

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

U.S. Customs and Border Protection

on

Notice of a Modified System of Records: DHS/U.S. Customs and Border Protection (CBP)–022
Electronic Visa Update System (EVUS) System of Records

88 Fed. Reg. 41,648

July 27, 2023

The Electronic Privacy Information Center (“EPIC”) submits these comments in response to the Department of Homeland Security (DHS) subcomponent U.S. Customs and Border Protection (CBP)’s Notice of a modified system of records for the (CBP)–022 Electronic Visa Update System (EVUS) System of Records.¹ The EVUS system is designed to collect biographic information from long-term visa holders travelling to and from the U.S. without re-applying for short term visas. CBP is planning to update the system of records to include an optional category asking for “social media identifier(s) (e.g.,username(s)/handle(s), platform(s) used).” CBP plans to use social media information “in assessing an individual's eligibility to travel to or be admitted to the United States.”

The Electronic Privacy Information Center is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to secure the

¹ 88 Fed. Reg. 41,648, <https://www.federalregister.gov/documents/2023/06/27/2023-13540/privacy-act-of-1974-system-of-records>.

fundamental right to privacy in the digital age for all people through advocacy, research, and litigation.² EPIC has a particular interest in preserving the Privacy Act safeguards enacted by Congress.³ EPIC also has a long history of advocating for increased privacy protections for travelers and opposing the expansion of surveillance at the border.⁴

EPIC and many civil society groups have consistently opposed DHS and the State Department's collection of social media identifiers since the agencies first proposed collecting social media data.⁵ Again, EPIC urges CBP not to collect social media identifiers from visa holders. This

² EPIC, *About Us* (2023), <https://epic.org/about/>.

³ See, e.g., EPIC Comments to DHS on Terrorist Screening Database System of Records Notice and Notice of Proposed Rulemaking, Docket Nos. DHS-2016-0002, DHS-2016-0001 (Feb. 22, 2016), <https://epic.org/wp-content/uploads/apa/comments/EPIC-Comments-DHS-TSD-SORN-Exemptions-2016.pdf>; EPIC Comments to the Department of Homeland Security, Correspondence Records Modified System of Records Notice, Docket No. DHS-2011-0094 (Dec. 23, 2011), <http://epic.org/privacy/1974act/EPIC-SORN-Comments-FINAL.pdf>; EPIC Comments to the Department of Homeland Security, 001 National Infrastructure Coordinating Center Records System of Records Notice and Notice of Proposed Rulemaking, Docket Nos. DHS-2010-0086, DHS-2010-0085 (Dec. 15, 2010), http://epic.org/privacy/fusion/EPIC_re_DHS-2010-0086_0085.pdf.

⁴ Dana Khabbaz, DHS's Data Reservoir: ICE and CBP's Capture and Circulation of Location Information (Aug. 2022), <https://epic.org/documents/dhss-data-reservoir-ice-and-cbps-capture-and-circulation-of-location-information/>; EPIC Comments to DHS: Advance Collection of Photos at the Border (Nov. 29, 2021), <https://epic.org/documents/epic-comments-to-dhs-advance-collection-of-photos-at-the-border/>; EPIC Comments to DHS on Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States (Dec. 21, 2023), <https://epic.org/documents/collection-of-biometric-data-from-aliens-upon-entry-to-and-departure-from-the-united-states/>.

⁵ EPIC and Brennan Center Comments to DHS Opposing Amending ESTA to Collect Visa Applicant Social Media Information (Mar. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/brennan-center-and-epic-urge-dhs-withdraw-proposal-collect-social-media>; Civil Society Coalition Letter Opposing Denials of Entry to the U.S. Based on Social Media Information (Nov. 19, 2019), <https://www.brennancenter.org/sites/default/files/2019-11/Coalition%20Letter%20to%20DHS%20on%20social%20media%20monitoring.pdf>; EPIC and Coalition Comments to DHS on Collection of Social Media Information on Immigration and Foreign Travel Forms (Docket Number DHS-2019-0044) (Nov. 4, 2019), <https://www.brennancenter.org/sites/default/files/2019-11/DHS%20SMM%20comments%20-%20FINAL.pdf>; EPIC and Coalition Comments to OMB on DS-160 and DS-156, Application for Nonimmigrant Visa, OMB Control No. 1405- 0182; DS-260, Electronic Application for Immigrant Visa and Alien Registration, OMB Control No. 1405-185 (May 29, 2018), <https://www.brennancenter.org/sites/default/files/analysis/Comments%20-%20Department%20of%20State%20-Visa%20Applicant%20Social%20Media%20Collections%20-%20Public%20Notices%2010260%20-%2010261.pdf>; Coalition Letter of Computing Experts Opposing ICE's Extreme Vetting Program Using Social Media Information (Nov. 16, 2017), <https://www.brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opp>

information is unlikely to have significant intelligence value and likely to be misused, enabling discrimination and wrongful surveillance. As detailed below, there is no evidence that social media screening is useful for vetting travelers and immigrants, although it imposes serious costs—both financial and social.

I. Impacts on Civil Rights and Civil Liberties

EPIC has repeatedly warned both DHS and the State Department that collecting social media identifiers has serious and increasing impacts on privacy, civil rights, and travelers' well-being. In short, those impacts include:

a. Free Expression and Association

Social media monitoring, like other forms of surveillance, impacts what people say, what they hear, and with whom they interact online.⁶ The proposed collection, if approved, will pressure applicants to engage in self-censorship by, for example, deleting their accounts, disassociating from online connections, limiting their social media postings, or sanitizing their internet presence for fear of misinterpretation or adverse consequences. These impacts will be felt by the Americans with

osing%20the%20Extreme%20Vetting%20Initiative%20-%2011.15.17.pdf; EPIC Comments on to CBP on (CBP)-024 CBP Intelligence Records System (CIRS) System of Records (Oct. 23, 2017), <https://epic.org/wp-content/uploads/apa/comments/EPIC-CBP-Intelligence-Records-System-Comments.pdf>; Coalition Letter Opposing Collection of Social Media Information in A-Files (Oct. 18, 2017), <https://cdt.org/wp-content/uploads/2017/10/Coalition-Letter-Opposing-DHS-Social-Media-Retention-.pdf>; Coalition Comments Opposing Addition of Social Media to Supplemental Questions for Visa Applicants Form (Oct. 2, 2017), <https://www.brennancenter.org/sites/default/files/StateDeptcomments-10.2.2017.pdf>. For a more extensive list of comments and letters opposing collecting social media information for vetting, see Brennan Center, Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department, <https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and>.

⁶ For example, one study found that fear of government surveillance of the internet had a substantial chilling effect among both U.S. Muslims and broader samples of Internet users. Elizabeth Stoycheff et al., *Privacy and the Panopticon: Online Mass Surveillance's Deterrence and Chilling Effects*, *New Media & Society* 21 (2018); and Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, *U. Md L. J. Race, Religion, Gender & Class* 7 (2007). Even people who said they had nothing to hide were highly likely to self-censor online when they knew the government was watching. Elizabeth Stoycheff, *Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, *Journalism & Mass Communication Quarterly* 93 (2016): 307-8.

whom the applicants communicate, all of whom benefit from the free exchange of information. A lawsuit filed by the Brennan Center and the Knight First Amendment Institute against the State Department and DHS documents these impacts in a nearly identical context.⁷ It shows how the collection of social media identifiers on visa forms led a number of international filmmakers to stop talking about politics and promoting their work on social media. That is, they self-censored because they were concerned that what they said online could be misinterpreted or reflect controversial viewpoints in ways that would prevent them from getting a U.S. visa or be used to retaliate against them.

b. Privacy

A person’s social media presence—their posts, comments, photos, likes, group memberships, and so on—can collectively reveal their ethnicity, political views, religious practices, gender identity, sexual orientation, personality traits, and vices, far beyond what may be required to adjudicate a travel application through EVUS.⁸ Further, social media can reveal more about a person than they intend to reveal. Platforms’ privacy settings frequently change and can be difficult to navigate, resulting in the inadvertent disclosure of information meant to be private. Given the networked nature of social media, such privacy risks will also impact the Americans with whom EVUS applicants interact. DHS has recognized this privacy risk, categorizing social media handles as “Sensitive PII” whose disclosure could “result in substantial harm, embarrassment, inconvenience, or unfairness to an individual.”⁹

⁷ Complaint, *Doc Society v. Pompeo*, No. 1:19-cv-03632-TJK (D.D.C. December 5, 2019).

⁸ Sophia Cope & Saira Hussain, *EFF to Court: Social Media Users Have Privacy and Free Speech Interests in Their Public Information*, Electronic Frontier Foundation (Jun. 30, 2020) <https://www.eff.org/deeplinks/2020/06/eff-court-social-media-users-have-privacy-and-free-speech-interests-their-public>.

⁹ Privacy Office, “Privacy Threshold Analysis Version number: 01-2014,” DHS, January 2014, 4n2, <https://www.brennancenter.org/sites/default/files/2022-02/PTA%20for%20OI%20and%20OPR.pdf>; and

c. Disparate Targeting and Impacts

Muslim, Arab, Middle Eastern, and South Asian communities have often been particular targets of the U.S. government’s discriminatory travel and immigration screening practices, including social media screening. The State Department’s collection of social media identifiers on visa forms, for instance, came out of President Trump’s Muslim ban,¹⁰ while earlier social media monitoring and collection programs focused disproportionately on people from predominantly Muslim countries as well as Arabic speakers.¹¹

II. Social media information is particularly prone to misinterpretation and bias.

The nature of social media makes rigorous analysis and interpretation particularly difficult because so much online speech is context-dependent and reliant on outwardly unclear relationships. Social media information then is often of very low value for legitimate risk assessments or vetting purposes. These same characteristics make social media information a strong vector for expressing conscious and unconscious biases in decision-making. In fact, DHS has never shown that social media screening is useful for vetting travelers or immigrants.

DHS’s own public findings regarding its pilot programs run by U.S. Citizenship and Immigration Services (USCIS)—which experimented with using social media screening to support immigration vetting—found them practically useless to “enhance . . . vetting processes,” as the department alleges the current proposal will do.¹² In a brief from late 2016 prepared for the incoming

Privacy Office, “Privacy Threshold Analysis (PTA) version number: 04-26,” DHS, March 14, 2017, 8, <https://www.brennancenter.org/sites/default/files/2022-03/PTA%202017%20SM%20as%20SPII.pdf> (noting that social media handles constitute “stand-alone Sensitive Personally Identifiable Information.”).

¹⁰ Charlie Savage, *Trump Administration Sued over Social Media Screening for Visa Applicants*, N.Y. Times (Dec. 5, 2019), <https://www.nytimes.com/2019/12/05/us/politics/visa-applications-social-media.html>.

¹¹ Faiza Patel et al., *Social Media Monitoring*, Brennan Center for Justice, updated March 11, 2020, 30–31, <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>.

¹² Customs and Border Protection, “Supporting Statement for Arrival and Departure Record (Forms I-94, I-94W) and Electronic System for Travel Authorization (ESTA),” OMB Number 1651-0111, Department of Homeland Security (hereinafter DHS), February 23, 2022, 4-5, <https://www.reginfo.gov/public/do/DownloadDocument?objectID=118995400>

Trump administration, DHS noted that “no immigration benefits have been denied solely or primarily because of information uncovered through social media vetting,” and it stated that all denials were based on non-social media information uncovered through sources such as routine security and background checks.¹³ Only in a “small number of cases” did social media have even a “limited impact” by “developing additional lines of inquiry.”¹⁴ And in three out of its four programs used to vet refugees, “the information in [social media] accounts did not yield clear, articulable links to national security concerns, even for those applicants who were found to pose a potential national security threat based on other security screening results.”¹⁵ DHS also found more generally that it was difficult to discern the “authenticity, veracity, [and] social context” of social media content, as well as “whether the content evidences indicators of fraud, public safety, or national security concern.”¹⁶ It is unsurprising, then, that DHS officials concluded that “mass social media screening” was a poor use of resources: “[t]he process of social media screening and vetting necessitates a labor intensive manual review,” taking people away from “the more targeted enhanced vetting they are well trained and equipped to do.”¹⁷

¹³ U.S. Citizenship and Immigration Services, “Social Media,” in *U.S. Citizenship and Immigration Services Briefing Book*, 183, <https://www.dhs.gov/sites/default/files/publications/USCIS%20Presidential%20Transition%20Records.pdf> (*hereinafter* USCIS Briefing Book).

¹⁴ USCIS Briefing Book, 183.

¹⁵ USCIS Briefing Book, 181.

¹⁶ USCIS Briefing Book, 183-84, Other documents from 2016 and 2017 indicated that the DHS pilots within USCIS produced similar results, providing little by way of actionable information. Aliya Sternstein, *Obama Team Did Some ‘Extreme Vetting’ of Muslims before Trump, New Documents Show*, Daily Beast (Jan. 2, 2018), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>; and Manar Waheed, *New Documents Underscore Problems of ‘Social Media Vetting’ of Immigrants*, American Civil Liberties Union (Jan. 3, 2018), <https://www.aclu.org/blog/privacy-technology/internet-privacy/new-documents-underscore-problems-social-media-vetting>.

¹⁷ Office of the Inspector General, *DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-Term Success (Redacted)* at 2, DHS (Feb. 27, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

If social media information is of little to no value for vetting, what is it good for? The short answer is it serves as a cover for arbitrary and biased denials of visa status and travel approval. Border officials routinely deny entry to the U.S. based on irrelevant data gleaned from social media.¹⁸ In one illustrative example, 17-year-old Harvard freshman Ismail Ajjawi from Palestine was turned away at the border because of the content of posts on his social media feed. The border officer cited “people posting political points of view that oppose the US on [his] friend[s] list” to Ajjawi as the reason for his denial.¹⁹

In part because social media data is of such low probative value, it is almost uniquely prone to misinterpretation and biases. Social media like Facebook, Twitter, and Instagram have distinct and culturally dependent mannerisms that are likely to be missed by border officers. For example, on Twitter a retweet might indicate approval of a statement, but a user might also retweet a statement they disagree with to draw attention to it. These nuances are intelligible to other users but may be impenetrable for outside observers. A better policy, then, is to simply avoid using social media information for vetting.

III. Conclusion

EPIC urges CBP not to amend the EVUS records system to include social media information. Collecting social media information has numerous demonstrable harms to privacy, free expression, civil rights, and individuals free access to the U.S. There are few if any counter-vailing benefits that would justify imposing those harms, and particularly imposing them on populations who have

¹⁸ Zack Whittaker, *US border officials are increasingly denying entry to travelers over others’ social media*, TechCrunch (Aug. 27, 2019), <https://techcrunch.com/2019/08/27/border-deny-entry-united-states-social-media/>.

¹⁹ Shera S. Avi-Yonah and Delano R. Franklin, *Incoming Harvard Freshman Deported After Visa Revoked*, Harvard Crimson (Aug. 27, 2019), <https://www.thecrimson.com/article/2019/8/27/incoming-freshman-deported/>.

already received visa approval. We urge CBP and DHS to reverse course here, and to re-evaluate the collection of social media data more broadly.

Respectfully Submitted,

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