

Attn: Jonathan R. Cantor
Acting Chief Privacy Officer
Privacy Office
Department of Homeland Security
Washington, DC 20528-0655

Re: 82 Fed. Reg. 43556, Docket No. DHS-2017-0038; Notice of Modified Privacy Act System of Record

October 18, 2017

Dear Mr. Cantor:

Muslim Advocates, a civil rights organization dedicated to ensuring the free and peaceful practice of all faiths, writes to express its deep concern regarding the Department of Homeland Security’s (“DHS”) profoundly vague and expansive notice, published September 18, 2017, regarding its collection and usage of social media. Under this notice, DHS will collect and retain “social media handles, aliases, associated identifiable information, and search results” for the inclusion in the official record of an individual’s visa and immigration history, or Alien Files (“A-Files”).¹ Perhaps most problematically, this incredibly broad category of information collection will apply to permanent residents and naturalized citizens, meaning that DHS will continue to retain, share, and use (and potentially, continue to collect) this sensitive information long after these individuals become U.S. citizens—despite any compelling need to do so.

DHS’s notice is simply another extension of this administration’s targeting of immigrants—particularly those who are Muslim—through broadly-defined policies that are ripe for discriminatory implementation. As discussed below, DHS’s policy will chill freedom of speech and association, invade the privacy of both immigrants and U.S. citizens through its unchecked collection of swaths of information on them, and create a discriminatory tier-based system between naturalized citizens and U.S.-born citizens—all without any evidence of a national security benefit. For all of these reasons, Muslim Advocates urges DHS to reconsider this deeply flawed and fundamentally misguided policy.

I. Introduction

DHS’s notice raises a number of serious questions about how it uses social media as a method of surveillance. Under the notice, DHS will collect an unduly broad and undefined amount of social media information on visa applicants, legal permanent residents (*i.e.*, green card holders), and naturalized citizens. It will then store this information in each individual’s A-File—a government record-keeping system that tracks individuals as they move through the immigration process and determines whether they receive residency in the United States—for up to *100 years* after the individual’s date of birth.

¹ See Docket No. DHS-2017-0038 [82 F.R. 43556], published Sept. 18, 2017, *available at* <https://www.federalregister.gov/documents/2017/09/18/2017-19365/privacy-act-of-1974-system-of-records>.

Under DHS’s notice, they can also use this information for purposes beyond an individual’s A-File. The notice outlines dozens of such scenarios, including intelligence gathering and counterterrorism. The notice further explains that DHS can share this data with many other parties, including other government agencies, state and local authorities, foreign governments, and even private parties.² Despite this expansive use, DHS has failed to clarify the parameters of such collection, including how the information collected can be used or shared after an individual becomes a naturalized citizen.

While the notice does not explicitly single out any religious group or nationality, there is ample evidence to suggest that it will disproportionately affect Muslims and their relations, including their relations in the United States. Their communications with any individual subject to this notice via social media will necessarily be implicated. As such, this policy chills speech and association, invades privacy, and places a particularly heavy burden on an entire group of individuals—simply because of their religious background.

II. DHS’s Social Media Collection Will Disproportionately Burden Muslims.

DHS’s incredibly expansive collection, retention, and sharing of highly sensitive information is problematic in itself. But when viewed in the context under which it arises, the purpose of this notice is clear: to target immigrants, particularly those who are Muslim.

The Trump administration has already disproportionately targeted Muslim travelers and immigrants while signaling repeatedly that it intends to continue. It has single-mindedly pushed restrictions on such individuals entering the country by repeatedly issuing and defending what President Trump refers to as a “Muslim ban.”³ The administration has also continued to impose burdensome and invasive administrative hurdles on visa applicants—particularly Muslims—through its so-called “extreme vetting” measures. Such policies already ask for social media handles (along with a litany of other items, such as travel history, employment history, and familial history).⁴ These measures are part and parcel of the policies intended to disproportionately burden Muslim travelers. And they have: Within the first four months of the Trump presidency, the number of non-immigrant visas issued to people from Muslim-majority countries declined by 20% compared to monthly averages from last year.⁵ Visas issued in the six

² *Id.* at 43561.

³ Matt Zapposky, *Second Judge Rules Against Latest Travel Ban, Saying Trump’s Own Words Show It Was Aimed at Muslims*, WASHINGTON POST (Sept. 15, 2017), available at https://www.washingtonpost.com/world/national-security/second-judge-rules-against-latest-travel-ban-saying-trumps-own-words-show-it-was-aimed-at-muslims/2017/10/18/5ecd44-b3ed-11e7-9e58-e6288544af98_story.html?utm_term=.8851400a0c8c.

⁴ Yeganeh Torbati, *Trump Administration Moves to Make Tougher U.S. Visa Vetting Permanent*, REUTERS (Aug. 3, 2017), available at <https://www.reuters.com/article/us-usa-immigration-visa/trump-administration-moves-to-make-tougher-u-s-visa-vetting-permanent-idUSKBN1AJ2UC>.

⁵ Nahal Toosi and Ted Hesson, *Visas to Muslim-Majority Countries Down 20 Percent*, POLITICO (May 25, 2017), available at <http://www.politico.com/story/2017/05/25/trump-muslim-visas-238846>.

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countries targeted by the second Muslim ban were down 55% compared with the 2016 monthly average.⁶ In addition, countless Muslims and people from Muslim-majority countries have been detained and questioned regarding their religious beliefs.⁷

In addition, President Trump's anti-Muslim rhetoric, which was a vital component of his campaign speeches and rallies, has continued into his presidency. As the most recent ruling enjoining his current version of the Muslim ban makes clear, these anti-Muslim comments have continued up to the present day.⁸

We have highlighted only a small sampling of the myriad of anti-Muslim and anti-immigrant policies and comments stemming from President Trump and his administration.⁹ The takeaway of all this, however, is clear: in this political climate, we are deeply concerned that DHS's proposed policies will grossly invade the rights and chill the speech of many—particularly Muslims. Such a vast collection and retention of social media may also serve as the groundwork for two of President Trump's repeatedly-urged policies: a "Muslim registry" and the exclusion of individuals on ideological grounds. We therefore urge DHS to reconsider its policy.

III. DHS's Expansive Collection and Retention of Social Media Will Have a Chilling Effect on Freedom of Speech and Association.

DHS's social media collection will not just impact Muslims—it will impact anyone likely to associate or communicate with them online. The broad collection and extended retention of such information—coupled with DHS's expansive authority to share such information with local and foreign governments, or even private actors—will likely result in individuals refraining from posting certain opinions, reacting to certain articles, visiting certain locations, associating with certain people that may raise suspicion, or simply be embarrassing. Given that studies have

⁶ Nahal Toosi and Ted Hesson, *Visas to Muslim-Majority Countries Down 20 Percent*, POLITICO (May 25, 2017), <http://www.politico.com/story/2017/05/25/trump-muslim-visas-238846>; see also Yeganeh Torbati, *Trump Administration Moves to Make Tougher U.S. Visa Vetting Permanent*, REUTERS (Aug. 3, 2017) (noting that immigration attorney found that every single one of his Iranian clients applying for visas since June 2017 has been subject to enhanced "extreme vetting" questionnaire, and that other immigration attorneys have found similar impositions on their Iraqi and Libyan clients).

⁷ Muslim Advocates, *"Extreme Vetting" Comment*, Oct. 2, 2017, at 6-8 (providing examples of invasive questioning targeted at Muslims).

⁸ *IAAB et al. v. Trump et al.*, 8:17-cv-02921-TDC, ECF No. 46, Oct. 17, 2017 (noting that President Trump's anti-Muslim comments have continued into recent months, including tweets in support of a tougher Muslim ban and a tweet endorsing General John Pershing's purported massacre of Muslims with bullets dipped in pig's blood, in which President Trump then advised people to "[s]tudy what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!").

⁹ See, e.g., Jenna Johnson and Abigail Hauslohner, *'I think Islam hates us': A timeline of Trump's comments about Islam and Muslims*, WASHINGTON POST (May 20 2017), available at https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.5210d4659105.

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repeatedly shown that people alter their behavior if they are aware (or fearful) of being watched,¹⁰ this reality is more than a mere hypothetical.

Muslims have already faced increased hurdles and scrutiny in this context.¹¹ And as a result of their enhanced likelihood of being targeted by this policy, Muslims will be uniquely impacted by the chilling effect posed by government surveillance, particularly those who want to study, work, visit, or associate with friends or relatives in America.¹²

The implications of this chilled speech are far reaching. Individuals may limit their communications with others whom they perceive to be immigrants—including naturalized U.S. citizens—for fear of surveillance of their activities by association. This can have serious consequences for vital political and business interests: journalists, human rights activists, and scholars are only a handful of the people whose work will be affected.

In addition to chilling these individuals' right to associate, it will stigmatize immigrant communities through no fault of their own. Finally, DHS's policy triggers the dangerous likelihood that its policy will be replicated in other countries, many of which punish activity that would be protected speech here. Increased surveillance is thus a real result of this policy, not just in the United States but abroad.

IV. The Categories of Information Subject to Collection Are Dangerously Broad, Violate Privacy, and Treats Naturalized Citizens as Second-Class Citizens.

Although DHS has alleged that this protocol is not a departure from its previous practices,¹³ the categories of information covered under its notice are virtually limitless. The collection of “social media handles, aliases, associated identifiable information, and search results” will result in the retention of a large swath of information on individuals without any basis for suspicion. These individuals may have numerous social media handles, including on platforms that they do not routinely use. And “associated identifiable information” may include a host of items: social

¹⁰ See, e.g., Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L. J. 1, 117 (2016) (finding a statistically significant decrease in traffic to Wikipedia articles on topics that raise privacy concerns following Edward Snowden's NSA/PRISM online surveillance revelations); Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NTIA (May 13, 2016) (finding Americans' concerns with online privacy and security have led them to limit their online activity), available at <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

¹¹ Don Melvin and Molly Roecker, Muhammad Ali Jr. *Detained at Airport, Asked About Being Muslim: Lawyer*, NBC NEWS (Feb. 25, 2017), available at <https://www.nbcnews.com/news/us-news/muhammad-ali-jr-detained-airport-asked-about-being-muslim-lawyer-n725571>.

¹² Adolfo Flores, *People Are Worried About DHS Plans To Gather Social Media Info*, BUZZFEED (Sep. 28, 2017), available at https://www.buzzfeed.com/adolfoflores/people-are-worried-about-dhs-plans-to-gather-social-media?utm_term=.ejk1wa4VD#kgxpx7qbZ.

¹³ Novak, Matt, *US Homeland Security Says Tracking Social Media is Nothing New*, GIZMODO (Sept. 28, 2017), available at <https://gizmodo.com/us-homeland-security-says-tracking-social-media-of-immi-1818875395>.

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media handles are frequently used for sign-on to a wide variety of web services, and each one may generate a trail of additional information. It is also unclear whether there is any temporal limitation with respect to how far back DHS will go to collect social media information.

DHS's notice raises additional concerns about the broad range of data sources from which it may collect social media, including "publicly available information obtained from the internet," data from "commercial data providers," and information "pursuant to information sharing agreements."¹⁴ In addition, the inclusion of "search results" further broadens the scope of collection.¹⁵ "Search results" could mean Google searches, searches of other online databases, or searches of particular social media websites—a potentially limitless amount of information. These data sources reveal how little verification may be involved in DHS's broad collection.

Given that such information will be stored for up to 100 years in an individual's A-File—in other words, during the pendency of their immigration evaluation and well beyond—the concern for misuse is severe. As a result, the over 20-million naturalized citizens in the United States will be subject to what is essentially second class status: their social media information will be collected, retained, and potentially shared extremely broadly, a risk that U.S.-born citizens will not share. Such a policy therefore serves to stigmatize naturalized citizens through no fault of their own.

The mosaic of information subject to collection under this policy will reveal much about the millions of visa-holders, lawful permanent residents, and naturalized citizens. DHS will be able to collect information on their relationships, personal preferences, religious views, political opinions, and other matters protected under the First Amendment—including large amounts of information that is easily misconstrued and otherwise irrelevant to immigration decisions. As a result, DHS will have endless information from which it can draw unreasonable negative inferences about Muslims, and more venues in which vulnerable and innocent Muslims will be targeted. Without any clear explanation from DHS as to the need for its policy, the potential for misuse is real.

V. The Evidence Does Not Support a National Security Benefit from Collecting and Retaining Social Media Information.

Despite pushing a proposal that chills speech, invades privacy, and burdens a religious group and its associates, there is no evidence that social media monitoring is effective from a national security perspective.¹⁶ First, social media is notoriously subjective. Posts on Twitter or Facebook may be sarcastic, aimed to provoke, or otherwise misinterpreted from a variety of reasons, whether analyzed by individuals or algorithms.¹⁷ The unlimited discretion afforded to

¹⁴ See Docket No. DHS-2017-0038 [82 F.R. 43556], published Sept. 18, 2017.

¹⁵ *Id.*

¹⁶ Harsha Panduranga, Faiza Patel, and Michael W. Price, *Extreme Vetting & The Muslim Ban*, BRENNAN CTR. FOR JUSTICE (Oct. 2, 2017), available at <https://www.brennancenter.org/publication/extreme-vetting-and-muslim-ban>.

¹⁷ See, e.g., Ahmed Abbasi, Ammar Hassan, & Milan Dhar, *Benchmarking Twitter Sentiment Analysis Tools* (concluding that the most commonly found errors in text-analysis tools for social media involve the use of jokes, (continued...))

DHS under this policy to collect a broad category of information, interpret it (literally, if it is in another language, or figuratively), and ultimately use it as it unilaterally sees fit, raises serious concerns about the potential for implicit bias or explicit discrimination—particularly in a political climate that already targets immigrants and Muslims.¹⁸

Empirical evidence also fails to support DHS’s expansive and dangerous policy. Research consistently shows that expressive conduct—such as that on social media—is not a valid predictor of one’s propensity to commit an act of violence.¹⁹ A recent independent audit of DHS’s pilot program to collect social media raised serious questions about its validity and effectiveness.²⁰ Among other things, the audit found that DHS had enacted insufficient metrics to ensure the programs’ effectiveness, without which the programs have minimal utility in enacting further social media screening initiatives.²¹ Finally, simple common sense undermines DHS’s entire policy: a true bad actor can easily manipulate his or her social media presence to deflect attention.

VI. Conclusion

There is no justification for the systematic collection, analysis, and retention of the social media information of visa-holders, lawful permanent residents, and naturalized citizens. For all the reasons above, we urge DHS to reconsider this deeply problematic policy.

Please do not hesitate to let us know if we can provide any additional information. You may contact us directly at juvaria@muslimadvocates.org or (202) 897-1896.

Respectfully Submitted,

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sarcasm, and literary devices), *available at* https://www.researchgate.net/profile/Ammar_Hassan6/publication/273000042_Benchmarking_Twitter_Sentiment_Analysis_Tools/links/54f484d70cf2ba6150634593.pdf.

¹⁸ Vivian Yee, *‘They Treated Us Like Criminals’: U.S. Border Crossers Report Severe Reception*, N.Y. TIMES (May 2, 2017), *available at* <https://www.nytimes.com/2017/05/01/us/customs-airports-trump.html>; *see also* Kendall Brown, *Muslim Advocates Files Lawsuits About Electronic Privacy and Profiling Abuses at Borders and Airports*, MUSLIM ADVOCATES (May 3, 2017), *available at* <https://www.muslimadvocates.org/foia-lawsuits/>.

¹⁹ Harsha Panduranga, Faiza Patel, and Michael W. Price, *Extreme Vetting & The Muslim Ban*, BRENNAN CTR. FOR JUSTICE (Oct. 2, 2017), Oct. 2, 2017, *available at* <https://www.brennancenter.org/publication/extreme-vetting-and-muslim-ban>

²⁰ Office of Inspector General, *DHS’s Pilots for Social Media Screening Need Increased Screening to Ensure Scalability and Long-term Success*, Feb. 27, 2017, *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

²¹ *Id.*