

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

DEPARTMENT OF STATE

Notice of Information Collection Under OMB Emergency Review:
Supplemental Questions for Visa Applicants

[Docket No. 2017-08975]

May 18, 2017

By notice for request for emergency OMB approval and public comment published on May 4, 2017 the Department of State (“Department”), proposes to add new questions for visa applicants concerning their social media use.¹ The Department proposes to ask individuals which social media platforms they use as well as social media identifiers used in the last five years.

The agency claims it is “requesting [social media] information...from a subset of visa applicants worldwide, in order to more rigorously evaluate applicants for terrorism or other national security related visa ineligibilities.”² The Department has provided little other details about the use of the social media identifiers the agency plans to collect.

Pursuant to the agency’s request for comments, the Electronic Privacy Information Center (“EPIC”) submit these comments to urge the Department to: (1) withdraw its proposal to

¹ *Notice of request for an emergency OMB approval and public comment on “Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants,”* 82 Fed. Reg. 20,956 (May 4, 2017) (hereafter “Notice for Approval”).

² Notice for Approval at 20,957.

collect social media identifiers; and (2) review the appropriateness of using social media to make visa determinations.

I. Introduction

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and protect privacy, the First Amendment, and constitutional values.³ EPIC has a particular interest in preserving the right of people to engage in First Amendment protected activities without the threat of government surveillance.

EPIC previously sued the Department of Homeland Security (“DHS”) to obtain documents related to a DHS social network and media monitoring program.⁴ These documents revealed that the agency had paid over \$11 million to an outside company, General Dynamics, to engage in monitoring of social networks and media organizations and prepare summary reports for DHS.⁵ According to DHS documents, General Dynamics would “monitor public social communications on the Internet,” including the public comments sections of NYT, LA Times, Huff Po, Drudge, Wired’s tech blogs, and ABC News.⁶ DHS also requested monitoring of Wikipedia pages for changes⁷ and announced its plans to set up social network profiles to monitor social network users.⁸

DHS required General Dynamics to monitor not just “potential threats and hazards” and “events with operational value,” but also paid the company to “identify[] media reports that

³ EPIC, *About EPIC* (2016), <https://epic.org/epic/about.html>.

⁴ EPIC, *EPIC v. Department of Homeland Security: Media Monitoring*, <https://epic.org/foia/epic-v-dhs-media-monitoring/>.

⁵ DHS Social Media Monitoring Documents, available at <https://epic.org/foia/epic-v-dhs-media-monitoring/EPIC-FOIA-DHS-Media-Monitoring-12-2012.pdf>; See also Charlie Savage, *Federal Contractor Monitored Social Network Sites*, New York Times, Jan. 13, 2012, <http://www.nytimes.com/2012/01/14/us/federal-security-program-monitored-public-opinion.html>.

⁶ DHS Social Media Monitoring Documents at 127, 135, 148, 193.

⁷ *Id.* at 124, 191.

⁸ *Id.* at 128.

reflect adversely on the U.S. Government [or] DHS”⁹ The DHS clearly intended to “capture public reaction to major government proposals.”¹⁰ DHS instructed the media monitoring company to generate summaries of media “reports on DHS, Components, and other Federal Agencies: positive and negative reports on FEMA, CIA, CBP, ICE, etc. as well as organizations outside the DHS.”¹¹

The documents obtained by EPIC through its Freedom of Information Act lawsuit led to a Congressional hearing on DHS social network and media monitoring program.¹² EPIC submitted a statement for the record for that hearing opposing the agency’s media monitoring and called for the immediate end of the program.¹³ Members of Congress expressed concern about the federal agency’s plan to monitor social media.¹⁴

Given government misuse of social media monitoring techniques in the past, EPIC is skeptical of the State Department’s proposal to use social media to scrutinize visa applicants during the vetting process. EPIC opposes this proposal.

II. The Lack of Transparency Surrounding the Department’s Proposal Increases the Prospect of Abuse, Mission Creep, and Disproportionate Risks for Marginalized Groups

The Department has stated that the agency will use the social media identifiers as part of the existing investigative process to screen "a subset of visa applicants worldwide, in order to

⁹ *Id.* at 51, 195.

¹⁰ *Id.* at 116.

¹¹ *Id.* at 183, 198.

¹² See *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security*, 112th Cong. (2012).

¹³ Marc Rotenberg, President and Ginger McCall, EPIC Open Government Project Director, *Statement for the Record for Hearing on DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy* (Feb. 16, 2012), <https://epic.org/privacy/socialmedia/EPIC-Stmnt-DHS-Monitoring-FINAL.pdf>.

¹⁴ Andrea Stone, *DHS Monitoring of Social Media Under Scrutiny by Lawmakers*, Huffington Post, Feb. 16, 2012, http://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html; *Congress Grills Department of Homeland Security*, EPIC, Feb. 16, 2012, <https://epic.org/2012/02/congress-grills-department-of-.html>.

more rigorously evaluate applicants for terrorism or other national security-related visa ineligibilities."¹⁵ Little additional information is provided.

It is not clear how the Department intends to use the social media identifiers. Other federal agencies have a history of using social media for controversial purposes. For example, DHS has monitored social and other media for dissent and criticism of the agency.¹⁶ Will the State Department monitor for similar speech that is critical of U.S. policy? Will mere dissent constitute grounds for denying entry into the U.S.? Additionally, will alien visitors who provide their social media identifiers open up their social network associations to scrutiny? How long will social media identifiers be retained and who will they be shared with? How will the State Department prevent Muslim and Arab Americans from being scrutinized more harshly?

Additionally, what information will the social media identifiers be combined with? Will the Department use the social media identifiers to obtain additional information about the applicant from the social media companies? Will applicants be informed if the information obtained from their social media accounts led to the denial of their application? And does the acquisition of social media identifiers place at risk the privacy and security of account holders? Is the State Department prepared to accept liability if the practice leads to identity theft or financial fraud?

Answers to these questions should be provided prior to adoption of the Department's proposal to acquire the social media identifiers of people suspected of no crime.

This proposal leaves the door open for abuse, mission creep, and the disproportionate targeting of Muslim and Arab Americans among other groups. This proposal is especially

¹⁵ Notice for Approval at 20,957.

¹⁶ Marc Rotenberg, President and Ginger McCall, EPIC Open Government Project Director, *Statement for the Record for Hearing on DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, 1-3, Feb. 16, 2012, <https://epic.org/privacy/socialmedia/EPIC-Stmnt-DHS-Monitoring-FINAL.pdf>.

alarming in light of past misuses of social media from all levels of government¹⁷ as well as the Trump administration's controversial travel ban.¹⁸ The Department has provided no details of how the agency will tailor the use of social media identifiers to ensure their use does not expand beyond the stated purpose or prevent the targeting of individuals merely engaged in First Amendment protected activities.

III. Indiscriminate Scrutiny of Social Media Accounts Chills First Amendment Protected Activities

The Department's proposal to collect social media identifiers of visa applicants also implicates the First Amendment and will have a chilling effect on protected speech. Freedom of speech and expression are core civil liberties and have been strongly protected by the Constitution and the U.S. courts.¹⁹ These rights extend to non-U.S. citizens.²⁰

Many people around the world use social media, including Facebook and Twitter, to support democratic movements and to campaign for political reform.²¹ But these political views

¹⁷ Elizabeth Dwoskin, *Police Are Spending Millions of Dollars to Monitor the Social Media of Protesters and Suspects*, Washington Post, Nov. 18, 2016, <https://www.washingtonpost.com/news/the-switch/wp/2016/11/18/police-are-spending-millions-to-monitor-the-social-media-of-protesters-and-suspects/>; *Map: Social Media Monitoring By Police Departments, Cities, and Counties*, Brennan Center for Justice, Nov. 16, 2016, <https://www.brennancenter.org/analysis/map-social-media-monitoring-police-departments-cities-and-counties>; Eric Yoder, *Beware What You Post: Federal Employees May Face Government Scrutiny on Social Media*, Washington Post, May 12, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/05/12/beware-what-you-post-federal-employees-may-face-government-snooping-on-social-media/>.

¹⁸ Alex Emmons, *Activists Worry That Social Media Vetting of Visa Applicants Could Quietly Expand Trump's Muslim Ban*, The Intercept, Mar. 23, 2017, <https://theintercept.com/2017/03/23/activists-worry-that-social-media-vetting-of-visa-applicants-could-quietly-expand-trumps-muslim-ban/>.

¹⁹ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (holding that the "First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs"); see also *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) (holding that immunity from state scrutiny of membership lists was related to the right of freedom of association and fell under the 14th Amendment of the U.S. Constitution); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (holding that a city ordinance that required hotels to make their registries available to the police on demand was unconstitutional under the 4th Amendment of the U.S. Constitution).

²⁰ See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367-388 (2003) ("foreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.").

²¹ Sophie Hutchinson, *Social media Plays Major Role In Turkey Protests*, BBC, Jun. 4, 2013, <http://www.bbc.com/news/world-europe-22772352>; David Auerbach, *The Bernie Bubble*, Slate, Feb. 17, 2016,

reflect the specific circumstances of national political systems and regional political conflict, and there is some risk that comments taken out of context could discourage political reform efforts. For example, social media is credited with empowering the Arab Spring and allowing Egyptians to remove former President Hosni Mubarak from power.²² Social media also played a pivotal role in the 2013 Gezi Park protests in Turkey and the recent anti-Putin protests in Russia, which were sparked by a blog post and YouTube video.²³

The Department states that obtaining social media identifiers, presumably to view user accounts, will provide more information to help determine which individuals should not be admitted to the United States. However, the proposal assumes that social media provides an accurate picture of a person. This is especially concerning given that the Department proposes examining social media use over the past five years where their views may have significantly changed.²⁴ People connect with others on social media for many reasons. An individual's "friend" on a social media site could range from a close friend to an acquaintance to someone they may never have met. Often individuals connect to people on social media who have completely different perspectives and world views. Furthermore, the proposal fails to state to what extent possible connections will be used in the vetting process and whether the social media accounts of U.S. citizens may be used as part of the vetting process.

http://www.slate.com/articles/technology/future_tense/2016/02/the_bernies_sanders_campaign_owes_a_lot_to_social_media.html.

²² Amitava Kumar, *'Revolution 2.0': How Social Media Toppled A Dictator*, NPR, Feb. 8, 2012, <http://www.npr.org/2012/02/08/145470844/revolution-2-0-how-social-media-toppled-a-dictator>; Ramesh Srinivasan, *Taking Power Through Technology in the Arab Spring*, Al Jazeera, Oct. 26, 2012, <http://www.aljazeera.com/indepth/opinion/2012/09/2012919115344299848.html>.

²³ Steve Dorsey, *Turkey's Social Media And Smartphones Key To 'Occupy Gezi' Protests*, Huffington Post, Jun. 10, 2013, http://www.huffingtonpost.com/2013/06/09/turkey-social-media-smartphones-occupy-gezi-protests_n_3411542.html; Julia Ioffe, *What Russia's Latest Protests Mean for Putin*, The Atlantic, Mar. 27, 2017, <https://www.theatlantic.com/international/archive/2017/03/navalny-protests-russia-putin/520878/>.

²⁴ Alfred Ng, *Five Years Of Social Media History Can Get Anyone In Trouble*, CNET, May 5, 2017, <https://www.cnet.com/news/state-department-five-years-social-media-handles-refugee-immigrants-visa/>.

The proposal also indicates that the Department will use social media on some visa applicants, but fails to detail exactly how social media will be used in the visa application process. Moreover, the proposal provides no way to determine which visa applicants will be asked for their social media information, stating that the information will only be sought from “a subset of visa applicants worldwide” and noting that DHS already collects such information from certain individuals.²⁵ Many individuals have been on social media for years and have created a permanent record of their lives.²⁶ Teenagers are routinely warned to be careful of what they post on social media,²⁷ however teenagers and adults have made posts on social media which they later regret and may not be an actual reflection of who they are.²⁸ This should be taken into account when using social media to vet those entering the country. Social media does not necessarily reflect who a person truly is and taking posts out of context has the potential to wrongly deny people entry because of an inside joke or posturing that the Department does not understand from viewing certain information in isolation.²⁹ Furthermore, the proposal runs the risk of making what is not on social media seem suspect. Some individuals may not be active on social media or may not have any social media accounts at all and the Department has failed to say what impact, if any, this may have on the vetting process.

²⁵ Notice for Approval at 20,957.

²⁶ Alexandra Mateescu et. al., *Social Media Surveillance and Law Enforcement*, DATA & CIVIL RIGHTS, Oct. 27, 2015, http://www.datacivilrights.org/pubs/2015-1027/Social_Media_Surveillance_and_Law_Enforcement.pdf.

²⁷ Franki Rosenthal, *Caution ahead: The dangers of social media*, SUN SENTINEL, Feb. 2, 2016, <http://www.sun-sentinel.com/teenlink/college/tl-caution-ahead-the-dangers-of-social-media-20160202-story.html>.

²⁸ Alyssa Jacobbe, *6 ways social media can ruin your life*, BOSTON GLOBE, May 21, 2014, <https://www.bostonglobe.com/magazine/2014/05/21/ways-social-media-can-ruin-your-life/St8vHIIdqCLk7eRsvME3k5K/story.html>.

²⁹ Mateescu et. al., *Social Media Surveillance*; Brandon Giggs, *Teen failed for Facebook 'joke' is released*, CNN, Jul. 13, 2013, <http://www.cnn.com/2013/07/12/tech/social-media/facebook-jailed-teen/> (discussing a teenager who was arrested after making a “threat” that, when viewed in context, appears to be sarcasm); Ellie Kaufman, *Social Media Surveillance Could have a Devastating Impact on Free Speech. Here's Why.*, MIC, Jan. 19, 2016, <https://mic.com/articles/132756/social-media-surveillance-could-have-a-devastating-impact-on-free-speech-here-s-why>.

Government programs that threaten important First Amendment rights are immediately suspect and should only be undertaken where the government can demonstrate a compelling interest that cannot be satisfied in other way.³⁰ Government programs that scrutinize online comments, dissent, and criticism for the purpose of vetting visitors prior to entry into the U.S. send a chilling message to all users of social media—which increasingly provides important forums to share ideas, engage in debates, and explore new ideas.

Concern over the how the government uses social media is widespread and several questions remain unanswered. Earlier this month, several members of the House of Representatives sent a letter to Attorney General Jeff Sessions raising concerns about how the federal government and federal law enforcement agencies used technologies that monitored social media.³¹ Those Representatives noted how social media was effectively being used to monitor people who were suspected of no wrongdoing in violation of their Fourth Amendment rights stating:

There is evidence that social media data has been used to monitor protests and activists. . . . An investigator at the Oregon Department of Justice used a service called DigitalStakeout to search Twitter for tweets using the hashtag #BlackLivesMatter. On the basis of his tweets – which included political cartoons and commentary but no indications of criminal activity or violence – the Department’s own Director of Civil Rights was deemed a “threat to public safety.”³²

The same concerns are present in the Department’s current proposal and these concerns must be addressed before any further steps are taken.

³⁰ See, e.g., *NAACP v. Button*, 83 S. Ct. 328 (1963); *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

³¹ Letter to Jeff Sessions from Keith Ellison et al., May 2, 2017, <https://www.documentcloud.org/documents/3696481-House-Democrats-Letter-to-Sessions-re-Social.html>.

³² *Id.*

IV. The Demand for an Individual’s Personal Identifier Raises Particular Privacy Concerns

The request for “social media identifiers” raises a related concern – this particular type of personal information is the key that ties together discrete bits of personal data.³³ In the past, the United States has sought to regulate the collection and use of the Social Security Number precisely because of the concern that it leads to government profiling.³⁴ The availability of the SSN has been shown to contribute to identity theft and financial fraud.³⁵

A social media identifier is not private in the sense that it is a secret. But the collection of a social media identifier by the government does raise privacy concerns because it enables enhanced profiling and tracking of individuals. Furthermore, an individual has no way of knowing who in the government may be tracking them and for how long that surveillance could continue. What is initially presented as a way to vet visa applicants can turn into unwarranted, large scale surveillance of innocent people.

For this reason as well, we urge the agency to withdraw the proposal.

V. EPIC Recommendations

The problems with collecting social media identifiers and scrutinizing the social media accounts of persons not suspected of any wrongdoing are significant and far-reaching. The Department has provided little transparency in how the agency plans to use social media identifiers collected from alien visitors. Such opaqueness in the Department’s proposal provides little comfort that the Department will provide the transparency necessary to ensure that the program is subject to appropriate oversight and accountability.

³³ *Social Security Numbers*, EPIC, <https://epic.org/privacy/ssn/>.

³⁴ Testimony of Marc Rotenberg, Computer Professionals for Social Responsibility, "Use of Social Security Number as a National Identifier," Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 1st Sess. 71 (February 27, 1991). republished Marc Rotenberg, "The Use of the Social Security Number as a National Identifier," *Computers & Society*, vol. 22, nos. 2, 3, 4 (October 1991); Privacy Act of 1974, 5 U.S.C. §552a (2016).

³⁵ *Identity Theft*, EPIC, <https://epic.org/privacy/idtheft/>; *Social Security Numbers*, EPIC, <https://epic.org/privacy/ssn/>.

EPIC urges the Department to withdraw its proposal to collect social media identifiers from visa applicants. Additionally, EPIC recommends that any current use of social media analysis by the Department should be reviewed to determine whether it is necessary, whether it undermines First Amendment protected activities, and to determine what safeguards are in place and if the safeguards ensure appropriate oversight and public transparency.

VI. Conclusion

EPIC respectfully requests that the State Department reconsider its proposal to collect social media identifiers. The proposal undermines privacy and is contrary to First Amendment rights of speech, expression, and association.

Respectfully submitted,

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