding an earlier *Further Notice of Proposed Rule Making (FNPRM)* in this proceeding [See 66 FR 20779, April 25, 2001]. The complete text of this *Second FNPRM* is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC, and may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., (800) 378-3160, 445 12th Street, SW., Room CY-402,

Washington, DC 20554. The complete text is also available on the Internet at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-228A1.pdf.

Synopsis of Second Further Notice of Proposed Rule Making

In AM radio, the tower itself functions as the antenna. Consequently, a nearby tower may become an unintended part of the AM antenna system, reradiating the AM signal and distorting the authorized AM radiation pattern. Thus, our rules contain several sections concerning tower construction near AM antennas that are intended to protect AM stations from the effects of such tower construction, specifically, §§ 73.1692, 22.371, and 27.63. These existing rule sections impose differing requirements on broadcast and wireless entities, although the issue is the same regardless of the types of antennas mounted on a tower. Other rule parts, such as Part 90 and Part 24, entirely lack provisions for protecting AM stations from possible effects of nearby tower construction. An *ad hoc* coalition of radio broadcasters, equipment manufacturers, and broadcast consulting engineers ("the Coalition") has proposed that the Commission adopt rules to "harmonize the disparate treatment" regarding tower construction near AM stations, and also to incorporate moment method techniques in the analysis of the impact of nearby structures on the AM station.

Existing AM proximity rules governing wireless licensees specify fixed distances within which tower construction is presumed to affect the AM station. The Coalition's proposal, in contrast, would specify critical distances from an AM station in terms of wavelengths at the AM frequency, albeit limiting the distance to a maximum of three kilometers, as specified in existing rules for wireless licensees. The Coalition's proposal designates moment method modeling as the principal means of determining whether a nearby tower affects an AM pattern. The proposal would, however, allow traditional partial proof measurements taken before and after tower construction as an alternative procedure when the AM station in question was licensed pursuant to field strength measurements. The Coalition proposes to eliminate short towers from consideration, with critical tower heights also defined in terms of the AM wavelength. Existing rules apply to modification of towers, as well as to new tower construction near AM stations. The Coalition's proposal would define the types of tower modification that may affect AM stations, and would

exclude many routine cases in which antennas are added to existing towers.

The *Second FNPRM* seeks comment on proposed new rules based on those suggested by the Coalition, and on the types of towers to which the new rules would apply. Specifically, the *Second FNPRM* asks whether the new rules should apply to all towers, including structures that are not otherwise subject to Commission licensing processes, i.e., with regard to structures such as towers that do not require registration and which no Commission licensee or applicant uses or proposes to use. The *Second FNPRM* seeks comment on a number of issues that could establish limits on the scope of the new rules, and the technical and/or policy grounds for such limits. For example, the *Second FNPRM* requests comment on the criteria used for the exclusion of short towers, and on the incorporation in the new rule of a provision requiring tower proponents to protect the AM station upon submission of a credible demonstration that the tower affects the AM pattern.

Paperwork Reduction Act Analysis

This document contained proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104-13. Public and agency comments are due February 9, 2009. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated information collection techniques or other forms of information technology. The information collection will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it may "further reduce the information collection burden for small business concerns with fewer than 25 employees."