

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEPARTMENT OF HOMELAND SECURITY

“Agency Information Collection Activities: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes”

DHS-2011-0030

September 16, 2011

By a System of Records Notice ("SORN") published in the Federal Register on July 18, 2011, the Department of Homeland Security ("DHS") has proposed to revise its collection of personal information pursuant to the REAL ID Act.¹ The Office of Management and Budget specifically requested comments on efforts that "[m]inimize the burden of the collection of information on those who are to respond, . . ." to make a determination as to full compliance with the agency's requirements.² The Electronic Privacy Information Center ("EPIC") hereby submits these comments and recommendations to address the substantial burden that REAL ID has placed not simply on state officials but also on individual Americans, whose loss of life may actually be attributed to these agency rules.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has particular interest in preserving privacy safeguards established by Congress and preventing the development of a national identification program.³

¹ Agency Information Collection Activities: Minimum Standards for Driver's Licenses and Identification Cards Acceptably by Federal Agencies for Official Purposes, 76 Fed. Reg. 42132 (July 18, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-07-18/pdf/2011-17935.pdf> ["Federal Register Notice"].

² *Id.* at 42133.

³ See EPIC AND PRIVACY INTERNATIONAL, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND PRACTICE (EPIC 2006); EPIC, *Comments on DHS 2006-0030: Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes* (May 8, 2007), *available at* http://www.epic.org/privacy/id_cards/epic_realid_comments.pdf; See EPIC, *Federal REAL ID Proposal Threatens Privacy and Security* (March 2007), *available at* <http://epic.org/privacy/surveillance/spotlight/0307/>. See also Anita Ramasastry, *Why the New Department of Homeland Security REAL ID Act Regulations are Unrealistic: Risks of Privacy and Security Violations and Identity Theft Remain, and Burdens on the States Are Too Severe*, Findlaw, Apr. 6, 2007, *available at* <http://writ.news.findlaw.com/ramasastry/20070406.html>; See EPIC, *Federal REAL ID Proposal Threatens Privacy and Security* (March 2007), *available at* <http://epic.org/privacy/surveillance/spotlight/0307/>; Melissa Ngo, EPIC, *Testimony and Statement for the Record at a Hearing Before the Data Privacy and Integrity Advisory Comm., Dep't of Homeland Sec.* (Mar. 21, 2007),

EPIC has considerable expertise analyzing the privacy and security risks attendant to the design and implementation of REAL ID. In 2007, EPIC filed comments on behalf of privacy and technology experts in response to the draft regulations proposing to implement REAL ID.⁴ EPIC highlighted the privacy and security risks of REAL ID as part of its “Spotlight on Surveillance” series.⁵ EPIC also testified before the Department's Data Privacy and Integrity Advisory Committee establishing how the REAL ID Act and draft regulations create a national identification system and threaten national security and individual privacy.⁶ In 2008, EPIC published a report detailing the significant costs of implementing REAL ID.⁷

EPIC writes today to draw the agency's attention to the death of Lewis Brown, a former college basketball prodigy, who died on the streets of Los Angeles because he could not scrape together the money to obtain a state-issued identity document.⁸ Locals described Brown as "caretaker of the neighborhood" where he worked washing windows for spare change.⁹

According to the New York Times, Brown, a basketball legend at the University of Nevada at Las Vegas, planned to fly to visit his family in New York and could not.¹⁰ Homeless and destitute, living on the sidewalks of Hollywood, Brown had developed cancer and planned to go to the hospital.¹¹ Brown's mother learned about his condition and stated that she wanted to see him "before he died."¹² Brown's sister, Anita, told him to visit New York.¹³ Brown told confidants that he lacked funds to qualify for a California identification card, and was taking donations and borrowing money.¹⁴

available at http://epic.org/privacy/id_cards/ngo_test_032107.pdf; See EPIC, *REAL ID Implementation Review: Few Benefits, Staggering Costs* (May 2008), available at http://epic.org/privacy/id_cards/epic_realid_0508.pdf.

⁴ EPIC, *Comments on DHS 2006-0030: Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes* (May 8, 2007), available at http://www.epic.org/privacy/id_cards/epic_realid_comments.pdf.

⁵ See EPIC, *Federal REAL ID Proposal Threatens Privacy and Security* (March 2007), available at <http://epic.org/privacy/surveillance/spotlight/0307/>. See also Anita Ramasastry, *Why the New Department of Homeland Security REAL ID Act Regulations are Unrealistic: Risks of Privacy and Security Violations and Identity Theft Remain, and Burdens on the States Are Too Severe*, Findlaw, Apr. 6, 2007, available at <http://writ.news.findlaw.com/ramasastry/20070406.html>.

⁶ Melissa Ngo, EPIC, *Testimony and Statement for the Record at a Hearing Before the Data Privacy and Integrity Advisory Comm., Dep't of Homeland Sec.* (Mar. 21, 2007), available at http://epic.org/privacy/id_cards/ngo_test_032107.pdf.

⁷ See EPIC, *REAL ID Implementation Review: Few Benefits, Staggering Costs* (May 2008), available at http://epic.org/privacy/id_cards/epic_realid_0508.pdf.

⁸ Adam Nagourney, *Ex-Basketball Prodigy Dies on Streets Where He Lived*, N.Y. TIMES, Sept. 15, 2011, available at <http://www.nytimes.com/2011/09/16/us/lewis-brown-faded-basketball-prodigy-dies-homeless.html?ref=us>.

⁹ Adam Nagourney, *A Former Basketball Prodigy, Bereft of All but His Memories*, N.Y. TIMES, May 19, 2011, available at <http://www.nytimes.com/2011/05/20/us/20homeless.html>.

¹⁰ Adam Nagourney, *Ex-Basketball Prodigy Dies on Streets Where He Lived*, N.Y. TIMES, Sept. 15, 2011, available at <http://www.nytimes.com/2011/09/16/us/lewis-brown-faded-basketball-prodigy-dies-homeless.html?ref=us>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* See also California Dep't of Motor Vehicles, *Driver License/Identification Card Application Fees*, CA.Gov, available at http://dmv.ca.gov/dl/fees/driverlicense_fees.htm

The Department of Homeland Security's travel regulations require a state-issued identification document to board commercial airlines.¹⁵ Under REAL ID, the Department of Homeland Security:

prohibits Federal agencies from accepting state-issued drivers' licenses or identification cards for any official purpose – defined by the Act and regulations as boarding commercial aircraft . . . – unless the license or card is issued by a state that meets the requirements set forth in the Act.¹⁶

This requirement, imposed on California despite the written objection of the state forced to implement it, prevented Lewis Brown from travelling to see his family members.¹⁷ Brown collapsed on the sidewalk where he lived on September 13, 2011, pleading for someone to call an ambulance.¹⁸ Paramedics arrived too late to the scene to revive Brown, who was lying on the concrete when they arrived.¹⁹

States are under considerable pressure to implement REAL ID, and citizens who fail to qualify for identity documents will find it impossible to pursue many routine activities, such as travelling to see a family member.²⁰ On March 18, 2008, the Director of the California Department of Motor Vehicles George Valverde wrote Homeland Security Secretary Michael Chertoff objecting to "the absence of adequate federal funding; the lack of specificity regarding how to protect and secure personal information; and the design and support of required electronic verification systems that are critical to the program."²¹ Notwithstanding these objections, the agency has set January 15, 2013 as the deadline for national REAL ID compliance in every state.²²

The Office of Management and Budget has specifically requested comments that focus on the "quality, utility, and clarity of the information to be collected."²³ Pursuant to this goal, the Department of Homeland Security should collect information regarding the burden imposed on the public resulting from the agency's identity requirements. Documented burdens include the inability to travel, which may adversely impact health or lead to loss of life. The agency should monitor these instances and routinely report them to the public in the annual report of the Department of Homeland Security Chief Privacy Officer.

¹⁵ 49 C.F.R. § 1540.107(c); 49 C.F.R. § 1560.

¹⁶ Federal Register Notice at 42132.

¹⁷ See Letter from George Valverde to Department of Homeland Security Secretary Michael Chertoff (Mar. 18, 2008), available at http://epic.org/privacy/id_cards/calif_dhs_031808.pdf.

¹⁸ Adam Nagourney, *Ex-Basketball Prodigy Dies on Streets Where He Lived*, N.Y. TIMES, Sept. 15, 2011, available at <http://www.nytimes.com/2011/09/16/us/lewis-brown-faded-basketball-prodigy-dies-homeless.html?ref=us>.

¹⁹ *Id.*

²⁰ EPIC, *Comments on DHS 2006-0030: Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes* 3 (May 8, 2007), available at http://www.epic.org/privacy/id_cards/epic_realid_comments.pdf.

²¹ Letter from George Valverde to Department of Homeland Security Secretary Michael Chertoff (Mar. 18, 2008), available at http://epic.org/privacy/id_cards/calif_dhs_031808.pdf

²² Federal Register Notice at 42132.

²³ *Id.* at 42133.

A rigorous, transparent review of the actual costs of REAL ID, including the possible loss of life that results from a mandatory document requirement that prevents routine travel, would allow the public and the agency to fully evaluate the costs and benefits of the agency program.

We would consider a failure by the agency to adopt such a reporting requirement a violation of the Administrative Procedure Act and subject to subsequent litigation.

Sincerely,

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