



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION

Agency Information Collection Activities: Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization

60-Day Notice and Request for Comments; Revision of an Existing Collection of Information

[1651-0111]

August 22, 2016

---

By a Notice and Request for Comments published on June 23, 2016, the Department of Homeland Security (“DHS”), Customs and Border Protection (“CBP”) proposes to add the following question to the I-94W (Nonimmigrant Visa Waiver Arrival/Departure Record) form and to the Electronic System for Travel Authorization (“ESTA”), “Please enter information associated with your online presence— Provider/Platform—Social media identifier.”<sup>1</sup>

The agency states, “collecting social media data will enhance the existing investigative process and provide DHS greater clarity and visibility to possible nefarious activity and connections by providing an additional tool set which analysts and

---

<sup>1</sup> Notice and Request for Comments, 81 Fed. Reg. 40892 (proposed June 23, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-23/pdf/2016-14848.pdf>.

investigators may use to better analyze and investigate the case.” DHS has provided little other details about the use of the social media identifiers it plans to collect.

Pursuant to DHS’s Notice and Request for Comments, the Electronic Privacy Information Center (“EPIC”) submit these comments to urge the agency to: (1) withdraw its proposal to collect social media identifiers; and (2) review the appropriateness of the agency’s current use of social media analysis.

## **I. Introduction**

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and protect privacy, the First Amendment, and constitutional values.<sup>2</sup> EPIC has a particular interest in preserving the right of people to engage in First Amendment protected activities without the threat of government surveillance.

EPIC previously sued DHS to obtain documents related to a DHS social network and media monitoring program.<sup>3</sup> These documents revealed that the agency had paid over \$11 million to an outside company, General Dynamics, to engage in monitoring of social networks and media organizations and prepare summary reports for DHS.<sup>4</sup> According to DHS documents, General Dynamics would “monitor public social communications on the Internet,” including the public comments sections of NYT, LA Times, Huff Po,

---

<sup>2</sup> EPIC, *About EPIC* (2016), <https://epic.org/epic/about.html>.

<sup>3</sup> EPIC, *EPIC v. Department of Homeland Security: Media Monitoring*, <https://epic.org/foia/epic-v-dhs-media-monitoring/>.

<sup>4</sup> DHS Social Media Monitoring Documents, *available at* <https://epic.org/foia/epic-v-dhs-media-monitoring/EPIC-FOIA-DHS-Media-Monitoring-12-2012.pdf>; *See also* Charlie Savage, *Federal Contractor Monitored Social Network Sites*, NYT (Jan. 13, 2012).

Drudge, Wired’s tech blogs, and ABC News.<sup>5</sup> DHS also requested monitoring of Wikipedia pages for changes<sup>6</sup> and announced its plans to set up social network profiles to monitor social network users.<sup>7</sup>

DHS required General Dynamics to monitor not just “potential threats and hazards” and “events with operational value,” but also paid the company to “identify[] reports that reflect adversely on the U.S. Government [or] DHS . . . .”<sup>8</sup>

Within the documents, DHS clearly stated its intention to “capture public reaction to major government proposals.”<sup>9</sup> DHS instructed the media monitoring company to generate summaries of media “reports on DHS, Components, and other Federal Agencies: positive and negative reports on FEMA, CIA, CBP, ICE, etc. as well as organizations outside the DHS.”<sup>10</sup>

The documents obtained by EPIC through its Freedom of Information Act lawsuit led to a Congressional hearing on DHS social network and media monitoring program.<sup>11</sup> EPIC submitted a statement for the record for that hearing opposing the agency’s media monitoring and called for the immediate cease of the program.<sup>12</sup>

---

<sup>5</sup> *Id.* at 127, 135, 148, 193.

<sup>6</sup> *Id.* at 124, 191.

<sup>7</sup> *Id.* at 128.

<sup>8</sup> *Id.* at 51, 195.

<sup>9</sup> *Id.* at 116.

<sup>10</sup> *Id.* at 183, 198.

<sup>11</sup> *See DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security, 112th Cong. (2012).*

<sup>12</sup> Marc Rotenberg, President and Ginger McCall, EPIC Open Government Project Director, *Statement for the Record for Hearing on DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy* (Feb. 16, 2012), <https://epic.org/privacy/socialmedia/EPIC-Stmnt-DHS-Monitoring-FINAL.pdf>.

DHS now proposes collecting social media identifiers of foreigners seeking to visit the United States in order to scrutinize their social media accounts during the vetting process. EPIC opposes this proposal.

## **II. The Lack of Transparency Surrounding DHS's Proposal Increases the Prospect of Abuse, Mission Creep, and Disproportionate Risks for Marginalized Groups**

DHS has stated that the agency will use the social media identifiers as part of the existing investigative process to screen "alien visitors for potential risks to national security and the determination of admissibility to the United States."<sup>13</sup> Little additional information is provided.

It is not clear how DHS intends to use the social media identifiers. In the past, DHS has monitored social and other media for dissent and criticism of the agency.<sup>14</sup> Will the agency monitor for similar speech that is critical of U.S. policy? Will mere dissent constitute grounds for denying entry into the U.S.? Additionally, will alien visitors who provide their social media identifiers open up their social network associations to scrutiny? How long will social media identifiers be retained and who will they be shared with? How will DHS prevent Muslim and Arab Americans from being scrutinized more harshly?

Additionally, what information will the social media identifiers be combined with? Will DHS use the social media identifiers to obtain additional information about the applicant from the social media companies? Will applicants be informed if the

---

<sup>13</sup> 81 Fed. Reg. at 40892-893.

<sup>14</sup> Marc Rotenberg, President and Ginger McCall, EPIC Open Government Project Director, *Statement for the Record for Hearing on DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, 1-3 (Feb. 16, 2012).

information obtained from their social media accounts led to the denial of their application? Answers to these questions and more need to be provided prior to any consideration of DHS inquiry into social media identifiers of people suspected of no crime.

This lack of transparency around a proposal that will scrutinize the social media accounts of individuals not suspected of any wrongdoing leaves the door open for abuse, mission creep, and the disproportionate targeting of Muslim and Arab Americans among other marginalized groups. This proposal is especially alarming in light of DHS's past monitoring of social media for dissent. DHS has provided no details of how the agency will tailor the use of social media identifiers to ensure their use does not expand beyond the stated purpose or be misused to target individuals merely engaged in First Amendment protected activities.

### **III. Indiscriminate Scrutiny of Social Media Accounts Chills First Amendment Protected Activities**

The DHS proposal to collect social media identifiers of visiting aliens implicates the First Amendment and will have a chilling effect. Freedom of speech and expression are core civil liberties and have been strongly protected by the Constitution and the U.S. courts.<sup>15</sup> These rights extend to non-U.S. citizens.<sup>16</sup>

---

<sup>15</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (holding that the “First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs”).

<sup>16</sup> See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367-388 (2003) (“foreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.”).

Government programs that threaten important First Amendment rights are immediately suspect and should only be undertaken where the government can demonstrate a compelling interest that cannot be satisfied in other way.<sup>17</sup> Government programs that potentially scrutinize online comments, dissent, and criticism for the purpose of vetting alien visitors prior to entry into the U.S. send a chilling message to all users of social media—which increasingly provides important forums to share ideas, engage in debates, and explore new ideas.

Providing one’s social media identifiers may be voluntary, but it is of little comfort. Most applicants will feel pressure to provide the information over concerns that withholding such information will seem suspect and reflect negatively on their application.

#### **IV. EPIC Recommendations**

The problems with collecting social media identifiers and scrutinizing the social media accounts of persons not suspected of any wrongdoing are significant and far-reaching. DHS has provided little transparency in how the agency plans to use social media identifiers collected from alien visitors. Such opaqueness in DHS’s proposal to collect social media identifiers provides little comfort that DHS will provide the transparency necessary to ensure that the program is subject to appropriate oversight and accountability.

EPIC urges DHS to withdraw its proposal to collect social media identifiers from alien visitor applicants. Additionally, EPIC recommends that any current use of social

---

<sup>17</sup> See, e.g., *NAACP v. Button*, 373 U.S. 83 (1963); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

media analysis by DHS should be reviewed to determine whether it is necessary, whether it undermines First Amendment protected activities, and to determine what safeguards are in place and if the safeguards ensure appropriate oversight and public transparency.

**V. Conclusion**

EPIC respectfully requests that DHS reconsider its proposal to collect social media identifiers. The proposal is contrary to First Amendment rights of speech, expression, and association.

Respectfully submitted,

Jeramie D. Scott  
EPIC National Security Counsel