



BY EMAIL  
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June 14, 2016

Karen Neuman  
Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 29528-0655

Dear Ms. Neuman:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”), U.S. Customs and Border Protection (“CBP”).

EPIC seeks the Report drafted as a result of the 1:1 Facial Recognition Air Entry Pilot program that ran from March 2015 to May 2015. CBP has used the findings contained within the report to expand the program nationwide.

#### Document Requested

1. The Report detailing all findings from the 1:1 Facial Recognition Air Entry Pilot (subsequently renamed “1-to-1 Facial Comparison Project”) implemented in 2015.
2. Any and all technical specifications for facial recognition and data retention as deployed in both the 1:1 Facial Recognition Air Entry Pilot and the expanded 1:1 Facial Comparison Project.
3. Any and all Requests for Proposal, contracts, grant allocations, and Statements of Work related to the 1:1 Facial Comparison Project.

#### Background

CBP is implementing facial recognition software to assist CBP Officers in assessing the identity of entering U.S. citizens, as well as first-time travelers from the 38 countries subject to

the Visa Waiver Program (“VWP”). The 1-to-1 Facial Comparison Project was announced following a sixty-day pilot beginning March 2015, and now extends to nationwide air ports of entry. It is mandatory for all individuals selected for facial comparison; there is no opt-out.<sup>1</sup>

In March 2015, CBP began a sixty-day field test of facial recognition software meant to assist officials in verifying the identity of passport-holders during inspection.<sup>2</sup> The algorithm compared images of randomly selected U.S. citizens captured during inspection to the facial image encoded on the citizen’s biometric e-Passport, and issued a match confidence score from 0 to 100.<sup>3</sup> Within the pilot parameters, CBP collected photographs, match results, passport issuance date and (if sent to secondary screening) origin, and determination of traveler age.<sup>4</sup>

In January 2016, CBP expanded the program (now renamed 1-to-1 Facial Comparison Project) to cover individuals traveling to the United States subject to VWP, as well as detail operations of the national rollout.<sup>5</sup> While the biometric data will only be retained for persons subject to additional inspection that results in adverse action,<sup>6</sup> it will be searchable by timestamp by agency officials.<sup>7</sup>

The Pilot PIA stated an intent to draft a Report summarizing the findings of the pilot. CBP also reserved the option of sending the Report to the Office of Biometric Information Management, as well as DHS Science and Technology in order to provide “awareness of the overall *findings* of the pilot.”<sup>8</sup>

CBP did draft such a Report. In the PIA for the expansion of the program, the nationwide expansion was justified by the findings “documented in a *comprehensive pilot report* that included analysis of the impact to arrival processing operations, comparison of the performance of multiple facial comparison algorithms, and an assessment of appropriate scoring thresholds to ensure that only possible imposters were referred for additional inspection.”<sup>9</sup> The updated PIA did not indicate whether the Report was in fact disseminated to OBIM or DHS S&T.

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<sup>1</sup> U.S. Customs and Border Protection, *CBP 1-1 Facial Comparison Project Tear Sheet* at 1, [https://www.cbp.gov/sites/default/files/documents/600339%20-%201%20to%201%20Face%20ePassport%20-%20TEAR%20SHEET%20\(REVISED\)%20-%20FINAL%20\(web%20ready\).pdf](https://www.cbp.gov/sites/default/files/documents/600339%20-%201%20to%201%20Face%20ePassport%20-%20TEAR%20SHEET%20(REVISED)%20-%20FINAL%20(web%20ready).pdf).

<sup>2</sup> See U.S. Customs and Border Protection, *1:1 Facial Recognition Air Entry Pilot Privacy Impact Assessment* (March 11, 2015) [hereinafter Pilot PIA], <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-1-to-1-facial-recognition-20150311.pdf>.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> See U.S. Customs and Border Protection, *1:1 Facial Comparison Project Privacy Impact Assessment Update* (Jan. 14, 2016) [hereinafter Expansion PIA], <https://www.dhs.gov/sites/default/files/publications/DHS-CBP-PIA%20%E2%80%93%20025a%201-1%20Facial%20Comparison%20Project.pdf>.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> Pilot PIA at 3, 4.

<sup>9</sup> Expansion PIA at 3, 4.

## Expedited Processing

This request warrants expedited processing because (1) it is made by a “person primarily engaged in disseminating information” and (2) it pertains to a matter about which there is an urgency to inform the public about an actual or alleged federal government activity.”<sup>10</sup>

EPIC is “primarily engaged in disseminating information.”<sup>11</sup> Further, EPIC takes an active role in pursuing developments in government use of biometric information.<sup>12</sup> EPIC is also engaged in longstanding litigation regarding airport privacy.<sup>13</sup> EPIC has advised Congress and government agencies regarding proposed public<sup>14</sup> and private<sup>15</sup> use of facial recognition technologies.

The “urgency to inform the public” derives from the rapid expansion and broad scope of the facial recognition program, as well as the sensitive nature of the collected data. Less than a year elapsed between the commencement of the pilot program and the national expansion, which will apply indefinitely at every U.S. point of entry.<sup>16</sup>

Moreover, mandatory deployment of facial recognition technology applying to millions of citizens and non-citizens carries unique privacy and security concerns. Facial recognition accuracy is often contested, and research indicates certain algorithms can create or accentuate disparate impact depending on implementation.<sup>17</sup> The implementation of the program will admittedly vary according to the discretion of each supervisory CBPO.<sup>18</sup>

The requested documents should contain precisely the type of information necessary to allay such concerns. The Report details the accuracy threshold that the agency finds acceptable, as well as the parameters comparing the validity of the algorithms tested.<sup>19</sup> CBP found the

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<sup>10</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

<sup>11</sup> *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (“[T]he Court concludes that EPIC is indeed “primarily engaged in disseminating information” for the purposes of expediting the request.”).

<sup>12</sup> See, e.g., EPIC, *Comments of the Electronic Privacy Information Center* (June 14, 2013), <https://epic.org/privacy/biometrics/EPIC-OBIM-Cmts.pdf>; Letter to Department of Justice Re: Next Generation Identification System (May 27, 2016), <https://epic.org/privacy/fbi/coalition-letter-urges-public-comment-extension-on-NGI.pdf>.

<sup>13</sup> EPIC, *EPIC v. DHS (Suspension of Body Scanner)*, <https://epic.org/privacy/litigation/apa/tsa/bodyscanner/>.

<sup>14</sup> EPIC, *Spotlight on Surveillance: FBI’s Next Generation Identification System* (December 2013), <https://epic.org/privacy/surveillance/spotlight/ngi.html>.

<sup>15</sup> EPIC, *In re Facebook II*, [http://epic.org/privacy/facebook/in\\_re\\_facebook\\_ii.html](http://epic.org/privacy/facebook/in_re_facebook_ii.html).

<sup>16</sup> Expansion PIA at 3.

<sup>17</sup> See Claire Garvie & Jonathan Frankle, *Facial-Recognition Software Might Have a Racial Bias Problem*, THE ATLANTIC (Apr. 7, 2016), <http://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/>.

<sup>18</sup> Pilot PIA at 3.

<sup>19</sup> Expansion PIA at 4.

findings detailed in report sufficiently persuasive to justify national expansion of the Project as a “routine part of processing.”<sup>20</sup>

### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.<sup>21</sup> Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.<sup>22</sup>

Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.<sup>23</sup> According to the agency’s regulations, a fee waiver should be granted because (i) the subject of the request concerns “the operations or activities of the government”; (ii) disclosure is “likely to contribute” to an understanding of government operations or activities and the information is not already in the public domain; (iii) the disclosure “will contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and EPIC has the “expertise in the subject area and ability and intention to effectively convey information to the public” (As the agency notes, “[i]t shall be presumed that a representative of the news media will satisfy this consideration.”); and, (iv) the disclosure is likely “to contribute ‘significantly’ to public understanding of government operations or activities.”<sup>24</sup>

### Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days. For questions regarding this request I can be contacted at 202-483-1140 x104 or [FOIA@epic.org](mailto:FOIA@epic.org).

Sincerely,

Ari Lipsitz  
EPIC IPIOP Law Clerk

John Tran  
EPIC FOIA Counsel

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<sup>20</sup> *Id.* at 8.

<sup>21</sup> *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>23</sup> § 552(a)(4)(A)(iii).

<sup>24</sup> 6 C.F.R. § 5.11(k).