

Before the
PRIVACY OFFICE
DEPARTMENT OF HOMELAND SECURITY
Washington, DC 20528

Privacy Act of 1974,
System of Records Notice (SORN),
DHS/CBP-006,
“Automated Targeting System (ATS)”

DHS-2006-0060

**SUPPLEMENTAL COMMENTS OF
THE IDENTITY PROJECT (IDP)
AND JOHN GILMORE**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

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The Identity Project submits these supplemental comments in response to public statements by the Department of Homeland Security concerning the Automated Targeting System (ATS), records system DHS/CBP-006, and the extension of the comment period on the Privacy Act of 1974, System of Records Notice (SORN) for the ATS, published at 71 Federal Register 71182 (December 8, 2006).

Since the filing of our original comments on this docket, focusing primarily on the fact that the SORN directly contravenes Congressional limitations placed on DHS through the DHS Appropriations Acts and on violations of the Privacy Act, available in docket DHS-2006-0060 and at <<http://hasbrouck.org/IDP/IDP-ATS-comments.pdf>>, public statements by the DHS concerning the ATS have revealed additional uses of the ATS records system -- not disclosed in the SORN -- which reveal substantial defects in the SORN, as well as violations of other laws. These Supplementary Comments

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address these issues, and reinforce our request that the ATS system of records be eliminated, as it is illegal, and that all data contained in it and in all backups and copies be destroyed.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. NEW DHS DISCLOSURES REVEAL SERIOUS DEFICIENCIES IN THE ATS SORN.

The original SORN for the ATS record system (71 Federal Register 64543-64546, November 2, 2006) described the purposes of the ATS records system as “To perform targeting of individuals, including passengers and crew, focusing CBP resources by identifying persons who may pose a risk to border security, may be a terrorist or suspected terrorist, or may otherwise be engaged in activity in violation of U.S. law”, and “To assist in the enforcement of the laws enforced or administered by DHS.” There was no definition of “targeting” in the SORN, and no mention of the potential consequences to an individual of being “targeted”. The implication of the SORN was that these consequences would be limited to “identification” and heightened scrutiny (“focusing CBP resources”). There was no mention in the description of “Purposes” or of “Routine uses of records” of use to prohibit entry to, or exit from, the U.S., or to prohibit travel by common carrier or along public rights-of-way.

On December 8, 2006, after the close of the original comment period, Time reported as follows:

This week, the DHS extended the deadline for public comment on the ATS system; most of the complaints have attacked the system on privacy grounds. The Identity Project, a privacy-rights group, has alleged that the ATS data collection is illegal. It claims that “Congress has expressly forbidden the DHS from spending a penny on any system like this to assign risk scores to airline passengers, and that the Privacy Act forbids any Federal agency from collecting information about how we exercise rights protected by the First Amendment -- like our right to travel -- except as expressly directed by Congress.”

The outcry has grown loud enough to bring out DHS officials for an aggressive counterattack. DHS Secretary Michael Chertoff ... told TIME in an interview that the ATS program is ... “essential”. ... According to DHS, ATS was the primary means used to bar 565,417 people from entering the U.S. last year; 493 of them were found to be

inadmissible under “suspicion of terrorist or security grounds.” And thousands were turned back because DHS couldn't quite be sure who they were.

Sally B. Donnelly, “Airline 'Risk Assessment': Defending the Right to Snoop”, Time, December 8, 2006, available at <<http://www.time.com/time/nation/article/0,8599,1568354,00.html>> . We assume for purposes of these Supplementary Comments that this report in Time is true and correct, at least with respect to the statements attributed to the DHS. If true, these press statements by the DHS indicate serious deficiencies in the SORN.

These DHS comments have created confusion regarding the purpose of this system of records. Nothing in the SORN or the common usage of the word equates “targeting” with a “bar ... from entering the U.S.”, or discloses denial of entry to the U.S. as a purpose, routine use, or possible consequence of the presence, absence, or particular contents of data contained in ATS records.

Inconsistencies, between public statements by DHS and those made within the format of the SORN, about the purposes of the ATS System of Records, raise serious concerns as to DHS' forthrightness and/or ability to communicate both internally and to the public at large.

DHS has claimed recently that it would “creat[e] public confusion” to disclose statements that official DHS spokespeople have previously made to journalists, and that have already been published. Letter from Catrina M. Pavlik, FOIA Officer, Transportation Security Administration, to Edward Hasbrouck, September 25, 2006, “FOIA Case Number TSA 2006-0854,” available at <<http://hasbrouck.org/documents/Hasbrouck-TSA-FOIA2.pdf>>, reported at <<http://hasbrouck.org/blog/archives/001167.html>>. This is a sorry state of affairs. Disclosures concerning the purposes, uses, and consequences of data in Federal Systems of Records systems are required by the Privacy Act to be fully disclosed in a specified manner: in a SORN and published in the Federal Register. Speeches, Congressional testimony, newspaper op-eds, press releases, or other types of disclosures, while they do not fulfill the notice requirement of the Privacy Act, should at least not “cause public confusion.” Inconsistency between what is contained in the SORN and public statements made by DHS is not a “hide the ball” option. Individuals are entitled by the Privacy Act to rely on the SORN, and the SORN alone, to *fully* disclose the existence and attributes of each system of records. DHS has failed to do so here.

III. THE ATS SYSTEM WOULD VIOLATE THE MANDATE OF THE PRIVACY ACT THAT INFORMATION BE COLLECTED DIRECTLY FROM THE INDIVIDUAL WHEN THE INFORMATION MAY RESULT IN AN ADVERSE DETERMINATION ABOUT AN INDIVIDUAL'S RIGHTS.

The Privacy Act of 1974, 5 U.S.C. 552a(e)(2), requires that:

Each agency that maintains a system of records shall - ... collect information to the maximum extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

The ATS system, as described in the new DHS disclosures, does not comply with this requirement. As noted above, Time has reported that, "According to DHS, ATS was the primary means used to bar 565,417 people from entering the U.S. last year". And the SORN specifically mentions that the ATS will contain information concerning, and be used to target, "passengers on any vessel, vehicle, aircraft, or train who enters or exits the United States." 71 Federal Register 64544. Presumably, at least some of those for whom "ATS was the primary means used to bar" entry to the U.S. were airline passengers or would-be passengers on airlines and perhaps other international common carriers such as Amtrak (a Federally chartered and operated entity). Information in the ATS system has thus resulted in adverse determinations about these individuals' rights, benefits, and privileges under Federal programs including airline passenger screening and transportation by Federally-licensed common carriers.

The right to assemble is a right protected under the First Amendment to the U.S. Constitution. And, as discussed below, the right of transit through the navigable airspace (including by air common carrier) and the right of carriage by common carrier (for all persons complying with the published tariff of fares and conditions of carriage), are rights guaranteed under the Federal programs for regulation of air common carriers pursuant to the Airline Deregulation Act of 1978 and the International Covenant on Civil and Political Rights (a treaty ratified by, and binding on, the U.S.).

The Airline Deregulation Act of 1978, 49 U.S.C. 40102 (a)(5), 49 U.S.C. 40102 (a)(23), 49 U.S.C. 40102 (a)(25), and 49 U.S.C. 40102 (a)(27), requires that intrastate, interstate, and international airlines respectively all be licensed only as "common carriers". By definition, a common carrier is required to transport all passengers complying with their published tariff of fares and conditions of carriage. As licensed common carriers, airlines are thereby forbidding by statute from refusing to transport an otherwise-qualified passenger, except on the basis of a binding order from a court of

competent jurisdiction. The right to travel by common carrier is thus a right protected under the Federal licensing programs for air common carriers, pursuant to the Airline Deregulation Act.

The Airline Deregulation Act at 49 U.S.C. 40101(c)(2) also requires that in issuing regulations, “the Administrator of the Federal Aviation Administration shall consider the following matters:... (2) the public right of freedom of transit through the navigable airspace.” The authority and obligations of the Administrator of the FAA under that Act have since been transferred to the DHS.

There is no indication in the SORN or any other Federal Register publication we have been able to find that this “public right of freedom of transit” has been considered by the DHS in any rulemaking related to ATS. (We have been unable to find any explicit acknowledgment or consideration of this right in *any* DHS rulemaking.) And the clear implication of this clause of 49 U.S.C. 40101(c)(2) is that “the public right of freedom of transit through the navigable airspace” is a right, benefit, or privilege under Federal programs specifically including those administered under DHS regulations.

If this clause of the Airline Deregulation Act had not already been Federal law, Congress would have been required to enact it, or a similar provision, as of the entry into effect of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782). As we have discussed in our comments filed with the DHS in another current rulemaking, Article 12 of the ICCPR obligates the U.S. to respect the right of freedom of movement. And the U.S. has advised the United Nations Human Rights Committee, in reports required by the ICCPR, that Federal agencies are required to consider in rulemaking, and do in fact consider, the rights guaranteed by the ICCPR. “Comments of the Identity Project et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States” (October 12, 2006), available in docket USCBP-2005-0003 and at <<http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>. The meaning of this clause of the Airline Deregulation Act, and the “public right of transit,” required to be considered by the DHS, should therefore be interpreted in light of Article 12 of the ICCPR, to which it gives effect.

“Screening” of airline passengers is, of course, a Federal program operated by the DHS's Transportation Security Administration (TSA) and Bureau of Customs and Border Protection (CBP).

Since information in the ATS system may, apparently, result in adverse determinations about an individual's rights, benefits, and privileges under each of these Federal programs, the Privacy Act thus

requires this information to be collected to the greatest extent practicable directly from the individual.

According to the SORN, however, information about travelers would be obtained from airlines and other third parties, not from travelers themselves, even when travelers interact directly with TSA and/or CBP screening personnel and information could be collected from them directly.

In public statements, the DHS has claimed that information in Passenger Name Records (PNR's) is "provided by passengers". This claim is false. Any competent expert in the personal information architecture of travel reservations and the contents of PNR's knows that most information in airline PNR's is not provided to those airlines directly by passengers. The false claim by the DHS raises serious doubt as to the technical competence (or the honesty) of the DHS's experts on reservations and PNR's.

First, none of the information in PNR's is provided directly to the DHS by individual data subjects: It is provided by various entities to airlines and/or computerized reservation systems (CRS's), from which it is obtained by the DHS -- by what means and under what authority is not mentioned in the SORN. Second, much of the information in PNR's pertains to individuals other than passengers, as discussed in our original comments on the SORN for ATS. Third, with respect to passengers, almost none of the information in PNR's is even provided directly to the airlines. Only in the case of airline staff making reservations for their own travel is *any* information entered directly into a PNR by the data subject. Information in a typical PNR comes from multiple sources including third parties other than the airline and the passengers. And the information provided by passengers is typically provided through at least one, typically two or three, and sometimes half a dozen intermediaries, many of them unknown to the passenger:

1. A business associate or family member makes reservations for a party of several people to travel together. The other travelers may not know that this has been done, or what information the person making reservations that include them has provided about them. (A single PNR, of course, can contain information on one, two, or up to one hundred or more people traveling as a group.)
2. The person requesting the reservations contacts a travel agency or agent, through their Web site or by other means. The agency or agent enters some data into a CRS to which it subscribes, to create a PNR in that CRS. The agency may enter no information about the prospective traveler other than a name (which may or may not be accurate or consistent with any other reservations or other records), a little information, or a lot of personal information. Using identical formats, the agency or agent may enter contact information (telephone number, address, etc.) for the agency or for the traveler, or no such contact information at all. The information entered into a PNR for a party of more than one traveler may pertain to any one or more of the travelers, and may or may not be associated with a specific name or names. The person requesting the reservations does not know, has in most cases no legal right to know (particularly if reservations are made

in the U.S.), has no way to find out, and has no control over what information about them is entered into any PNR. In particular, we have been unable to find *any* airline or travel agency Web site that allows customers or other individuals identified in reservations to (a) view the PNR's containing information about them, (b) know at what stage in the inquiry, reservation, and ticket-purchase process a PNR will be created, (c) know what (if any) information will be entered in a PNR (and what will be stored, if at all, only in some separate record system), or (d) have any control over any of these things.

3. The CRS in which the agency PNR is created sends automated messages in AIRIMP or other mutually agreed format to the CRS(s) that host(s) the transporting airline(s) reservations. These messages typically contain only portions of the information in the agency PNR. Neither the agency nor any of the travelers generally knows or has control over exactly which data is in these messages, or how it is formatted (for example, whether associations of particular data with particular names are preserved in transmission). The receiving CRS uses this message data to create its own PNR in the airline's "partition" in its database. Presumably, although it isn't made clear in the SORN, this and not the original PNR in the booking agency's CRS is the one somehow obtained by the DHS and entered or converted, in whole or in part, into ATS records.
4. Additional data is entered into the PNR through messages to the host CRS from various third parties such as hotel and car rental companies (entering confirmations and details of service requests, such as for bedding type or other intimate personal preferences), and by airline staff. The passengers may or may not be aware of the general subjects of these messages, but rarely if ever see the exact details, especially of free-text non-printing remarks visible only to others with access to the full PNR ("became irate with customer service representative", or the like).

Yet the presence, absence, or contents of this data -- of whose contents the individual has only a vague idea if any, no right of access or correction from its commercial holders if it is collected originally in the U.S. by a U.S. entity, and little or no control -- will be relied on, and is already being relied on, by the DHS as "the primary means used to bar 565,417 people from entering the U.S. last year."

This is exactly why section (e)(2) of the Privacy Act requires that data relied on in making such significant determinations must be collected "to the maximum extent practicable" directly from the individuals whose rights are to be affected by those decisions. As this information is not collected to any extent directly from the individual, and the "practicable" issue has never been addressed, DHS has failed to comply with this requirement of the Privacy Act. If the ATS system is not eliminated, it should be modified so that any information concerning travelers is collected directly from them, and not from PNR's or other airline or third-party sources.

IV. DHS HAS EXCEEDED ITS AUTHORITY.

A SORN is a notice, not an order, which *describes* a system of records. A SORN itself does not, and cannot, create any obligations on individuals to provide information to government agencies or third

parties, authorize any particular use of information, or impose any penalties for providing or not providing information. A SORN is a necessary but not a sufficient condition for the lawful creation, maintenance, or use of a system of records. Mandatory divulgence of information as a prerequisite to the exercise of rights must be accompanied by a valid law or a valid regulation duly adopted pursuant to a valid statutory authorization. Where is this law or regulation?

Further, DHS has no authority to “bar ... people from entering the U.S.” in the absence of an order from a court of competent jurisdiction. We have addressed this issue in a pending rulemaking in which the DHS has asserted such authority not merely to enforce judicial “no fly”, “no board”, or “no transport”, orders but to issue such orders itself, without judicial process. See “Comments of the Identity Project et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States” (October 12, 2006), available in docket USCBP-2005-0003 and at <<http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>. The total lack of judicial process when summarily depriving individuals of protected rights violates the United States Constitution and U.S. treaty obligations under the ICCPR.

V. DHS HAS AGAIN VIOLATED THE PRIVACY ACT OF 1974

The Privacy Act of 1974 requires that each individual be informed of “the effects on him, if any, of not providing all or any part of the requested information”. 5 U.S.C. 552a(e)(3)(D). There is no evidence that any such notice has been, or is being, provided to any travelers or other individuals about whom the ATS records system contains information.

Finally, we note that the original SORN provided that, "The new system of records will be effective December 4, 2006, unless comments are received that result in a contrary determination." 71 Federal Register 64543. Neither the notice of extension of comment period (71 Federal Register 71182) nor any other Federal Register publication to date has disclosed any such "contrary determination." Nor is there anything necessarily contrary about putting a system of records into effect and continuing or resuming acceptance of public comments concerning it. So we must assume that this illegal system of records has been “effective” since December 4, 2006, and perhaps earlier.

As we pointed out in our original comments, maintenance of the ATS system as described in the SORN is a continuing criminal violation of the Privacy Act on the part of each officer or employee of any
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agency willfully participating in such maintenance. Accordingly, we respectfully request that appropriate law enforcement agencies including the DHS Office of the Inspector General, to whom these supplementary comments and our original comments are being forwarded, immediately initiate appropriate criminal investigation and enforcement proceedings against the DHS and any other agency officers and employees responsible for putting the ATS system of records into effect and maintaining it.

VI. CONCLUSION AND RECOMMENDATIONS

As described above, the DHS has now disclosed additional purposes and routine uses, not disclosed in the SORN, of data about individuals contained in the ATS records system: as “the primary means used to bar ... people from entering the U.S.” For this and all the foregoing reasons, as well as those stated in our original comments, the Identity Project respectfully requests that the ATS system of records be shut down; that all data contained in it and in all backups and copies be destroyed; that no similar system under any name be created unless and until a new SORN has been published complying with the requirements of the Privacy Act, the Airline Deregulation Act, and the International Convention on Civil and Political Rights; and that criminal investigations and enforcement proceedings under the Privacy Act be initiated promptly against the DHS and any other Federal agency officers or employees responsible for its creation or maintenance.

Respectfully submitted,

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