

August 30, 2018

Philip S. Kaplan
Chief Privacy Officer, Privacy Office
Department of Homeland Security
Washington, DC 20528

RE:

1. System of Records Notice, Docket No. DHS-2018-0003: Department of Homeland Security/US Citizenship and Immigration Services-018 Immigration Biometric and Background Check (IBBC) System of Records¹
2. Proposed Rulemaking, Docket No. DHS-2018-0002: Implementation of Exemption; Department of Homeland Security/US Citizenship and Immigration Services-018 Immigration Biometric and Background Check (IBBC) System of Records²

Dear Mr. Kaplan:

The Brennan Center for Justice and the American Civil Liberties Union jointly submit these comments in response to the above-referenced notices, published in the Federal Register on July 31, 2018. In addition, we request a meeting with your office to discuss our concerns in more detail.

As an initial matter, we wish to express our concern that this system is being created as part of this administration's ongoing campaign to surveil, harass, and ultimately deport both documented and undocumented immigrants to this country, as well as to discourage individuals who might otherwise come to this country for business, family, or other legitimate purposes. These efforts have ranged from making a discretionary decision to target and separate children from parents at the southern U.S. border in violation of domestic law and international obligations,³ to arresting and detaining lawful immigrants with minor, decades-old infractions,⁴ to banning Muslims from the country,⁵ to

¹ System of Records Notice, 83 Fed. Reg. 36950 (July 31, 2018) [hereafter "IBBC SORN"], available at <https://www.gpo.gov/fdsys/pkg/FR-2018-07-31/pdf/2018-16138.pdf>.

² Notice of Proposed Rulemaking, 83 Fed. Reg. 36792 (July 31, 2018) [hereafter "IBBC NPRM"], available at <https://www.gpo.gov/fdsys/pkg/FR-2018-07-31/pdf/2018-16137.pdf>.

³ See Seung Min Kim, *7 questions about the family-separation policy, answered*, WASH. POST, June 19, 2018, available at https://www.washingtonpost.com/politics/q-and-a-understanding-the-controversy-over-separating-families-at-the-border/2018/06/19/8a61664a-73fb-11e8-be2f-d40578877b7b_story.html?utm_term=.e33c3b360582; Noah Lanard, *New Data Shows How Trump Administration Prosecuted Migrant Parents With Children Instead Of Adults Traveling Alone*, MOTHER JONES, July 4, 2018, available at <https://www.motherjones.com/politics/2018/07/new-data-shows-how-trump-administration-prosecuted-migrant-parents-with-children-instead-of-adults-traveling-alone>; Inter-Am. Comm'n H.R., *LACHR Grants Precautionary Measure To Protect Separated Migrant Children In The United States*, OAS.ORG, Aug. 20, 2018, available at https://www.oas.org/en/iachr/media_center/PReleases/2018/186.asp.

⁴ See, e.g., Sarah Mervosh, *A Legal Resident, An Arrest by ICE and Father's Day In Jail*, N.Y. TIMES, June 17, 2018, available at <https://www.nytimes.com/2018/06/17/us/legal-resident-arrested.html>; see also Haley Hinkle and Rachel Levinson-Waldman, *The Abolish ICE Movement Explained*, BRENNAN CENTER FOR JUSTICE, July 30, 2018, available at <https://www.brennancenter.org/blog/abolish-ice-movement-explained>.

⁵ Exec. Order No.13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No.13780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-09-27/pdf/2017-20899.pdf>.

denying passports to and even detaining individuals with U.S. birth certificates,⁶ to attempting to collect social media information from immigrants in the United States to make baseless predictions about their intentions.⁷ Our organizations have condemned these and similar practices, and we reiterate those objections here.

We also have a number of concerns about these notices and the system they describe. First, the time period for comment undermines the intent of the publication requirements for System of Records Notices (SORNs), which is – according to the Department of Homeland Security’s published guidance – to “[p]revent the creation of a system of records without first giving individuals an opportunity to review and comment on the purpose and routine uses for which their PII [personally identifiable information] is collected.”⁸ Those same guidelines state that “[a]ll SORNs, whether for new systems of records or updates to legacy systems of records, are required to be published in the Federal Register for a thirty (30) day public comment period *prior to a system becoming operational.*”⁹

In this case, the SORN announced that the system itself was effective as of the date of the notice’s publication in the federal register (July 31), which appears to be in clear violation of DHS’s own rules: the publication date was coextensive with the system’s becoming operational, and individuals will not have had “an opportunity to review and comment” prior to the creation of the system of records.

The SORN also articulates twenty routine uses that will cover the records in the two DHS systems of records that are being consolidated by this notice as well as twenty independent databases whose records will be “ingested and covered by this SORN”; those databases encompass records from five separate federal agencies (DHS, Department of Justice-FBI, Department of State, Office of the Director of National Intelligence/National Counterterrorism Center, and Department of Defense).¹⁰ According to the SORN, those routine uses will become effective on August 30, the date on which comments are due.

This timeline also is not in compliance with the requirements described above, as it provides no real opportunity for DHS to consider comments on routine uses before they become effective. As we have previously conveyed, federal agencies must comply with existing privacy laws that require the

⁶ Kevin Sieff, *U.S. Is Denying Passports To Americans Along The Border, Throwing Their Citizenship Into Question*, WASH. POST, Aug. 29, 2018, available at https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html?utm_term=.126bf9242ab3.

⁷ See, e.g., Drew Harwell and Nick Miroff, *ICE just abandoned its dream of ‘extreme vetting software that could predict whether a foreign visitor would become a terrorist*, N.Y. TIMES, May 17, 2018, available at https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/?noredirect=on&utm_term=.1994cd555b4c.

⁸ DHS, *System of Records Notices Official Guidance*, available at https://www.dhs.gov/xlibrary/assets/privacy/privacy_guidance_sorn.pdf#page=18.

⁹ *Id.* at 8 (emphasis added).

¹⁰ IBBC SORN at 36953.

opportunity for public comment in cases where an agency intends to undertake actions that involve the collection, use, and retention of vast amounts of data where there are privacy equities at stake.¹¹

Turning to the proposed system itself, we have several concerns about the scope and interconnectedness of the new system.

We have grave concerns with the amount of information that will purportedly be synthesized in this new system, and the extent to which this information will be shared at the federal, state, and local level. Prior state and local information sharing efforts by the Department, including fusion centers, have been widely criticized¹² for wasting taxpayer dollars, encouraging the dissemination of information that violated individuals' privacy and civil rights, and encouraging profiling and discrimination. We fail to see anything in this SORN that would prevent similar problems from arising here.

The vast amount of information sharing and collection also raises potential constitutional concerns. As we have noted in other contexts, the Fifth Amendment's Due Process Clause prohibits government collection of sensitive personal information without sufficient safeguards against privacy violations: "Even if a law adequately protects against *public* disclosure of a [person's] private information, it may still violate informational privacy rights if an unbounded, large number of government employees have access to the information."¹³ The potential privacy implications of this system are significant. Not only does it involve highly sensitive biometric information, it purports to collect vast amounts of information on individuals including their associations, attributes, and other personally identifiable information.¹⁴

Moreover, there are numerous federal laws, including the Violence Against Women Act, that include confidentiality provisions that limit the dissemination of the personally identifying information of

¹¹ See, e.g., ACLU Letter to White House Counsel regarding the Privacy Implications of EO 13768 (Feb 28, 2017), available at <https://www.aclu.org/letter/aclu-letter-white-house-counsel-regarding-privacy-implications-executive-order-13768>; Brennan Center Urges State Department to Abandon New "Extreme Vetting" Initiatives, BRENNAN CENTER FOR JUSTICE, May 18, 2017, available at <https://www.brennancenter.org/analysis/brennan-center-urges-state-department-abandon-new-extreme-vetting-initiatives>.

¹² See Senate Homeland Security and Government Affairs Permanent Subcommittee on Investigations, "Federal Support for and Involvement in State and Local Fusion Centers" (Oct 3, 2012), available at <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>.

¹³ Tucson Woman's Clinic v. Eden, 379 F.3d 531, 551–52 (9th Cir. 2004).

¹⁴ For further explication of the privacy risks arising from large government databases, including biometric databases, see, e.g., EPIC Statement to House Committee on Oversight and Government Reform, 115th Cong. (2017), Mar. 22, 2017, <https://epic.org/testimony/congress/EPIC-HCOGR-FacialRecognition-Mar2017.pdf>; EFF Comments on DHS's Proposal to Exempt its New Database of Biometrics and Relationship Data from the U.S. Privacy Act, May 24, 2018, <https://www.eff.org/document/eff-comments-dhs-its-proposal-exempt-its-new-biometrics-and-relationship-data-us-privacy>; U.S. Gov't Accountability Office, GAO-16-267, "Face Recognition Technology: FBI Should Better Ensure Privacy and Accuracy" 49, 12 (May 2016), <https://www.gao.gov/assets/680/677098.pdf>.

noncitizens that have been the victims of abuse.¹⁵ Disturbingly, the notice provides no insight into how the Department intends to comply with these legal requirements.

It is of special concern that the breadth of collection and information-sharing are coupled with extensive exemptions from the Privacy Act's provisions, particularly in light of the fact that no exemptions were claimed for the two systems that are being consolidated to create this system.¹⁶ The Department has not provided any information to explain what has changed in the intervening years that would require the imposition of thirteen exemptions from the Privacy Act. Such exemptions would strip individuals of important privacy protections, including limits on dissemination, opportunities to correct information, and redress procedures.

Moreover, the justifications for some of the exemptions reflect a cavalier attitude towards the important protections enshrined in the Privacy Act. As the Department's own guidance states, the Act "provides protection to individuals by ensuring that personal information collected by Federal agencies is *limited to that which is legally authorized and necessary* and is *maintained in a manner which precludes unwarranted intrusions upon individual privacy*."¹⁷ In contravention of that animating principle, the proposed rulemaking would exempt the system from the entire section of the Privacy Act requiring "relevancy and necessity of information," on the grounds that the Department should be permitted to "retain *all* information that *may* aid in establishing patterns of unlawful activity."¹⁸

The Privacy Act stands for the principle that personal information about individuals should not be retained simply on the off-chance that it may prove useful in the future. As multiple officials have recognized, the accumulation of stores of information on the theory that it may someday be helpful often has precisely the opposite effect, overwhelming both computer systems and human analysts.¹⁹

Finally, we wish to emphasize that these systems will by their terms have a significant impact on people living in the United States, including U.S. citizens. The categories of individuals who will be covered by the new system includes associates, family members, household members, and others who have a connection with an applicant for immigration benefits. It is inconceivable that this will not include vast numbers of people residing in the United States, including U.S. citizens, making their information subject to this system and potentially subject to sharing across federal, state, and local agencies.

¹⁵ See, e.g., 8 U.S.C. § 1367(a)(2).

¹⁶ 72 Fed. Reg. 17172, 17176 (Apr. 6, 2007), available at <https://www.gpo.gov/fdsys/pkg/FR-2007-04-06/pdf/07-1643.pdf>; 72 Fed. Reg. 31082, 31085 (June 5, 2007), available at <https://www.gpo.gov/fdsys/pkg/FR-2007-06-05/pdf/07-2782.pdf>.

¹⁷ DHS, *What is a Privacy Act Statement?*, https://www.dhs.gov/xlibrary/assets/privacy/privacy_guidance_e3.pdf (emphasis added).

¹⁸ IBBC NPRM at 36793.

¹⁹ See Rachel Levinson-Waldman, *What the Government Does with Americans' Data*, BRENNAN CENTER FOR JUSTICE, 2013, at 15-16, available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>.

We believe that far more consideration is warranted before this notice and its provisions are implemented, and we therefore urge you to halt the implementation of this system and the adoption of the routine uses. In addition, we request a meeting to discuss our concerns with you in person. We can be reached at levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman, 202-249-7193) and nguliani@aclu.org (Neema Singh Guliani, 202-675-2322).

Sincerely,

Rachel Levinson-Waldman
Senior Counsel
Brennan Center for Justice at NYU School of Law

Neema Singh Guliani
Legislative Counsel
American Civil Liberties Union