

VIA MAIL

December 12, 2018

Sabrina Burroughs, FOIA Officer
FOIA Division
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, N.W.
Mail Stop 1181
Washington, DC 20229

Dear Ms. Burroughs:

This letter constitutes an urgent 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”) Customs and Border Patrol (“CBP”).

EPIC seeks records related to alternative screening procedures in CBP’s biometric entry/exit program.¹

Documents Requested

- (1) All records concerning the creation and modification of CBP’s “Biometric Exit Frequently Asked Questions (FAQs)” webpage up to and including the changes posted on December 3, 2018;²
- (2) All records concerning the “alternative procedures” described in CBP’s “Biometric Exit Frequently Asked Questions (FAQs)” webpage.³

EPIC requests all responsive documents in electronic format to be emailed directly to FOIA@epic.org or sent via mail to EPIC’s office at 1718 Connecticut Ave NW, Suite 200, Washington, DC 20009. EPIC cannot receive documents through the FOIAonline portal system and requests that CBP not send any communications through that system.

¹ U.S. Dep’t of Homeland Sec., DHS/CBP/PIA-056, Privacy Impact Assessment for the Traveler Verification Service 9 (Nov. 14, 2018), <https://www.dhs.gov/sites/default/files/publications/PIA%20for%20Traveler%20Verification%20Service.pdf> [hereinafter Traveler Verification Service PIA].

² U.S. Customs and Border Prot., *Biometric Exit Frequently Asked Questions (FAQs)* (Dec. 3, 2018), <https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

³ *Id.*

Background

Without authority or the opportunity for public comment, the U.S. Customs and Border Protection has deployed facial recognition technology in U.S. airports, sea ports, and land ports of entry and collected biometric identifiers from American travelers.⁴ The agency plans to “incrementally deploy biometric capabilities across all modes of travel — air, sea, and land — by fiscal year 2025.”⁵ According to the most recent Privacy Impact Assessment (“PIA”), the Traveler Verification Services (“TVS”) retains both U.S. citizens’ and non-citizens’ photos in the TVS Cloud Matching Service for up to 12 hours, photos of non-immigrant aliens and lawful permanent residents are stored for up to 14 days in an Automated Targeting System database, and photos of “in-scope travelers”⁶ are retained in the Automated Biometric Identification System (“IDENT”) for up to 75 years.⁷ CBP integrates information from flight manifests provided by airlines with photographs obtained from State Department databases to prepare “galleries” to match with photos captured at ports of entry.⁸ According to CBP, if the agency “does not have access to advance passenger information, such as for pedestrians or privately owned vehicles at land ports of entry, CBP will build galleries using photographs of ‘frequent’ crossers for that specific port of entry[.]”⁹ CBP uses its own equipment and that of private firms, other government agencies, and foreign governments to capture face images.¹⁰

This vast biometric collection program exposes Americans and other travelers to substantial privacy risks. The problem begins when the State Department, without authority, transferred facial images collected for passport applications to the CBP. This largely immutable biometric information is then used to conduct government surveillance unrelated to the purpose for which the photos were collected. The legislation this program purports to implement does not authorize this activity,¹¹ and there is no federal legislation to regulate the use of facial recognition or other biometric surveillance techniques in these circumstances.

CBP claims U.S. citizens are provided the opportunity to opt out of the program, but descriptions of the alternative screening procedures have varied over time on both the CBP’s “Biometric Exit Frequently Asked Questions (FAQ)” webpage and in the PIAs for the program.

Today, the FAQ webpage entry reads:

⁴ See U.S. Customs and Border Prot., *Biometrics*, <https://www.cbp.gov/travel/biometrics> [hereinafter CBP Biometrics Website].

⁵ U.S. Dep’t of Homeland Sec., Office of Inspector Gen., *OIG-18-80, Progress Made, but CBP Faces Challenges Implementing a Biometric Capability to Track Air Passenger Departures Nationwide*, 7 (Sept. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-80-Sep18.pdf> [hereinafter *OIG Report*].

⁶ “In-scope travelers” are any aliens other than those specifically exempted in 8 CFR 235.1(f).

⁷ Traveler Verification Service PIA, *supra* note 1, at 9.

⁸ *OIG Report*, *supra* note 5, at 7.

⁹ Traveler Verification Service PIA, *supra* note 1, at 5.

¹⁰ *Id.* at 7–8.

¹¹ Letter from Sens. Edward J. Markey and Mike Lee to Sec’y Kirstjen Nielsen, Dep’t of Homeland Sec., 1-2 (Dec. 21, 2017), <https://www.markey.senate.gov/imo/media/doc/DHS%20Biometrics%20Markey%20Lee%20.pdf>.

Are U.S. Citizens required to provide biometrics for the entry-exit system?

U.S. Citizens entering or exiting the country are generally required to have a valid U.S. passport. At this time, however, CBP does not require U.S. Citizens to have their photos captured when entering or exiting the country. U.S. Citizens who do not wish to participate in this biometric collection should notify a CBP Officer or an airline or airport representative to seek an alternative means of verifying their identity and documents. CBP discards all photos of U.S. Citizens, once their identities have been verified.¹²

But on March 6, 2018, the same FAQ webpage entry stated:

Individuals seeking to travel internationally are subject to the laws and rules enforced by CBP and are subject to inspection. If a U.S. citizen, however, requests not to participate in the Traveler Verification System, specified agreements between CBP and the partner airline or airport authority will guide alternate procedures. For some participating airlines, a traveler may request not to participate in the TVS and, instead, present credentials to airline personnel before proceeding through the departure gate. In other cases of an opt-out, an available CBP Officer may use manual processing to verify the individual's identity.¹³

And on August 24, 2018, the FAQ webpage entry read:

Individuals seeking to travel internationally are subject to the laws and rules enforced by CBP and are subject to inspection. However, if a U.S. Citizen does not wish to participate in the biometric entry or exit process, he or she must request to be processed using alternate procedures, such as presenting travel credentials to an available CBP Officer or authorized airline personnel.¹⁴

The descriptions of alternative screening procedures also vary in the subsequent Privacy Impact Assessments published on the program. The most recent PIA states: "U.S. citizens who do not wish to submit to facial photo capture pursuant to these processes may request alternative processing, which typically involves a manual review of their travel documents by a CBPO."¹⁵ It also states, "if a U.S. citizen requests not to participate in the TVS, an available CBP Officer may use manual processing to verify the individual's identity."¹⁶

Contrastingly, a June 2017 PIA described multiple scenarios for alternative screening:

¹² U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)*, *supra* note 2.

¹³ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Mar. 6, 2018), *available at* <https://web.archive.org/web/20180306164048/https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

¹⁴ U.S. Customs and Border Protection, *Biometric Exit Frequently Asked Questions (FAQs)* (Aug. 24, 2018), *available at* <https://web.archive.org/web/20180824202202/https://www.cbp.gov/travel/biometrics/biometric-exit-faqs>.

¹⁵ Traveler Verification Service PIA, *supra* note 1, at 9.

¹⁶ *Id.* at 20.

For some participating airlines, for instance, a traveler may request not to participate in the TVS and instead present credentials to airline personnel before proceeding through the departure gate. In other cases, if an individual opts-out of TVS, his or her identity may be verified by an available CBP Officer who will manually verify the traveler's identity and the authenticity of the documentation.¹⁷

The agency's repeated modification of the FAQ webpage entry for alternative procedures for U.S. citizens who do not wish to have a photo taken and its modification of subsequent PIAs presents a situation where CBP is modifying rules as it is implementing the Biometric Entry/Exit program. This modification of rules is done without legal authority or an opportunity for public comment.

Request for Expedition

This request warrants expedited processing under the FOIA and the DHS's FOIA regulations. 5 U.S.C §552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, this request is entitled to expedited processing because there is an "urgency to inform the public about an actual or alleged federal government activity," and because the request is "made by a person who is primarily engaged in disseminating information." §5.5(e)(1)(ii).

CBP's biometric entry/exit program is an "actual . . . federal government activity" because the agency uses facial recognition software to compare photos captured at the gate with those obtained from the State Department. CBP supposedly allows U.S. citizens to opt out of the program, and in those cases, CBP uses alternative screening procedures. Beyond the overall program, these alternative screening procedures, in particular, constitute an "actual . . . federal government activity."

It is "urgen[t] to inform the public" about the modifications to CBP's alternative screening procedures because these procedures have a direct impact on any U.S. citizen who enters or exits the United States. Since there is no federal legislation to regulate this program, the procedures are largely left to the agency to arbitrarily modify without notice. During 2018 alone, the agency has changed the alternative screening procedure policies for the biometric entry/exit program at least three times without informing the public of these changes.

The steady implementation of CBP's biometric entry/exit program in airports across the country has been widely reported in the news.¹⁸ This alternative screening policy, as part of

¹⁷ U.S. Dep't of Homeland Sec., DHS/CBP/PIA-030(c), Privacy Impact Assessment Update for the Traveler Verification Service (TVS): Partner Process, 8 (June 12, 2017) <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-appendixb-july2018.pdf>.

¹⁸ See e.g., Lori Aratani, *Facial-Recognition Scanners at Airports Raise Privacy Concerns*, Wash. Post (Sept. 15, 2018), https://www.washingtonpost.com/local/trafficandcommuting/facial-recognition-scanners-at-airports-raise-privacy-concerns/2018/09/15/a312f6d0-abce-11e8-a8d7-0f63ab8b1370_story.html; Nik Rajkovic, *Report: Airport Facial Recognition Screening Could Delay Passengers*, KTRH (Oct. 2, 2018), <https://ktrh.iheart.com/content/2018-10-02-report-airport-facial-recognition-screening-could-delay-passengers/>; *Delta Opening America's First Facial Recognition Airport Terminal in Atlanta*, CBS News (Nov. 30, 2018), <https://www.cbsnews.com/news/delta-americas-first-biometric-facial-recognition-airport-terminal/>; Thom Patterson, *U.S. Airport Opens First Fully Biometric Terminal*, CNN (Dec. 3, 2018), <http://www.cnn.com/travel/article/atlanta-airport-first-us->

CBP's biometric entry/exit program, affects a significantly large group of U.S. citizens traveling in and out of the country. At the Atlanta Hartsfield-Jackson International Airport alone, "[a]bout 25,000 passengers move through the terminal each week and most are already taking advantage of the technology."¹⁹ Further, "CBP hopes to have facial recognition boarding at all US airports serving international flights within 3 or 4 years."²⁰

On the second requirement, EPIC is an organization "primarily engaged in disseminating information." 6 C.F.R. §5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, "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). EPIC certifies that it is currently engaging in the same type of activities the District Court found sufficient in 2003. EPIC researches on privacy and civil liberties issues, analyzes and turns this raw material into a distinct work, and distributes that work to a wide audience through its website or publications. Every two weeks, for the past twenty three years, EPIC has published and disseminated its newsletter, the *EPIC Alert*, to the public.²¹ EPIC's work is also consistently featured in widely circulated news publications such as Politico, Law 360, Washington Post, New York Times, NPR, Wall Street Journal, The Hill, CBS, and USA Today.²²

In submitting this request for expedited processing, I certify this explanation is true and correct to the best of my knowledge and belief. 6 C.F.R. § 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. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC may receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) "disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government" and (ii) "disclosure of the information is not primarily in the commercial interest" of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC's request satisfies this standard based on the DHS's considerations for granting a fee waiver. 6 C.F.R. §§ 5.11(k)(2)–(3).

biometric-terminal-facial-recognition/index.html; Hugo Martin, *Your Face is Your Passport: American Airlines Launches Biometric Boarding Program*, L.A. Times (Dec. 7, 2018),

<https://www.latimes.com/business/la-fi-travel-briefcase-american-biometric-20181207-story.html>.

¹⁹ Lori Aratani, *Your Face is Your Boarding Pass at this Airport*, Wash. Post (Dec. 4, 2018), <https://www.washingtonpost.com/nation/2018/12/04/your-face-is-your-boarding-pass-this-airport/>.

²⁰ Thom Patterson, *US Airport Opens First Fully Biometric Terminal*, CNN (Dec. 3, 2018), <https://www.cnn.com/travel/article/atlanta-airport-first-us-biometric-terminal-facial-recognition/index.html>.

²¹ See EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

²² See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

Disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2). DHS components evaluate four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure “must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must 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) “[t]he public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

First, the subject of the request concerns “identifiable operations or activities of the federal government.” 6 C.F.R. § 5.11(k)(2)(i). CBP’s alternative screening procedures are conducted as necessary in its already-implemented biometric entry/exit program.²³

Second, disclosure would be “meaningfully informative” regarding the government activity and is “‘likely to contribute’ to an increased understanding of government operations or activities.” Disclosure of the requested documents will be meaningfully informative by providing information on what alternative screening procedures are in place and how CBP has modified those procedures over time. The FAQ page on CBP’s website, along with airport signage, is all the information the public has about their options when they encounter this program at the airport. The tear sheet supposedly provided at the airport is not easily accessible on CBP website—a search of the entire CBP website with the terms “tear sheet” provides links pages dedicated to outdated 2016 biometric-exit tear sheets in many languages.²⁴ On these pages, the documents referenced cannot be accessed. U.S. citizens arrive at the airport with very little information about their options when encountering the biometric entry/exit program and immediately must decide whether to allow their facial image to be captured without knowing the consequences of opting out.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the DHS FOIA regulations, DHS components will “presum[e] that a representative of the news media will satisfy this consideration.” 6 C.F.R. § 5.11(k)(2)(iii).

Fourth, the public's understanding of CBP’s biometric entry/exit program, and specifically, the alternative screening procedures, will “be enhanced by the disclosure to a significant extent.” Although CBP has implemented this program in 22 airports,²⁵ processed

²³ CBP Biometrics Website, *supra* note 4.

²⁴ CBP website search conducted 4:04 PM, (Dec. 11, 2018), <https://search.usa.gov/search?query=tear+sheet&search-button=Search&affiliate=cbpgov>.

²⁵ CBP Biometrics Website, *supra* note 4.

53,400 flights,²⁶ and screened over 5.8 million passengers,²⁷ CBP has not clearly defined its alternative screening procedures. U.S. citizens are left in the dark about their options to opt out of the program. The release of this information will significantly contribute to the public's understanding of their options under the program.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

The “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). The DHS components evaluate two considerations in assessing this requirement: (i) whether there is “any commercial interest of the requester . . . that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure” and “[c]omponents 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.” *Id.*

First, there is no “commercial interest of the requester . . . that would be furthered by the requested disclosure.” 6 C.F.R. § 5.11(k)(3)(i). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.²⁸ EPIC has no commercial interest in the requested records.

Second, “the public interest is greater than any identified commercial interest in disclosure.” 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC is a non-profit organization with no commercial interest in the requested records and has established there is significant public interest in the requested records. The DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS FOIA regulations state “[c]omponents 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.” *Id.* Here, EPIC is a news media requester and this request should satisfy the public interest standard.

For these reasons, a full fee waiver should be granted for EPIC's request.

²⁶ Dep't of Homeland Sec., Data Privacy and Integrity Advisory Committee, Meeting Presentation (Dec. 10, 2018), 19 <https://www.dhs.gov/sites/default/files/publications/SLIDES-DPIAC-Public%20Meeting%2012%2010-2018.pdf>.

²⁷ *Id.*

²⁸ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(e)(4). For questions regarding this request, please contact Enid Zhou at 202-483-1140 x104 or FOIA@epic.org.

Respectfully submitted,

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