

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

DEPARTMENT OF HOMELAND SECURITY

and the

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

[DHS Docket No. ICEB–2018–0002]

November 6, 2018

By notice published September 7, 2018, the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”) proposes a rule to amend the regulations relating to the apprehension, processing, care, and custody of alien minors and unaccompanied alien children. These regulations were established to implement the settlement agreement reached in the 2001 lawsuit *Flores v. Reno*, known as the *Flores Settlement Agreement* (“FSA”). The FSA and following implementation sought to ensure that “all juveniles in the government’s custody are treated with dignity, respect, and special concern for their particular vulnerability as minors.”¹

These comments focus on Section 401.302 of the proposed rule, which discusses the expansion of sponsor suitability assessments for the release of unaccompanied children from

¹ *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45486 (Sept. 7, 2018).

detention.² EPIC submits these comments to (1) explain how the proposed Suitability Assessments exceed the scope of the Privacy Impact Assessment (“PIA”) for information collected about unaccompanied children and their sponsors, (2) show that the proposed Suitability Assessments frustrate the purpose of the FSA, and (3) urge DHS and HHS to withdraw Section 401.302 of the proposed rule and narrow the collection, use, and disclosure of personal information collected for the Suitability Assessments to that which is necessary to promote the best interests of unaccompanied children.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.³ EPIC has a particular interest in preserving privacy safeguards established by regulation, and routinely comments in public rulemakings on agency proposals that would diminish the privacy rights and agency obligations set out in federal law.⁴

² *Id.*

³ *About EPIC*, EPIC (2018), <https://epic.org/epic/about.html>.

⁴ *See, e.g.*, Comments of the Electronic Privacy Information Center to the Office of Management and Budget, Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act (Oct. 28, 2016), available at: <https://epic.org/apa/comments/EPIC-OMB-Cir-A-108-Comments-10-28-2016.pdf>; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Automated Targeting System, Notice of Privacy Act System of Records and Proposed Rule, DHS-2012-0019 and 2012-0020 (June 21, 2012), available at: <https://epic.org/apa/comments/EPIC-ATS-Comments-2012.pdf>; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0082 (Nov. 28, 2011), available at <http://epic.org/privacy/1974act/EPIC-DHS-2011-0082.pdf>; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0030 (June 8, 2011), available at <http://epic.org/privacy/EPIC%20E-Verify%20Comments%20Final%2006.08.11.pdf>; Comments of the Electronic Privacy Information Center to the Office of the Director of National Intelligence, Notice of Privacy Act System of Records (May 12, 2010), available at http://epic.org/privacy/ODNI_Comments_2010-05-12.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System, System of Records and Notice of Proposed Rulemaking: Implementation of Exemptions; Automated Targeting System (Sept. 5, 2007), available at http://epic.org/privacy/travel/ats/epic_090507.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security United States Customs and Border Protection, Docket No. DHS-2005-0053, Notice of Revision to and Expansion of Privacy Act System of Records (May 22, 2006), available at <http://epic.org/privacy/airtravel/ges052206.pdf>.

I. The Scope of the Suitability Assessments in Section 401.302 of the Proposed Rule Go Beyond What is Necessary for the *Flores* Settlement Agreement

Under the *Flores* Settlement Agreement, HHS is required to “promptly place[] [an unaccompanied child] in the least restrictive setting that is in the best interest of the child[,]”⁵ and must do so “without unnecessary delay[.]”⁶ The proposed rule would allow for “interviews of household members, a home visit, and follow-up visits after release.”⁷ The proposed rule also provides for “[f]ingerprinting of potential sponsors and household members” and criminal records checks for “adult sponsors and other household members.”⁸

Under the previous administration, to release a child from immigration detention, HHS only required fingerprint background checks of potential sponsors who were not a parent or legal guardian of the unaccompanied child.⁹ The proposed rule would subject more people to background checks and increase the dissemination of the background check information for enforcement purposes.

Under the proposed rule, the agency would collect sensitive, personal information from individuals who happen to live in the same household as the sponsor. This information includes name, address, social security numbers, immigration status, and fingerprints. According to a recent memorandum of agreement, this sensitive, personal information will be disclosed to DHS for enforcement purposes.¹⁰ The expanded collection, use, and dissemination of information

⁵ 8 U.S.C. §1232 (c)(2)(A) (2018).

⁶ Stipulated Settlement Agreement at ¶ 14, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997).

⁷ 83 Fed. Reg. 45507.

⁸ *Id.*

⁹ Mark Greenberg, “Statement by Mark Greenberg, Administration for Children and Families, U.S. Department of Health and Human Services, Before the Committee on the Judiciary, U.S. Senate, February 23, 2016,” <https://www.judiciary.senate.gov/imo/media/doc/02-23-16%20Greenberg%20Testimony.pdf>.

¹⁰ Women’s Refugee Commission and National Immigrant Justice Center, “Backgrounder: ORR and DHS Information-Sharing Emphasizes Enforcement Over Child Safety,” 2018, <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-ICE-MOA.pdf>; *Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters*

obtained from Suitability Assessments goes well beyond what is necessary for HHS to determine suitability of potential sponsors under the FSA

II. The data collection, use, and dissemination of Suitability Assessment information under this proposed rule contravenes the Privacy Impact Assessment.

According to Section 208 of the E-Government Act, a federal agency is required to undertake a Privacy Impact Assessment (“PIA”) (1) when the agency “develop[s] or procur[es] information technology that collects, maintains, or disseminates information that is in an identifiable form,” and (2) when an agency “initiat[es] a new collection of information” that “includes any information in an identifiable form.”¹¹ This identifiable information, referred to as PII, is any information in a program or system that allows the identity of an individual to be directly or indirectly inferred.¹² The Office of Management and Budget (“OMB”), for the purposes of the E-Government Act, follows the Clinger-Cohen Act definition of information technology: “any equipment, software or interconnected system or subsystem that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.”¹³

PIAs must analyze and describe what information is to be collected and why, as well as “the intended use of the information” and “with whom the information will be shared (e.g.,

(Apr. 13, 2018), <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1>; 83 Fed. Reg. 20844 (May 8, 2018), <https://www.federalregister.gov/documents/2018/05/08/2018-09902/privacy-act-of-1974-system-of-records>.

¹¹ E-Government Act of 2002, Pub. L. No. 107-347, § 208 (b)(1)(A)(i)-(ii), 116 Stat. 2899 (2002).

¹² U.S. Dep’t of Homeland Sec., Privacy Impact Assessments: The Privacy Office Official Guidance 4 (2010), https://www.dhs.gov/sites/default/files/publications/privacy_pia_guidance_june2010_0.pdf [hereinafter DHS PIA Official Guidance].

¹³ Clinger-Cohen Act of 1996, 40 U.S.C. § 11101(6) (2011) (emphasis added); *See* Exec. Office of the President, Office of Mgmt and Budget, M-03-22, OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002 (Sept. 26, 2003), <https://www.whitehouse.gov/wp-content/uploads/2017/11/203-M-03-22-OMB-Guidance-for-Implementing-the-Privacy-Provisions-of-the-E-Government-Act-of-2002-1.pdf> [hereinafter OMB E-Government Act Guidance].

another agency for a specified programmatic purpose)[.]”¹⁴ Additionally, “The depth and content of the PIA should be appropriate for the nature of the information to be collected and the size and complexity of the IT system.”¹⁵

The HHS Chief Information Officer serves as the Senior Agency Official for Privacy and “ensur[es] privacy receives senior-level recognition and has visibility across the Department.”¹⁶ Each operating division is responsible for “completing and maintaining PIAs on all systems”¹⁷ and has a Senior Official for Privacy “to oversee privacy compliance activities.”¹⁸ The agency is required to make all PIAs available to the public under the E-Government Act of 2002.¹⁹

The current implementation of the FSA contradicts the only published PIA governing the collection, use, and dissemination of information about unaccompanied children.²⁰ According to this PIA, HHS collects or maintains personally identifiable information (“PII”) about public citizens, unaccompanied children, and their sponsors, including social security numbers, dates of birth, names, photographic and biometric identifiers, contact and address information.²¹ The primary purpose of the collection is “to document [unaccompanied children in] custody with HHS and to process their release to sponsors,” and according to the PIA, the information will be used for no secondary purposes.²²

¹⁴ OMB E-Government Act Guidance.

¹⁵ *Id.*

¹⁶ Dep’t of Health and Human Svcs., Privacy Policy Notice (last accessed Nov. 6, 2018) <https://www.hhs.gov/privacy.html>.

¹⁷ Dep’t of Health and Human Svcs., Privacy Impact Assessments (last accessed Nov. 6, 2018) <https://www.hhs.gov/pia/index.html>.

¹⁸ Dep’t of Health and Human Svcs., Privacy Policy Notice (last accessed Nov. 6, 2018) <https://www.hhs.gov/privacy.html>.

¹⁹ Pub. L. 107-347 (2002).

²⁰ U.S. Dep’t of Health and Human Svcs., *Privacy Impact Assessment for the Unaccompanied Alien Children Portal*, Jan. 1, 2015, <https://www.hhs.gov/sites/default/files/acf-unaccompanied-childp.pdf> [hereinafter HHS Unaccompanied Children PIA].

²¹ *Id.*

²² *Id.*

The information collected under a Suitability Assessment is pursuant to a release form that must be signed by a sponsor for a child to leave detention.²³ The PIA states: “*The release is limited to the purpose of obtaining a background check on the sponsor.*”²⁴ The release also “requires the consent of the sponsor and/or unaccompanied child if they agree to have that information released, except under circumstances where another government agency requests information on the sponsor and/or unaccompanied child, in those situations [Office of Refugee Resettlement] will use its discretion.”²⁵

The proposed rule conflicts with the PIA by disseminating information between HHS and DHS routinely. The PIA mandates that requests from other agencies for information on specific unaccompanied children and/or sponsors must follow the Unaccompanied Alien Children Program Operations Manual, which at the time the PIA was published, generally required the unaccompanied child or sponsor to consent to disclosure and that all requests are recorded and archived by HHS staff within the Office of Refugee Resettlement.²⁶ The proposed regulation states that other household members may be fingerprinted (not just the unaccompanied child and sponsor), and this would codify the current administration’s policy of automatically transmitting the fingerprints of all sponsors and all adult household members to DHS to search criminal and immigration databases.²⁷ ICE is already using this information for enforcement purposes against potential sponsors, in direct conflict with the PIA.²⁸ The proposed rule would permit this unnecessary and harmful practice to become codified and expand, as it allows for “interviews of

²³ *Id.*

²⁴ *Id.* (emphasis added).

²⁵ *Id.*

²⁶ *Id.*

²⁷ ORR Policy Guide Section 2.6.2 (2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.6.2>.

²⁸ “*Reinterpretation of Flores Settlement and Its Impact on Family Separation and Catch and Release*,” Hearing before the U.S. Sen. Homeland Sec. and Govt. Affairs Comm. 155th Cong. 2 (2018) (testimony of Matthew Albence).

household members, a home visit, and follow-up visits after release,” as well as fingerprinting of all household members.²⁹

The submission of PII is categorized as “[v]oluntary[,]” but unaccompanied children have no procedures to opt out, since they are in government custody, and “[a] sponsor who wishes to ‘opt out’ will not be allowed to sponsor [an unaccompanied child.]”³⁰ Unaccompanied children remain in detention until a sponsor submits to and passes a background check. So, when a sponsor opts out, it means a child will remain in detention until a different sponsor is found. In instances where a sponsor is not found, the child may remain in detention indefinitely.³¹

Although the PIA states that the submission of PII by individuals is “voluntary,”³² when HHS and DHS violate the PIA as a matter of policy, it is impossible for individuals to give meaningful consent. Even if HHS and DHS were acting in accordance with the dissemination procedures, sponsors and their household members are put in a coercive situation: either submit to a background check and risk adverse immigration consequences, such as the deportation of oneself and one’s family members, or allow a child, often a family member, to remain detained.³³ *Time Magazine* documented this dilemma: “‘I did not want to do the fingerprints, but I had no choice,’ said [Marvin Puerto, a] 29-year-old construction worker.”³⁴

²⁹ 83 Fed. Reg. 45507.

³⁰ *Id.*

³¹ *Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters* (Apr. 13, 2018), <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1>.

³² HHS Unaccompanied Children PIA, *supra* note 20; Gisela Salomon and Claudia Torrens, *Immigrant Parents Face Tougher Rules to Get Children Back*, *Time*, Sept. 22, 2018, <http://time.com/5403954/immigrants-tougher-rules-children-back/>.

³³ Gisela Salomon and Claudia Torrens, *Immigrant Parents Face Tougher Rules to Get Children Back*, *Time*, Sept. 22, 2018, <http://time.com/5403954/immigrants-tougher-rules-children-back/>.

³⁴ *Id.*

For Adan, a 27-year-old Guatemalan living in south Florida, leaving his 17-year-old sister in detention was out of the question. He followed the process and was given custody of her. Now, he wants to leave his apartment.

“I feel I need to move to have a sense of security”, said the landscaper about ICE knowing where he lives. He did not provide a last name because of his immigration status.³⁵

III. By contravening the Privacy Impact Assessment, the proposed rule frustrates the very purpose of the Suitability Assessments and undermines privacy to harm uniquely vulnerable individuals.

The proposed rule seeks to amend the regulations that codify the protections established by the FSA for children in immigration detention. These regulations require HHS to “promptly place[] [an unaccompanied child] in the least restrictive setting that is in the best interest of the child[,]”³⁶ and to do so “without unnecessary delay[.]”³⁷ The policy choices made by the current administration, that would be given legal force should the proposed rule be adopted, would go directly against this purpose. Experts believe that the reason children are remaining in detention nearly twice as long as they were in 2016 is because of the policy of collecting fingerprints from all household members and then transferring the information to DHS for enforcement purposes.

ICE admits it is now using information collected for Suitability Assessments intended to facilitate the release of unaccompanied children to family members. According to ICE official Matthew Albence, ICE has arrested 41 potential sponsors subsequent to these expanded

³⁵ *Id.*

³⁶ 8 U.S.C. §1232 (c)(2)(A) (2018).

³⁷ Stipulated Settlement Agreement at para. 14, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997).

background checks, as of September 2018.³⁸ 70% of the arrested potential sponsors were taken into custody solely for immigration violations.³⁹

Since the informal adoption of the procedures described in the proposed rule in 2017, the number of children in HHS custody has increased, with more than 13,000 in custody as of September 2018, as opposed to monthly averages of 4,000 to 9,000 in 2016.⁴⁰ In fact, according to a report issued in October 2018, an HHS official stated that detained children now spend an average of 74 days in federal custody, more than twice the average time spent in custody in 2016.⁴¹ Some unaccompanied children spend as long as seven or eight months detained.⁴² The rates of release dropped from 52,147 in Fiscal Year 2016 to 32,112 in Fiscal Year 2018,⁴³ prompting the growth of the temporary tent facility where unaccompanied children are detained in Texas.⁴⁴ Experts and a former HHS official under the Obama administration have declared the new memorandum of agreement between DHS and HHS, which expanded data collection and

³⁸ “*Reinterpretation of Flores Settlement and Its Impact on Family Separation and Catch and Release*,” Hearing before the U.S. Sen. Homeland Sec. and Govt. Affairs Comm. 155th Cong. 2 (2018) (testimony of Matthew Albence).

³⁹ Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN Sept. 20, 2018, <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

⁴⁰ Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN, Sept. 20, 2018, <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>; Tal Kopan, *The simple reason more immigrant kids are in custody than ever before*, CNN, Sept. 14, 2018, <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>; Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, *The New Yorker*, Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

⁴¹ Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, *The New Yorker*, Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>; Kandel, William, *Unaccompanied Alien Children: An Overview*, 10, published January 2017, <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

⁴² First Amended Class Action Complaint and Petition for a Writ of Habeas Corpus, *Minor v. Lloyd* (E.D.Va. 2018) para. 59 (<https://www.justice4all.org/wp-content/uploads/2018/07/Amended-Class-Complaint-and-Habeas-Petition-Anonymized.pdf>).

⁴³ Unaccompanied Alien Children Released by State, HHS Office of Refugee Resettlement, updated September 27, 2018, <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

⁴⁴ *Id.*

dissemination between the agencies, as the reason children remain in custody for longer periods.⁴⁵

The American Academy of Pediatrics stated that detention can permanently impair children, causing musculoskeletal, gastrointestinal, respiratory, and neurologic, anxiety and depression issues.⁴⁶ This goes against the purpose of the proposed rule to protect immigrant children. The proposed rule also targets other vulnerable individuals, such as the members of the sponsor's households, who are often undocumented immigrants themselves. Immigrant sponsors and household members have been intimidated by the need to submit fingerprints: "the whole thing scared me," said one potential sponsor.⁴⁷

IV. Conclusion

Section 401.302 of the proposed rule conflicts with the PIA on the handling of information relating to the release of unaccompanied children and forces children and their families to experience harm at the hands of government. Because the proposed rule and the agency practices it would codify are in direct conflict with the PIA and frustrate the purpose of obtaining sponsors for unaccompanied children, HHS and DHS should abandon the policy of expanded collection and dissemination to DHS, and as such, Section 401.302 of the proposed rule should be withdrawn.

⁴⁵ Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN Sept. 20, 2018, <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

⁴⁶ Linton JM, Griffin M, Shapiro AJ, American Academy of Pediatrics, *Detention on Immigrant Children*, Apr. 2017.

⁴⁷ Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, The New Yorker, Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

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