

OFFICE OF MANAGEMENT AND BUDGET

Docket No. TSA-2004-19160
Notice of Emergency Clearance Request
Secure Flight Test Records

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

By notice published on September 24, 2004, the Transportation Security Administration ("TSA") established a system of records ("Secure Flight Test Records") to test TSA's new Secure Flight passenger prescreening program.¹ The agency also published a privacy impact assessment for the proposed program, as well as a request for emergency processing of a new public information collection submitted to the Office of Management and Budget.² Together, these documents are referred to by TSA as the "Secure Flight Testing Privacy Package."³

According to TSA, Secure Flight "will involve the comparison of information in PNRs for domestic flights to names in the Terrorist Screening Database (TSDB) . . . to include the expanded TSA No-Fly and Selectee Lists, in order to identify individuals known or reasonably suspected to be engaged in terrorist activity."⁴ TSA will also "conduct a separate test of the use of commercial data to determine its effectiveness in identifying passenger information that is inaccurate or incorrect."⁵ In order to test both Secure Flight and the utility of using commercial information within the program, TSA

¹ Notice to Establish System of Records, 69 Fed. Reg. 57345 (proposed Sept. 24, 2004).

² Privacy Impact Assessment, 69 Fed. Reg. 57352 (proposed Sept. 24, 2004); Notice of Emergency Clearance Request, 69 Fed. Reg. 57342 (proposed Sept. 24, 2004).

³ The "Privacy Package" is available at <http://www.tsa.gov/public/display?content=09000519800cf3a7> (last visited Oct. 23, 2004).

⁴ 69 Fed. Reg. at 57346.

⁵ *Id.*

“is proposing to issue an order to all domestic aircraft operators directing them to submit a limited set of historical passenger name records to TSA.”⁶ Specifically, TSA intends to collect “PNRs with domestic flight segments completed in the month of June 2004.”⁷

TSA solicited public comment to:

1.) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; 2.) Evaluate to accuracy of the agency’s estimated burden; 3.) Enhance the quality, utility, and clarity of the information to be collected; and 4.) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.⁸

Pursuant to the TSA notice of emergency clearance request, the Electronic Privacy Information Center ("EPIC") submits these comments to the Office of Management and Budget (“OMB”) to urge the agency not to grant TSA’s request for emergency processing of a new public information collection and extend this comment period until TSA is willing to make more information about Secure Flight available to the public. EPIC also asks the OMB to require TSA to revise its “Privacy Package” before allowing TSA to collect public information for the Secure Flight test phase.

TSA states that it “believes it has taken action to mitigate any privacy risk by designing its next generation passenger prescreening program to accommodate concerns expressed by privacy advocates, foreign counterparts, and others.”⁹ However, the scant information about Secure Flight provided in the “Privacy Package” indicates that Secure Flight is disturbingly similar to the Computer Assisted Passenger Prescreening System

⁶ *Id.* at 57342.

⁷ *Id.* at 57344.

⁸ *Id.* at 57345.

⁹ *Id.* at 57355.

("CAPPS II") TSA proposed more than a year ago,¹⁰ which ultimately failed in large part due to privacy concerns.

Introduction

The U.S. Supreme Court has long recognized that citizens enjoy a constitutional right to travel. Thus, in *Saenz v. Roe*, the Court noted that the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence.¹¹ Indeed, DHS Deputy Secretary Admiral James Loy has observed that "the founding fathers . . . had mobility as one of the inalienable rights they were talking about."¹² For that reason, any governmental initiative that conditions the ability to travel upon the surrender of privacy rights requires particular scrutiny.

Given these constitutional implications, and the massive scope of the system (which sought to collect information about tens of millions of individuals), CAPPS II understandably was the focus of concern within Congress¹³ and among the general public.¹⁴ It also engendered strong opposition abroad, where foreign governments and their citizens resisted the demands of the U.S. government to provide detailed air

¹⁰ Interim Final Privacy Act Notice, 68 Fed. Reg. 45265 (August 1, 2003).

¹¹ 526 U.S. 489 (1999), quoting *United States v. Guest*, 383 U.S. 745 (1966).

¹² Testimony of Admiral James Loy before House Government Reform Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census (May 6, 2003).

¹³ In Homeland Security appropriations bill (H.R.2555), Congress blocked deployment of CAPPS II until the General Accounting Office ("GAO") studied the program's implications. The GAO's ensuing report found that seven of eight concerns voiced by Congress had not been addressed. General Accounting Office, *Aviation Security: Computer Assisted Passenger Prescreening Program Faces Significant Implementation Challenges*, GAO-04-385 (Feb. 2004) (hereinafter "GAO Report"). Congress's concern about CAPPS II is also evident in Press Release, Office of Senator Ron Wyden, Wyden Wins Commerce Committee Approval to Require Oversight of CAPPS II Airline Passenger Screening System (Mar. 13, 2003); Press Release, Office of Senator Patrick Leahy, Reaction of Senator Leahy to GAO's Report on Flaws in the CAPPS II Program (Feb. 13, 2004); Press Release, Senate Governmental Affairs Committee, Senators Collins, Lieberman Ask TSA: What Other Airlines Have Been Contacted and Asked for Passenger Information? (Apr. 14, 2004).

¹⁴ Editorials on CAPPS II published in major newspapers included Editorial, *Safe Skies*, Washington Post, Mar. 21, 2003, at A12; and Editorial, *Airport Screening System More Minus Than Plus*, Atlanta Journal Constitution, Mar. 25, 2004, at 14A.

passenger data as a condition of flight into the United States.¹⁵ Much of the controversy surrounding CAPPS II centered on the system's secrecy and the lack of public information concerning the manner in which the system would assess the security risks particular individuals are deemed to pose, as well as the types of data that TSA would use to make such assessments. When the General Accounting Office (“GAO”) issued a report on CAPPS II at Congress’s request in February 2004, the agency concluded that TSA had failed to address concerns about, among other things, privacy implications and provision of adequate redress.¹⁶

Unfortunately, Secure Flight presents the same problems. When it enacted the Privacy Act in 1974, Congress sought to restrict the amount of personal information that federal agencies could collect and, significantly, required agencies to be transparent in their information practices.¹⁷ The Privacy Act is intended “to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government[.]”¹⁸ Adherence to these requirements is critical for a system like Secure Flight. However, the Privacy Act notice and privacy impact assessment published by TSA to introduce the Secure Flight testing phase show that the program will, like CAPPS II, be exempt for many of the privacy protections established by the Privacy Act.¹⁹

In remarks before the international conference of data protection and privacy officials last year, the Chief Privacy Officer of the Department of Homeland Security

¹⁵ See, e.g., Sara Kehaulani Goo, *U.S., EU Will Share Passenger Records*, Washington Post, May 2004, at A02.

¹⁶ GAO Report, *supra* at n14.

¹⁷ S. Rep. No. 93-1183, at 1 (1974).

¹⁸ *Id.*

¹⁹ See Comments of the Electronic Information Center on Secure Flight Test Records Privacy Act Notice and Privacy Impact Assessment, Oct. 25, 2004.

assured the delegates that “[u]nder the Privacy Act, in concert with the Freedom of Information Act and the E-Government Act, citizens, legal residents, and visitors to the United States have been afforded almost unequalled transparency into the federal government's activities and the federal government's use of personal information about them.”²⁰ Unfortunately, the complete lack of responsiveness to Freedom of Information Act ("FOIA") requests for information about this program show that the Department, TSA, and other agencies involved in administering Secure Flight are falling short of such transparency.

I. The FBI, TSA, and CBP Have Thwarted Public Scrutiny of Secure Flight Under the Freedom of Information Act

EPIC has encountered tremendous difficulty using the FOIA to learn anything more about Secure Flight than the few details that have been published in the “Privacy Package.” On September 28, 2004, EPIC submitted a FOIA request to TSA asking for information about Secure Flight.²¹ EPIC asked that the request be processed expeditiously, noting the intense media interest surrounding Secure Flight. Specifically, EPIC demonstrated that 485 articles had been published about the program since TSA announced its plans for Secure Flight. EPIC also mentioned the October 25, 2004 deadline for public comments on the test phase of the system, explaining the urgency for the public to be as well informed as possible about Secure Flight in order to meaningfully respond to the agency’s proposal for the program. TSA determined these circumstances did not justify the information’s immediate release, and refused EPIC’s request that the information be made public prior to the October 25 deadline for these comments.²² TSA

²⁰ Remarks of Nuala O'Connor Kelly Before the 25th International Conference of Data Protection and Privacy Commissioners, Sydney Australia, September 11, 2003 ("Kelly Remarks").

²¹ Letter from Marcia Hofmann, Staff Counsel, EPIC, to Patricia Reip-Dice, Associate Director, FOIA Headquarters Office, TSA, Sept. 28, 2004 (on file with EPIC).

²² Letter from Catrina M. Pavlik, Associate Director, Freedom of Information Act and Privacy Act Division, TSA, to Marcia Hofmann, Staff Counsel, EPIC, Oct. 7, 2004 (on file with EPIC).

also denied EPIC a fee waiver, which the agency has never done before in its three-year existence. This maneuver has imposed a significant procedural barrier to EPIC's ability to obtain the information. EPIC has appealed TSA's decision.

On September 30, 2004, EPIC submitted a FOIA request to the FBI asking for information about the maintenance and administration of the Terrorist Screening Database.²³ EPIC showed that 213 articles had been published containing both "Secure Flight" and "FBI," and again noted the urgency for the public to learn as much as possible about Secure Flight prior to the expiration of the comment period. The FBI also denied EPIC's request, claiming that EPIC failed to adequately justify the need for the information's quick release.²⁴ Incredibly, the agency also refused to recognize that EPIC is "primarily engaged in disseminating information," despite a federal court decision in May that found otherwise.²⁵ In response to the FBI's decision, EPIC filed suit and a motion for a temporary restraining order and preliminary injunction asking a federal judge to order the FBI to process and release the documents immediately.²⁶ The very next day, the FBI voluntarily granted expedited processing of EPIC's request.²⁷ EPIC has yet to receive the documents.

Finally, on September 30, 2004, EPIC submitted a FOIA request to the Bureau of Customs and Border Protection ("CBP"), asking for documents concerning the impact Secure Flight might have on the agreement between the European Union and CBP for the

²³ Letter from Marcia Hofmann, Staff Counsel, EPIC, to David M. Hardy, Chief, Record/Information Dissemination Section, Records Management Division, FBI, Sept. 30, 2004 (on file with EPIC).

²⁴ Letter from David M. Hardy, Chief, Record/Information Dissemination Section, Records Management Division, FBI, to Marcia Hofmann, Staff Counsel, EPIC, Oct. 1, 2004 (on file with EPIC).

²⁵ *American Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n5 (D.D.C. 2004).

²⁶ Motion for a Temporary Restraining Order and Preliminary Injunction, *Electronic Privacy Information Center v. Dep't of Justice*, C.A. 04-1736 (D.D.C. 2004 HHK).

²⁷ Letter from David M. Hardy, Chief, Record/Information Dissemination Section, Records Management Division, FBI, to Marcia Hofmann, Staff Counsel, EPIC, Oct. 13, 2004 (on file with EPIC).

transfer of PNR data to the CBP, and whether such records might be transferred to the FBI or Terrorist Screening Center for inclusion in the Terrorist Screening Database.²⁸ EPIC once again asked for expedited processing, noting the extraordinary media interest in Secure Flight and the pendency of the public comment period for the test phase of Secure Flight.²⁹ To date, CBP has not responded.

The unwillingness of TSA and other agencies to release information about Secure Flight prior to the close of this comment period frustrates the ability of the public to submit meaningful, well informed comments in response to TSA's notice of emergency clearance request. In order for the public's comments to OMB to be even remotely informed, OMB must not grant TSA's request for emergency processing of the Secure Flight information collection and extend the time for comment until TSA and other agencies are willing to release more substantial information about Secure Flight's operation.

II. Collection of Secure Flight Test Information Should Not Proceed Until TSA's "Privacy Package" is Revised

TSA's notice of emergency clearance request states that the agency intends to order all domestic airlines to turn over a month's worth of PNR data on October 29, 2004.³⁰ Such data acquisition will place in the agency's hands personal information concerning millions of individuals. The few details available in the "Privacy Package" indicate that that information will lack crucial Privacy Act protections.³¹ TSA has articulated no reason why such rights should not be provided and, as such, even limited

²⁸ Letter from Marcia Hofmann, Staff Counsel, EPIC, to Freedom of Information Act Officer, CBP, Sept. 30, 2004 (on file with EPIC).

²⁹ *Id.* at 2.

³⁰ 69 Fed. Reg. 57344.

³¹ See Comments of the Electronic Information Center on Secure Flight Test Records Privacy Act Notice and Privacy Impact Assessment, Oct. 25, 2004.

use of personal information for testing purposes raises significant privacy issues that TSA seems unprepared to address. For this reason, acquisition of personal data should not proceed until TSA revises the “Privacy Package” to bring it into conformance with the intent of the Privacy Act.

Conclusion

For the foregoing reasons, EPIC believes that OMB should not grant TSA’s request for emergency processing of the Secure Flight information collection until TSA and other agencies involved in Secure Flight’s development are willing to disclose information about the program to the public. Furthermore, OMB should require TSA to substantially revise its “Privacy Package” so that it conforms to the principles of the Privacy Act. The public comment period on TSA’s emergency clearance request should remain open until that time.

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