

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

October 18, 2017

Re: 82 Fed. Reg. 43556, Docket No. DHS-2017-0038

Dear Mr. Cantor:

We, the undersigned organizations, write to express our concerns with the Department of Homeland Security (DHS) System of Records Notice, issued on September 18, 2017, Docket No. DHS-2017-0038 [82 FR 43556], stating that DHS will now store social media information in ‘Alien Files’ (A-Files), which include the official record of an individual’s visa and immigration history. Alien registration numbers, and their related A-File, are assigned to people who plan to make the United States their home, and also to certain categories of non-immigrants who are granted employment authorization. This includes naturalized citizens, lawful permanent residents (green card holders), immigrant visa holders, asylees, and special immigrant juveniles, and student visa holders with optional practical training.¹ DHS retains these records for immigrants even after they become U.S. citizens.

DHS has stated that this notice is not a departure from existing protocol.² However, the notice does appear to indicate that social media review is becoming a more prominent and routine component of DHS’s immigration screening procedures. The notice raises concerns that the collection, retention, use, and sharing of social media information will (1) invade the privacy of immigrants and U.S. citizens alike; (2) chill freedom of speech and association; (3) invite abuse in exchange for little security benefit; and (4) establish a system that treats naturalized citizens as second-class citizens. Finally, the notice’s lack of clarity compounds many of these concerns. For these reasons, we urge that DHS not retain social media information in A-Files.

¹ References to immigrants herein will refer to all individuals who receive Alien Registration Numbers, and therefore have A-Files.

² Novak, Matt, “US Homeland Security Says Tracking Social Media Is Nothing New.” Gizmodo (Sept. 28, 2017) <https://gizmodo.com/us-homeland-security-says-tracking-social-media-of-immi-1818875395> (“The notice did not announce a new policy. The notice simply reiterated existing DHS policy regarding the use of social media”).

I. Retention of Social Media Information Will be Highly Invasive.

The notice reflects that DHS is collecting, and will now be retaining, using, and sharing, potentially vast amounts of social media information that will implicate both immigrants and U.S. citizens and expose their social media content to a myriad of entities, making this a highly invasive proposal.

The notice states that “social media handles, aliases, associated identifiable information, and search results” may now be included in individuals’ A-Files. Yet “social media” is not defined, and could be broadly interpreted to include any online platform or site that enables users to publicly post content, communicate with each other, or communicate with the operator or host. That could encompass the gamut of someone’s online activity, including not only Twitter and Facebook, but also platforms that might reveal professional networks, romantic interests, shopping habits, and news and entertainment consumption.³ Nor does the notice define “search results,” leaving people to wonder what specific content will be amassed in the A-Files.

Immigrants are already required to provide DHS with a great deal of personal information, but this notice contemplates the collection, retention, and sharing of particularly sensitive information. Even if DHS is only retaining publicly available social media content, government scrutiny of such content implicates significant privacy and speech interests. Public social media content, when aggregated and analyzed, can reveal intimate information, including an individual’s political and religious beliefs, and her network of family, friends, colleagues and affiliations. People use social media platforms to organize social activities, demonstrations, and celebrations of customs and religious practices.

Public social media can also reveal more and different information than people may realize or intend to convey. Privacy settings are not always fully understood or utilized and may be changed by the platform without notice to the user. Profiles can contain long-forgotten posts and group memberships as well as content posted by other users.

Further, a government request for social media identifiers jeopardizes the right to and benefits of online anonymity or pseudonymity, as many platforms enable profile owners to employ pseudonyms and to shield their legal identities from their public postings. When individuals

³ Department of Homeland Security, *Official Usage of Publically Available Information* (2015) p. 3 available at https://www.aclu.org/sites/default/files/field_document/dhs_policy_re_official_use_of_public_social_media_info_-_01.13.2015.pdf (“The sphere of websites, applications, and web-based tools that connect users to engage in dialogue, share information and media, collaborate, and interact. Social Media takes many different forms, including but not limited to web-based communities and hosted services, social networking sites, video and photo sharing sites, wikis, blogs, virtual worlds, social bookmarking, and other emerging technologies.”).

provide the handles of their anonymous or pseudonymous profiles to the government, their ability to exercise the right to anonymity, and the benefits that stem from it, are compromised.

This policy impacts naturalized and U.S.-born citizens. In 2015, there were almost 45 million immigrants in the United States, 50 percent of whom are naturalized citizens.⁴ Immigrants' social media information collected and then retained under this notice will remain part of their A-Files for DHS's 100-year file retention period (and then indefinitely as the files are transferred to the National Archives and Records Administration), even after an immigrant has completed the naturalization process and become a citizen. Further, many naturalized and U.S.-born citizens interact with immigrants in their social networks, meaning the social media content of these citizens will also be subject to scrutiny.

Finally, the notice permits information in A-Files to be shared widely with a host of other government and private entities for a myriad of reasons, including to enforce a regulation or to obtain information for an investigation. This notice permits the contents of A-Files to be shared with other U.S. government agencies, state and local authorities, foreign governments, and even employers and private parties,⁵ which amplifies our concerns over the collection and retention of such personal and sensitive content.

II. Retention of Social Media Information Will Chill Free Speech and Free Association.

It is difficult to overstate the impact that the retention of immigrants' social media information could have on their exercise of their rights to freedom of speech and association.⁶ Knowing that their social media content will or could be monitored, these individuals will feel pressure to self-censor, delete their social media accounts, and disengage from online spaces, with negative

⁴ Zong Jie, & Batalova, Jeanne, "Frequently Requested Statistics On Immigrants and Immigration in the United States", Migration Policy Institute (March 8, 2017), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>. Note: the Census Bureau, which is where MPI pulled this statistic, defines immigrants to include naturalized citizens, lawful permanent residents, refugees and asylees, persons on certain temporary visas, and the unauthorized. Not all 45 million immigrants as defined by the Census Bureau would have A-Files. However, the Census Bureau does not have statistics on the number of immigrant visa holders, so the definition is also under-representative. In 2013, DHS had about 70 million active A-Files, which are retained for 100 years from the immigrant's birth, so this figure may include immigrants who are deceased. *Department of Homeland Security Shared Use of Alien Registration Files by U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement*, National Archives and Records Administration (2013) available at, <https://www.archives.gov/files/records-mgmt/pdf/dhs-inspection.pdf>.

⁵ Privacy Act of 1974; System of Records Notice, 82 FR 43556 available at <https://www.federalregister.gov/documents/2017/09/18/2017-19365/privacy-act-of-1974-system-of-records>.

⁶ See *United States v. Jones*, 565 U.S. 400 (2012) at 416 (Sotomayor, J., concurring) ("Awareness that the Government may be watching [public movements] chills associational and expressive freedoms.").

consequences for their social, political, and business activities. Immigrant activists have long been responsible for important reforms in our society, and government social media monitoring will jeopardize their vital engagement in civic action. As immigrants feel restrained in their freedom of speech, the public will lose valuable voices and perspectives in public debate, and immigrants will miss out on educational, social, and business opportunities.

DHS's policy will also chill the expressive activities of both naturalized and U.S.-born citizens' free speech because DHS will have collateral access to these individuals' social media content. Knowing this, citizens may sanitize or delete their social media profiles. They may also limit their engagement with immigrants for fear of surveillance, chilling the exercise of their free association rights while stigmatizing and isolating immigrant communities. This fear could drive some to limit their online activity across the board, since individuals likely will not know the immigration status of the people they may casually interact with by liking an image or retweeting a post.

Finally, U.S. government policies inevitably will be replicated in other countries with weaker protections for fundamental rights. The data policy announced in the notice increases the likelihood that U.S. citizens traveling or emigrating to other countries will be subjected to this very type of surveillance in the future.

III. Retention of Social Media Information Invites Abuse in Exchange for Little Security Benefit.

The government should not be making consequential immigration determinations using information as subjective and context-dependent as that found on social media. Social media communication, like most human interactions, is idiosyncratic. Deciphering the meaning of statements is difficult without an intimate understanding of the context in which they are made. Parsing meaning from text is particularly difficult when communications employ slang, sarcasm, or non-textual information including emojis, GIFs, and "likes."⁷ Immigrants' social media content will also often contain foreign languages, further increasing the complexity of analyzing this information. Interpretive errors are thus not only likely but inevitable, suggesting that the relevance and predictive value of social media is likely to be minimal.

And the stakes for immigrants are high. Misinterpreted social media content could become grounds for determinations of inadmissibility and removability, or it could be used as a bar to a showing of good moral character in a naturalization proceeding. Depending on the setting, an

⁷See, e.g. Ahmed Abbasi, Ammar Hassan & Milan Dhar, Benchmarking Twitter Sentiment Analysis Tools, <https://pdfs.semanticscholar.org/d0a5/21c8cc0508f1003f3e1d1fbf49780d9062f7.pdf> (finding that the most common errors in text-analysis tools involved use of jokes, sarcasm, and literary devices in social media postings).

immigrant may have little opportunity or real ability to explain their social media content, clarify misunderstandings, or contest inaccuracies. In addition, collection and retention of this information creates the risk that improper negative inferences will be drawn from an immigrant's personal beliefs or opinions, and neither the notice nor DHS's subsequent statement include assurances against such uses.

There is no reason to believe that collecting and retaining this information will yield a significant security benefit. DHS appears to believe that it can identify potential security threats by scrutinizing people's online speech, but research shows that such expressive conduct is not a valid predictor of one's propensity to commit an act of violence.⁸ Furthermore, a recent independent audit of DHS's social media pilot programs raised serious questions about the validity and efficacy of the programs. The audit found that insufficient metrics were in place to measure the programs' effectiveness, and that absent valid metrics and evaluation criteria, the programs would be of little utility in planning or implementing additional social media screening initiatives.⁹ DHS should not be keeping data from its monitoring and collection programs when it has not demonstrated that the programs themselves are effective.

Finally, social media screening is easy for bad actors to circumvent. Knowing that DHS will be combing through social media data, would-be criminals and terrorists can simply delete or manipulate their online social media behaviors, and disclose only newly-created, sanitized social media accounts to DHS during the immigration process in order to deflect attention. Thus, the kind of social media monitoring DHS is contemplating would be invasive, potentially abusive, and likely expensive, while yielding little actual security benefit.

IV. Indefinite Retention of Naturalized Citizens' Social Media Information Effectively Treats Them as Second-Class Citizens.

DHS's policy will relegate the over 20 million naturalized citizens in the United States¹⁰ to second-class status. Under this policy, the government will routinely retain stores of social media

⁸ Patel, Faiza & Koushik, Meghan, *Countering Violent Extremism*, Brennan Center for Justice (2017) p. 15 available at https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf ("Extreme or radical views are often assumed to lie at the heart of terrorism. But evidence shows that the overwhelming majority of people who hold radical beliefs do not engage in, nor support, violence.").

⁹ 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>.

¹⁰ Zong Jie, & Batalova, Jeanne, "Frequently Requested Statistics On Immigrants and Immigration in the United States" Migration Policy Institute (March 8, 2017), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

content associated with a naturalized citizen for effectively the rest of the citizen's life: DHS retains A-Files for 100 years after an individual's birth date, after which they are sent to the NARA for permanent retention.¹¹ As noted above, the sharing and use authority for this notice is broad, permitting DHS and other officials to use and disseminate the social media information (and other content in A-Files) for a variety of purposes, including for intelligence gathering and counter-terrorism. On the other hand, U.S.-born citizens can engage with social media knowing that specific government scrutiny of their individual public online activity will be unlikely. The existence of a persistent dossier of a naturalized citizen's social media activity will mean that these citizens face scrutiny of the record of their past social media activity in ways that U.S.-born citizens will not routinely face.

V. The Notice and DHS's Statement Lack Clarity.

The lack of clarity surrounding the DHS proposal heightens the concerns discussed above. The notice and DHS's subsequent statement on the matter do not provide answers to the many questions that have been raised. For example, will social media information that is collected before someone becomes a naturalized citizen be used and shared after they have become a citizen? Will social media information be collected about someone after they have become a naturalized citizen? Will the retention and screening of social media information occur solely at the time an individual applies for a benefit, or will this surveillance be ongoing? Further, there is no indication as to why social media information is being retained at all. The lack of clarity in DHS's plans for implementing this policy creates confusion and fear for the immigrants impacted by this policy, which, as noted above, will manifest in a retreat from online communities at great personal and public cost.

Conclusion

The DHS notice details government practices that are highly invasive and that will chill freedom of speech and association, invite abuse in exchange for little security benefit, and will reduce naturalized citizens to second-class citizenship. The notice's lack of clarity also compounds some of these concerns.

Over the past year, there has been an increase in government policies singling out immigrants for disfavored treatment. This notice and the underlying government practices it documents contribute to a climate of fear among immigrant communities about surveillance and restriction of their liberties. We urge DHS not to retain social media information in A-Files.

¹¹ Privacy Impact Assessment Fraud Detection and National Security Directorate DHS/USCIS/PIA-013 (Sept 2013) p. 4 available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdnspiaappendixc-september2013_0.pdf.

Sincerely,

Advocacy for Principled Action in Government
American Civil Liberties Union
American-Arab Anti-Discrimination Committee (ADC)
The Archivists Round Table of Metropolitan New York, Inc. (A.R.T.)
Association of Research Libraries
Brennan Center for Justice at NYU School of Law
Center for Democracy & Technology
The Concerned Archivists Alliance
The Constitution Project
Defending Rights & Dissent
Electronic Frontier Foundation
Free Press
The Freedom to Read Foundation
Human Rights Watch
Information Technology and Innovation Foundation
National Coalition Against Censorship
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National LGBTQ Task Force
New America's Open Technology Institute
OpenTheGovernment
PEN America
Privacy International
Public Citizen
Resilient Communities, New America
The Society of American Archivists
Woodhull Freedom Foundation