

**Before the Immigration and Naturalization Service
Washington, DC 20536**

Manifest Requirements Under Section 231 of the Act
INS No. 2182-01

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

February 3, 2003

Pursuant to the notice published by the Immigration and Naturalization Service ("INS") regarding a proposed rule requiring commercial carriers to submit passenger manifest information, 68 Fed. Reg. 292 (January 3, 2003), the Electronic Privacy Information Center ("EPIC") submits the following comments on the privacy and constitutional implications of the proposed rule. Because the INS has failed to comply with applicable statutory requirements, we request the publication of a revised notice and an opportunity for the public to comment on such new notice.

The proposed rule implements section 402 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Pub. L. 107-173) ("Border Act"). Section 402 of the Border Act amends section 231 of the Immigration and Nationality Act by requiring that commercial carriers transporting passengers to or from the United States deliver arrival and departure manifest information electronically to the INS.¹ Previously, similar information concerning non-United States persons was collected in paper form through Form I-94. The proposed rule would require the electronic submission of manifest information. More significantly, however, the proposed rule would amend current INS regulations that exempt United States persons from the collection of arrival and departure manifest information. Under the proposed rule, manifest information would, for the first time, be collected for all passengers, including United States citizens and

¹ Manifest information includes: complete name; date of birth; citizenship; sex; passport number and country of issuance; country of residence; United States visa number, date, and place of visa issuance, where applicable; alien registration number, where applicable; United States address while in the United States; and "such other information as the Attorney General, in consultation with the Secretaries of State and the Treasury, determines is necessary for the identification of the persons transported, for the enforcement of the immigration laws, and to protect public safety and national security." 68 Fed. Reg. 293.

lawful permanent residents. This proposed change raises significant issues under both the Privacy Act, 5 U.S.C. § 552a, and the Constitution.

INS Failure to Comply with the Privacy Act

The Privacy Act applies to an agency's creation and maintenance of a "system of records," which is defined as a group of records under the control of an agency "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). A "record" is any item or collection of information about an individual which is maintained by an agency and which contains that individual's name or other identifying particular. 5 U.S.C. § 552a(a)(4); *see also White v. Civil Service Comm'n*, 589 F.2d 713 (D.C. Cir. 1978). Significantly (in light of the proposed rule's extension of manifest information requirements to United States persons), the Act defines "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2).

When an agency seeks to create and maintain a system of records, as the INS does here, the Privacy Act imposes certain requirements that must be met. A fundamental requirement is that an agency must inform an individual from whom it proposes to collect information of its statutory authority; whether response is voluntary or mandatory; the principal purposes and routine uses of the information; and the effects of refusal to provide it. 5 U.S.C. § 552a(e)(3). The Act further provides that an agency is to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President. 5 U.S.C. § 552a(e)(1). The proposed rule addresses none of these issues and is thus clearly deficient under the Privacy Act.

An agency must also publish, at least annually in the Federal Register, notice of the existence of each system of records it maintains, as well as information about that system including the name and location; the categories of records and sources of records in it; the routine uses of the information; and the procedures by which access and correction can be requested. 5 U.S.C. § 552a(e)(4). We are unaware of any notice being published by the INS that meets these requirements with respect to the proposed expansion of the manifest information requirements to include United States persons, as the Privacy Act clearly requires.

Given the failure of the INS to publish information concerning the purpose and use of the manifest information it seeks to collect concerning United States persons, as it is legally required to do, EPIC and other commenters are currently unable to submit comprehensive comments on the proposed rule. We therefore request that the INS publish an amended notice that complies with the Act's requirements and provide the public with an opportunity to submit comments on that amended notice. We expressly reserve our right to supplement these comments once the INS has provided the legally required information that will facilitate informed comments on the Privacy Act implications of the proposed rule.

While we believe that the INS has not yet provided adequate information to permit an evaluation of the proposed rule's legality, we note initially that the proposed collection of detailed travel information concerning United States persons clearly raises serious questions under subsection (e)(7) of the Act. The subsection provides that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment, unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7).² Government collection of information detailing the international travel of United States persons would appear to run afoul of that prohibition and would, as we discuss below, raise additional constitutional issues.

Impact on Constitutionally-Protected Rights

The Supreme Court has long recognized that there is a constitutional right to travel internationally. The right to travel is "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards . . .," but "a virtually unconditional personal right." *Shapiro v. Thompson*, 394 U.S. 618, 642-643 (1969); *see also Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values."). The INS has failed to explain its

² It has been held that subsection (e)(7) applies to a "record" even if it is not incorporated in a "system of records." *Clarkson v. IRS*, 678 F.2d 1368, 1374-77 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 918-20 (D.C. Cir. 1980).

rationale for collecting information about the international travel of citizens, thus raising questions as to the legitimacy of the burden such collection would impose on the exercise of this constitutionally-protected right.

It would, for instance, be constitutionally suspect for the INS (and the government generally) to collect travel data for the purpose of determining or monitoring the associations of citizens. Manifest information clearly can be used for such purposes; the INS acknowledges, for instance, that it seeks to "analyze the patterns and associations of alien smugglers on a real-time basis." 68 Fed. Reg. at 300. A governmental desire to track individuals' movements, and its attempt to do so through a blanket provision that collects and archives travel information from all travelers, would clearly violate the right to associate anonymously, a right that would be burdened by a government program specifically designed to monitor associations.

The Supreme Court has long recognized a right to associate anonymously. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). *See also Shelton v. Tucker*, 364 U.S. 479, 485 (1960). To the extent that the proposed collection of personally identifying information would enhance the government's ability to track the movements and associations of United States persons, it would clearly implicate individuals' right to travel internationally and to associate anonymously.

Conclusion

For the foregoing reasons, we submit that the INS is required to publish an amended notice of its proposed rulemaking, expressly addressing the matters that the Privacy Act mandates. Compliance with the Act's requirements is particularly critical here, where the agency proposes an unprecedented practice of collecting and maintaining detailed information about the international travel of United States citizens absent particularized suspicion. Upon publication of a revised notice, EPIC and the public at large should be provided an opportunity to submit additional comments addressing the Privacy Act and constitutional implications of the proposed INS action.

Respectfully submitted,

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