

June 13, 2017

Sabrina Burroughs
FOIA Officer/Public Liaison
U.S. Customs & Border Protection
1300 Pennsylvania Avenue, NW, Room 3.3D
Washington, D.C. 20229

Dear Ms. Burroughs,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security’s (“DHS”) United States Customs and Border Protection (“CBP”) division.

EPIC seeks documents related to CBP’s biometric exit program and its use of facial recognition technology in connection with that program. There is good reason to believe that the records requested exist and that CBP is in possession of them because CBP has acknowledged the existence of the general biometric exit program and its various pilots, deployments, and iterations. Further, the types of documents requested are those that would typically be created in conjunction with such a program.

Documents Requested

EPIC requests the following documents in the possession of CBP:

(1) All technical specifications, contracts, and statements of work for purchases and acquisitions related to CBP’s biometric exit programs and partnerships, including but not limited to the Departure Information Systems Test (“DIST”), the Departure Verification System (“DVS”), the Traveler Verification Service (“TVS”), the JetBlue self-boarding program, and the June 2017 Washington Dulles International Airport (“Dulles Airport”) biometric exit deployment;

(2) All policies and procedures for the collection, storage, analysis, use, dissemination, retention, and/or deletion of data obtained through the JetBlue self-boarding program, the June 2017 Dulles Airport biometric exit deployment, and any other biometric exit program;

(3) All records concerning the dissemination of data collected by any biometric exit program, past or present, with other agencies, whether federal, state, local, or international, or third parties;

(4) Any correspondence between CBP and JetBlue and/or SITA concerning the facial recognition pilot program, and any correspondence with other airlines, airports, and/or companies concerning the use of facial recognition for a biometric exit program;

(5) Reports, memoranda, or other documents analyzing the biometric exit pilot programs, including but not limited to reports on the accuracy and/or possible racial bias of the facial recognition technology used in DIST, DVS, TVS, and any other biometric exit program;

(6) Any audits of the systems used for photo collection or facial recognition in DIST, DVS, TVS, or any other biometric exit program;

(7) Any training materials for the systems used in DIST, DVS, TVS, or any other biometric exit program, including any training materials shared with JetBlue or any other airline, third party, or agency, whether federal, state, or local;

(8) Memoranda or other documents about expansion of the biometric exit program, including but not limited to plans to implement further public/private partnerships and partnerships with local, state, and federal agencies;

(9) Any memorandum of understanding or similar agreement with federal, state, local, or international agencies or companies involved with the biometric exit program.

Background

Since June 2016, United States Customs and Border Protection (“CBP”) has been expanding its biometric exit program at an increasing rate. In the *Consolidated Appropriations Act of 2016*, Congress provided CBP with authorization for up to \$1 billion in funding to implement a biometric entry/exit program.¹ In April 2016, DHS announced its intention “to redouble its efforts to achieve a biometric entry/exit system, and to begin implementing biometric exit, starting at the highest volume airports, in 2018.”² President Trump has ordered expedited completion of the biometric entry/exit system by executive order.³ At the Border Security Expo in April 2017, CBP’s Larry Panetta said, “facial recognition is the path forward we’re working on.”⁴ Since May 31, 2017, two extensions of CBP’s biometric exit program have been announced: a

¹ Pub. L. 114-113.

² Dep’t of Homeland Sec., *Comprehensive Biometric Entry/Exit Plan: Fiscal Year 2016 Report to Congress* i (2016), available at <https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20-%20Comprehensive%20Biometric%20Entry%20and%20Exit%20Plan.pdf>.

³ Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13216 (Mar. 6, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf>.

⁴ Russell Brandom, Facial recognition is coming to US airports, fast-tracked by Trump, *The Verge* (Apr. 18, 2017, 8:00 AM), <https://www.theverge.com/2017/4/18/15332742/us-border-biometric-exit-facial-recognition-scanning-homeland-security>.

collaboration with JetBlue to provide opt-in facial recognition for self-boarding,⁵ and a mandatory facial recognition program for customers flying between Washington Dulles International Airport (“Dulles Airport”) and Dubai.⁶

From June 15, 2016, through November 2016, CBP ran a pilot facial recognition program at Hartsfield-Jackson Atlanta International Airport, called the Departure Information Systems Test (“DIST”), which required passengers on the route from Atlanta to Tokyo to submit themselves to facial recognition in order to board their departing flight.⁷ According to DIST’s Privacy Impact Assessment (“PIA”), the purpose of the pilot was to test, among other things, the accuracy of CBP’s facial recognition technology.⁸ CBP was to use an isolated part of its Automated Targeting System (“ATS”) that would “only support test performance analysis” to store and analyze the test data.⁹ While the data collected for the program was to remain isolated, CBP did retain facial images for U.S. citizens for up to two weeks to confirm a traveler’s identity, while other images are to be deleted no later than September 30, 2017, unless they are associated with an open law enforcement matter.¹⁰

The December 2016 PIA for the next iteration of CBP’s biometric exit facial recognition program, the Departure Verification System (“DVS”), stated that DIST’s matching program was able to identify travelers “with a high degree of confidence,” although no comprehensive analysis of the pilot program was made public.¹¹ The CBP also stated that the agency’s “initial findings support the piloted process as a viable solution to fulfill the mandated biometric exit requirements in certain settings.”¹² Several

⁵ JetBlue, *Board in a Snap: JetBlue to Launch First-of-Its-Kind Self-Boarding Program Using Facial Recognition*, Business Wire (May 31, 2017), <http://www.businesswire.com/news/home/20170531005701/en/>.

⁶ U.S. Customs & Border Prot., *CBP Deploys Biometric Exit Technology to Washington Dulles International Airport*, CBP.gov (June 2, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-deploys-biometric-exit-technology-washington-dulles>.

⁷ Dep’t of Homeland Sec., DHS/CBP/PIA-030(a), *Departure Verification System: Privacy Impact Assessment Update* (Dec. 16, 2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-030-a-dvs-december2016.pdf>.

⁸ *Id.* at 6.

⁹ *Id.* at 8.

¹⁰ *Id.* at 5, 6.

¹¹ Dep’t of Homeland Sec., DHS/CBP/PIA-030(a), *Departure Verification System: Privacy Impact Assessment Update 2* (Dec. 16, 2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-030-a-dvs-december2016.pdf>.

¹² *Id.*

experts have raised issues of inaccuracy and bias in current facial recognition technology,¹³ and it is unclear if CBP has addressed these issues.

In addition to providing conclusions concerning DIST, the PIA for DVS stated that CBP would begin creating exit records for passengers and retaining them in CBP's Advance Passenger Information System ("APIS").¹⁴ The facial recognition technology would use passenger flight manifests to compile photos from the Automated Biometric Identification System ("IDENT"), the Department of State's Consolidated Consular Database, and U.S. Citizen and Immigration Service's Computer Linked Adjudication Information Management System ("CLAIMS 3") into flight-specific galleries in ATS.¹⁵ CBP officers at the boarding gate would upload the photo gallery onto a tablet prior to boarding, and a camera would take a photo of the passenger and match it to a photo in the gallery.¹⁶ While the photos would be immediately deleted from the tablet,¹⁷ the photos of U.S. citizens could be retained until their identities were confirmed, and the photos of non-U.S. citizens could be retained for up to fifteen years in the DVS system in ATS.¹⁸ As with DIST, passengers would not be allowed to opt-out of DVS.¹⁹

On May 15, 2017, CBP released an updated PIA for yet another iteration of its biometric exit system, the Traveler Verification Service ("TVS"), which uses a cloud environment for facial recognition.²⁰ Under TVS, ATS Unified Passenger Module ("ATS-UPAX") generates "biometric templates of the historical images of travelers for a given flight," which include "photographs captured by CBP during the entry inspection, photographs from U.S. passports and U.S. visas, and photographs from other DHS encounters."²¹ The system then "temporarily store[s] those templates, but not the actual images, in the VPC prior to boarding."²² At the boarding gate, a CBP-owned camera captures and submits an image of the passenger to the cloud-based facial matching

¹³ Russell Brandom, *Airport face recognition could extend to US citizens, says Customs*, The Verge (May 9, 2017, 10:11 AM), <https://www.theverge.com/2017/5/9/15591648/airport-facial-recognition-customs-tsa-biometric-exit>.

¹⁴ Dep't of Homeland Sec., DHS/CBP/PIA-030(a), *Departure Verification System: Privacy Impact Assessment Update 3* (Dec. 16, 2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-030-a-dvs-december2016.pdf>.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 6.

²⁰ Dep't of Homeland Sec., DHS/CBP/PIA-030(b), *Traveler Verification Service: Privacy Impact Assessment Update* (May 15, 2017), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-may2017.pdf>.

²¹ *Id.*

²² *Id.*

service, which generates a template, and uses the template to search the historic templates.²³ If there is a match, the program returns “faces that best match the reference face.”²⁴ The TVS PIA further states that CBP will “temporarily retain all photos within the isolated part of ATS-UPAX to support system audits, to evaluate the TVS facial recognition technology, and to ensure accuracy of the facial recognition algorithms.” The “newly captured photos and templates” are to be deleted from ATS-UPAX “within 14 days,” and from the VCP “no later than the conclusion of the flight.”²⁵ The TVS PIA also indicates that DHS “is generating a report identifying how each algorithm performed as a true positive rate, false positive rate, false match rate, and false non-match rate.”²⁶

On May 23, 2017, DHS submitted written testimony for Deputy Executive Assistant Commissioner John Wagner for a House Committee on Homeland Security, Subcommittee on Border and Maritime Security hearing, which announced the implementation of TVS through the expansion of the biometric exit program to eight airports in the summer of 2017.²⁷ The testimony also highlights CBP’s interest in public/private partnerships — specifically, collaborating with U.S. carriers, which would “procure the biometric facial cameras and integrate with CBP’s provided TVS.”²⁸ CBP also noted that it was in talks with international carriers concerning “the biometric exit vision.”²⁹

On May 31, 2017, JetBlue announced that it would collaborate with CBP and SITA, a European technology firm, to test a new self-boarding process that would use CBP’s facial recognition technology to verify the identity of JetBlue customers on flights between Boston’s Logan International airport and Aruba’s Queen Beatrix International Airport.³⁰ The program, which begins June 12 and is slated to last two to three months, will utilize CBP’s database of passport, visa, and immigration photographs.³¹ The program is being reported as part of CBP’s “ongoing trials to implement a biometric exit process in the future.”³²

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.* at 5-6.

²⁶ *Id.* at 11-12.

²⁷ *Visa Overstays: A Gap in the Nation's Border Security: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. (2017) (statement of John Wagner, Deputy Exec. Assistant Comm’r, Office of Field Operations, Customs & Border Prot.), available at <https://www.dhs.gov/news/2017/05/23/written-testimony-plcy-cbp-and-ice-house-homeland-security-subcommittee-border-and>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ JetBlue, *Board in a Snap: JetBlue to Launch First-of-Its-Kind Self-Boarding Program Using Facial Recognition*, Business Wire (May 31, 2017), <http://www.businesswire.com/news/home/20170531005701/en/>.

³¹ *Id.*

³² *Id.*

In addition, on June 2, 2017, CBP announced that it would deploy facial recognition for one daily flight between Dulles Airport and Dubai.³³ According to CBP, this program builds upon the 2016 pilot Atlanta pilot program, and the press release links to the PIAs for DIST, DVS, and TVS, presumably indicating that the program is the first of the eight TVS rollouts CBP has planned for this summer.³⁴

Request for Expedition

EPIC is entitled to expedited processing of this request because (1) there is an “urgency to inform the public about an actual or alleged federal government activity,” and (2) the request is “made by a person who is primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” 6 C.F.R. § 5.5(e)(1)(ii). The “actual...federal government activity” at issue is the CBP’s biometric exit program. The existence of this program is clear from DHS and CBP documents, such as DHS’s 2016 report to Congress entitled “Comprehensive Biometric Entry/Exit Plan.” CBP has published PIAs for its various iterations of biometric exit, including DIST,³⁵ DVS,³⁶ and TVS.³⁷ A CBP press release announced CBP’s June 2017 expansion of biometric exit to Dulles Airport,³⁸ and a

³³ U.S. Customs & Border Prot., *CBP Deploys Biometric Exit Technology to Washington Dulles International Airport*, CBP.gov (June 2, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-deploys-biometric-exit-technology-washington-dulles>.

³⁴ *Id.*

³⁵ Dep’t of Homeland Sec., DHS/CBP/PIA-030, *Departure Information Systems Test: Privacy Impact Assessment* (Jun. 13, 2016), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-dis%20test-june2016.pdf>.

³⁶ Dep’t of Homeland Sec., DHS/CBP/PIA-030(a), *Departure Verification System: Privacy Impact Assessment Update* (Dec. 16, 2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-030-a-dvs-december2016.pdf>.

³⁷ Dep’t of Homeland Sec., DHS/CBP/PIA-030(b), *Traveler Verification Service: Privacy Impact Assessment Update* (May 15, 2017), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-may2017.pdf>.

³⁸ U.S. Customs & Border Prot., *CBP Deploys Biometric Exit Technology to Washington Dulles International Airport*, CBP.gov (June 2, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-deploys-biometric-exit-technology-washington-dulles>.

JetBlue press release, which quotes a CBP official, acknowledges CBP's collaboration with JetBlue and SITA on JetBlue's self-boarding program.³⁹

There is a clear "urgency to inform the public" about CBP's biometric exit program and use of facial recognition technology, since it will imminently affect a growing number of airline passengers, and Congress is currently debating funding for the expedited completion of the program. The JetBlue self-boarding and Dulles Airport biometric exit programs will immediately affect passengers on the relevant routes. Additionally, CBP has been expanding biometric exit and its use of facial recognition at an increasing rate since 2016, and President Trump has ordered an expedited completion and implementation of the biometric entry-exit system by executive order.⁴⁰ CBP stated that there will be eight deployments of TVS in U.S. airports this summer, including the Dulles Airport program.⁴¹ DHS's FY 2018 budget, which Congress is currently considering,⁴² includes "\$90.6 million supports CBP expedited completion of the Biometric Entry and Exit Data System (Biometric Entry-Exit System)."⁴³ Further, CBP is planning to open their facial recognition program to further collaborations with additional airlines, airports, and federal, state, and local agencies, which may result in a rapid proliferation of the technology. CBP says that it is actively seeking private/public partnerships.⁴⁴ At the Border Security Expo in April 2017, CBP's Larry Panetta said,

We're essentially building an IT backbone, which can allow TSA or potentially air carriers or any other partner to tie into our backbone. ... So once we completely build our exit infrastructure, we could potentially offer it to TSA if they want to use our facial matching or security screening test — or maybe if an airline wanted to use facial matching for access to their lounge. So we're trying to

³⁹ JetBlue, *Board in a Snap: JetBlue to Launch First-of-Its-Kind Self-Boarding Program Using Facial Recognition*, Business Wire (May 31, 2017), <http://www.businesswire.com/news/home/20170531005701/en/>.

⁴⁰ Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13216 (Mar. 6, 2017), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf>.

⁴¹ *Visa Overstays: A Gap in the Nation's Border Security: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. (2017) (statement of John Wagner, Deputy Exec. Assistant Comm'r, Office of Field Operations, Customs & Border Prot.), *available at* <https://www.dhs.gov/news/2017/05/23/written-testimony-plcy-cbp-and-ice-house-homeland-security-subcommittee-border-and>.

⁴² *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request*, H. Comm. on Appropriations (Jun. 13, 2017 10:00 AM), <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394892>.

⁴³ Dep't of Homeland Sec., *FY 2018 Budget in Brief* 6 (2017), *available at* <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf>

⁴⁴ *Id.*

be collaborative with our various stakeholders and our sister agencies such as TSA, and we'll make that available to them when we have it.⁴⁵

While CBP has released PIAs for several iterations of its biometric exit program, there remain several questions concerning CBP's use of facial recognition technology, including the technical specifications of the technology being used, its accuracy and possible racial bias, and the precise nature of relationships between CBP and its public and private partners.

Second, EPIC is an organization "primarily engaged in disseminating information." § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep't of Def.*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 5.5(e)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

Further, any duplication fees should also be waived because disclosure of the requested documents (1) is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and (2) is "not primarily in the commercial interest" of EPIC. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

First, this request meets the criteria CBP uses to evaluate whether a disclosure is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" because (i) the "subject matter of the request" concerns "identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated"; (ii) disclosure would be "meaningfully informative about government operations or activities"; (iii) disclosure would "contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester"; and (iv) the "public's understanding of the subject in question" would be "enhanced by the disclosure to a significant extent." 6 C.F.R. § 5.11(k)(2)(i-iv).

⁴⁵ Russell Brandom, Facial recognition is coming to US airports, fast-tracked by Trump, *The Verge* (Apr. 18, 2017, 8:00 AM), <https://www.theverge.com/2017/4/18/15332742/us-border-biometric-exit-facial-recognition-scanning-homeland-security>.

Under the first sub-factor, the request concerns “identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated” because the operations or activities in question — the general biometric exit program, the use of facial recognition, and the various pilots, deployments, and iterations — have been acknowledged or announced by CBP officials as operations or activities CBP has undertaken directly, as described above.

Under the second sub-factor, disclosure would be “meaningfully informative about government operations or activities” because, while CBP has released PIAs on several iterations of its biometric exit program, whether the JetBlue self-boarding program is covered by an existing PIA and, if not, what the privacy implications are for this program. Further, little is known about the technical specifications of the facial recognition systems CBP is using, the analysis of the data from facial recognition programs, the extent of the public and private partnerships CBP is undertaking, and how it plans to expand the use of its facial recognition system.

Under the third sub-factor, disclosure would “contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester,” because, as the relevant regulation states, it “shall be presumed that a representative of the news media will satisfy this consideration.” 6 C.F.R. § 5.11(k)(2)(iii). As shown above, EPIC is considered “a representative of the news media.”

Under the fourth sub-factor, the “public’s understanding of the subject in question” would be “enhanced by the disclosure to a significant extent” because the requested documents would provide information on aspects of CBP’s biometric exit program that are not fully understood by the public at this moment.

This request also meets the criteria CBP uses to evaluate whether disclosure is “not primarily in the commercial interest” of EPIC because (i) there is no “commercial interest of the requester ... that would be furthered by the requested disclosure” and (ii) even if EPIC had a commercial interest, “the public interest is greater than any identified commercial interest in disclosure.” 6 C.F.R. § 5.11(k)(3)(i-ii).

Under the first sub-factor, EPIC has no “commercial interest...that would be furthered by the requested disclosure” because EPIC is a 503(c)(3) non-profit organization committed to privacy, open government, and civil liberties that intends to use the disclosed documents for public education and advocacy purposes.⁴⁶

As to the second sub-factor, DHS “components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” 6 C.F.R. §

⁴⁶ *About EPIC*, <https://epic.org/epic/about.html>.

5.11(k)(3)(ii). As already described above, EPIC is a news media requester and satisfies the public interest standard.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days per 5 U.S.C. § 552(a)(6)(E)(ii)(I).

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

Megan Iorio
Megan Iorio
EPIC Law Clerk