

SUMMARY

The Identity Project submits these comments in response to the “Privacy Act of 1974, System of Records Notice (SORN) for records system DHS/CBP–007, Border Crossing Information (BCI),” published at *73 Federal Register* 43457-43459 (July 25, 2008), docket number DHS–2007-0040.

The SORN is fundamentally flawed, as it is based on materially false claims about the prior notice, or lack thereof, of the types and sources of data included in BCI records. The proposed records system would be a relabeling of illegally collected records. Those records be destroyed. The SORN describes a system of records containing travel and assembly information, in violation of the Privacy Act prohibition on collecting such records of First Amendment activities without statutory authorization. While the SORN claims “greater transparency” in the disclosure of records, it would in fact make it more difficult for travelers to obtain access to their travel records. In effect, DHS is running a “shell game” by repeatedly changing the names of the systems of records that requesters have to invoke to gain access to their travel records.

The SORN should be withdrawn. All DHS records of travel itineraries and other lawful, protected, First Amendment activities should be purged, regardless of which system(s) of records they are considered to be part of. And DHS should promptly process the backlog of outstanding Privacy Act requests and appeals for these records.

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.

COMMENTS

The SORN for the BCI system of records falsely claims that notice of the collection of third-party commercial travel itinerary records was provided by the 2001 SORN for the Treasury Enforcement Communications System (TECS). The BCI SORN, *73 Federal Register* 43457, reads:

CBP creates a record of the fact that the individual has been admitted or paroled into the United States at a particular time and port of entry. This record was previously covered by TECS system of records notice and will now be maintained in accordance with the privacy rules of this newly created Privacy Act System of Records Notice, BCI. The border crossing information identified below may be collected in a number of different ways. For example, information may be collected: ... (2) from carriers who submit information in advance of travel, through the Advance Passenger Information System (APIS).... For records first collected through APIS, the BCI record will contain all the data of the APIS record.

The notice proved by the TECS SORN was limited to information from government sources and travelers themselves. The TECS SORN did not give any notice of DHS retention of APIS or other itinerary and travel records obtained from airlines or other commercial third parties. The first notice of this massive collection of dossiers on the travel of innocent Americans was the SORN for records system DHS/CBP-006, the Automated Targeting System (ATS), on November 2, 2006 (*71 Federal Register* 64543-64546). As we have pointed out in our prior comments to DHS concerning the ATS travel surveillance and travel history records program.

The data now being relabeled as BCI is part of the same data that was previously labeled as ATS. The collection and retention of this data was and is illegal. See “Comments of the Identity Project and John Gilmore, Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP-2006-0060, Automated Targeting System (ATS)”, December 4, 2006, available at <http://hasbrouck.org/IDP/IDP-ATS-comments.pdf>”, and “Supplemental Comments of the Identity Project and John Gilmore, Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP-2006-0060, Automated Targeting System (ATS)”, December 29, 2006, available at <http://hasbrouck.org/IDP/IDP-ATS-comments2.pdf>”.

Changes to the name of the system of records containing this data neither make it legal nor address our prior comments regarding its illegality. As when such data was considered a part of ATS,

collection and retention of travel history data in BCI is prohibited by 5 U.S.C. 552a(e)(7). This section of the Privacy Act restricts the collection or retention of records of the exercise of rights protected by the First Amendment. See “Comments of the Identity Project and John Gilmore, Privacy Act of 1974: Implementation of Exemptions; Automated Targeting System”, docket DHS-2007-0043, available at <http://hasbrouck.org/IDP/IDP-ATS-comments3.pdf>.

As for APIS data included in BCI, we have also noted in prior comments that this information is being collected in violation of the Privacy Act, and used for an illegal purpose – to decide whether to impose restrictions on rights to travel and assembly protected by the First Amendment and international treaties including Article 12 of the International Covenant on Civil and Political Rights (ICCPR). See "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", Comments of the Identity Project, et al., before the Bureau of Customs and Border Protection, Department of Homeland Security, docket USCBP-2005-0003 (October 12, 2006), available at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>. APIS data is also collected from commercial third parties: airlines, travel agents, computerized reservation systems, and other intermediaries. This violates the requirement of the Privacy Act that data used as a basis for government decisions be collected, whenever feasible (as it is at both airports and land borders, where travelers interact directly with DHS staff) directly from data subjects. Inclusion of APIS data or other travel records in the proposed BCI system of records is prohibited for the same reasons that it was, and is, illegal to include this data in ATS or APIS records systems.

Rather than trying *again*, as they did with the ATS SORN, to provide retroactive notice and yet more new excuses for this illegal travel surveillance dragnet and system of “historical” travel records about the activities of innocent Americans, DHS should entirely expunge these illegal records of lawful activities protected by the First Amendment and international human rights treaties.

In addition, DHS claims in the BCI SORN that, “the Department is providing additional notice and transparency with respect to the handling of an existing collection of information.” Under the Privacy Act, “notice” must be provided by a SORN published *before* a system of records is created. The creation and operation of the systems of records containing this third-party commercial travel data, without a prior SORN, was a crime. We reiterate our complaint of this crime, and request that it be referred to, and acted upon by, appropriate criminal law enforcement authorities.

Under the Privacy Act, “transparency” is provided by the right to obtain records about oneself. This SORN will make it more difficult to exercise that right, since to obtain the records of their travels held by DHS an individual will now need to request records from even more systems of records: at a minimum, TECS, ATS, APIS, and now also BCI. Given the absence of a clear separation or well-defined distinctions between these “systems” within DHS – as is made clear by the succession of redefined SORNs which DHS claims cover the “same” records -- greater transparency would be provided by recognizing that these are all parts of a single system of “Travel Records”, and allowing individuals to obtain all such records held by all DHS components with a single request.

That right, and the transparency it should provide, are meaningless unless DHS actually responds to requests for access. Rather than issuing new SORNs that complicate the task of obtaining DHS records, the DHS Privacy Office should concentrate on processing the backlog of requests that has accumulated since the public learned of the existence of these travel records through news reports about ATS. The Identity Project has received numerous reports from individuals who have been waiting months without any response to their Privacy Act requests and appeals for ATS records (portions of which would, under this SORN, be recategorized as BCI records). One of our own appeals of the failure to provide requested ATS records has gone almost a year without any acknowledgment, assignment of a docket number, or reply. (Freedom of Information Act/Privacy Act Appeal on behalf of Edward Hasbrouck, appeal of CBP request file number 200F1676, September 13, 2007)

CONCLUSION

The Identity Project urges that the SORN be withdrawn. All DHS records of travel itineraries and other lawful, protected, First Amendment activities should be purged, regardless of which system(s) of records they are considered to be part of. And DHS should promptly process the backlog of outstanding Privacy Act requests and appeals for any of those records that are retained.

Respectfully submitted,

The Identity Project (IDP)

[<http://www.PapersPlease.org>](http://www.PapersPlease.org)

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

_____/s/____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

James P. Harrison

Staff Attorney, First Amendment Project

Director, IDP

John Gilmore

Post Office Box 170608

San Francisco, CA 94117