

**Before the**  
**PRIVACY OFFICE**  
**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**Washington, DC 20528**

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Notice of Modified Privacy Act System of Records, DHS/USCIS-ICE-CBP-001 Alien File, Index, and National File Tracking System of Records; Docket Number DHS-2017-0038, FR Doc. 2017-19365	}	<b>Comments of The Identity Project (IDP), Government Information Watch, National Workrights Institute, Woodhull Freedom Foundation, FirstAmendment.Com, American-Arab Anti-Discrimination Committee (ADC), Cyber Privacy Project (CPP), Society of Professional Journalists (SPJ), National Coalition Against Censorship (NCAC), Comic Book Legal Defense Fund (CBLDF), and Restore The Fourth, Inc.</b>
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The Identity Project (IDP)

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October 18, 2017

The undersigned national and international civil liberties and human rights organizations – The Identity Project (IDP), Government Information Watch, National Workrights Institute, Woodhull Freedom Foundation, FirstAmendment.com, the American-Arab Anti-Discrimination Committee (ADC), Cyber Privacy Project (CPP), Society of Professional Journalists (SPJ), National Coalition Against Censorship (NCAC), Comic Book Legal Defense Fund (CBLDF), and Restore The Fourth, Inc. – submit these comments in response to the “Notice of Modified Privacy Act System of Records, DHS/USCIS–ICE–CBP–001 Alien File, Index, and National File Tracking System of Records”, Docket Number DHS–2017–0038, FR Doc. 2017–19365, published at 82 *Federal Register* 43556-43565 (September 18, 2017).

**The Identity Project (IDP)** provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

**Government Information Watch** is focused on open and accountable government. Our mission is to monitor access to information about government policy, process, and practice and to ensure and preserve open, accountable government through advocacy. In this capacity, we intend to serve as a resource for policymakers, the media, advocacy groups, and the public.

**The National Workrights Institute** was founded in January 2000 by the former staff of the American Civil Liberties Union's National Taskforce on Civil Liberties in the Workplace. The Institute's creation grew from the belief that the workplace is a critical front in the fight for

human rights. The Institute's mission is to be the one human rights organization which commits its entire effort to workplace issues.

Established in February, 2003, **The Woodhull Freedom Foundation** is a 501(c)3 non-profit organization devoted to education and public advocacy in support of the principle that sexual freedom is a fundamental human right. Woodhull works in partnership with activists, advocacy organizations and coalitions across the United States fighting the political, social and economic forces driving and expanding restrictions on our personal autonomy.

**FirstAmendment.com** is a law firm advocating for First Amendment rights.

**The American-Arab Anti-Discrimination Committee (ADC)** is a nonprofit grassroots civil rights organization that seeks to preserve and defend the rights of those whose Constitutional and federal rights are violated. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan, with members from all fifty states and chapters nationwide. ADC is dedicated to defending the Arab-American and Arab immigrant community against discrimination, racism, and stereotyping. ADC vigorously advocates for immigrant rights and civil rights for all.

**The Cyber Privacy Project (CPP)** is a non-partisan organization focusing on governmental intrusions against Fourth and Fifth Amendment rights of privacy, particularly in government databanks and national identification schemes for voting, travel, and work, and on medical confidentiality and patient consent.

**The Society of Professional Journalists (SPJ)** is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free

flow of information vital to a well-informed citizenry through the daily work of its nearly 7,500 members; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.

**The National Coalition Against Censorship (NCAC)** is an alliance of 56 national civil liberties, educational, professional, labor and religious groups. NCAC promotes freedom of thought, inquiry and expression and opposes all forms of censorship.

**The Comic Book Legal Defense Fund (CBLDF)** is dedicated to defending the First Amendment rights of the comic book industry. CBLDF, which has its principal place of business in Portland, Oregon, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

**Restore The Fourth, Inc.**, is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the United States Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes in technology, governance, and law should foster the protection of this right. To advance these principles, Restore The Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore The Fourth also files amicus briefs in significant Fourth Amendment cases.

As described in the “Notice of Modified Privacy Act System of Records”, this system of records would include records the maintenance of which is forbidden by the Privacy Act. The Notice should be rescinded, the changes to this System of Records should not be made, and any information already collected in categories prohibited by the Privacy Act should be expunged.

While we have many objections to the overbreadth of the information already included in this System of Records and of the routine uses and disclosures to other agencies and third parties described in the previous System Of Records Notice for this system of records, we address these comments to a key change which would be made if the Notice of Modified Privacy Act System of Records is not rescinded: “Social media handles and aliases, associated identifiable information, and search results” would be added to the categories of records in the system.

The Privacy Act of 1974, 5 U.S.C. 552a(e)(7), requires that:

“Each agency that maintains a system of records 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.”

It should go without saying that records of “Social media handles and aliases, associated identifiable information, and search results” are records of how individuals exercise rights guaranteed by the First Amendment, including the right to freedom of speech, the right to freedom of the press, and the right of the people peaceably to assemble.

Social media is speech, whether in words or music or photos or videos. Records of our posts, comments, photos, videos, and other things we say on social media are, *per se*, records of how we exercise our First Amendment right to freedom of speech.

Social media platforms are publishing platforms. Records of what we post, share, upload, or otherwise publish on social media platforms are, *per se*, records of how we exercise our First Amendment right to freedom of the press.

Social media is, by definition, social. People don't participate in social media as individuals, but in association with others. Social media network maps, lists of "friends" or "followers", or records of who "likes" or "shares" or comments on our posts, who we associate with in other ways on social media, or how we do so are, *per se*, records of how we exercise our First Amendment right to assemble online – the social media equivalent of a mail cover, a telephone call log, or a list of attendees and speakers at an in-person political meeting.

The right to assemble in cyberspace is, of course, especially critical to the right to assemble across U.S. and other national borders and by citizens and residents of different countries, for whom visa and immigration rules and, in some cases, fear of government persecution or other hazards may make in-person assemblies difficult, dangerous, or impossible.

The Privacy Act permits the maintenance by a Federal agency of records such as these of how we exercise rights guaranteed by the First Amendment only if it is: (a) expressly authorized by statute, (b) expressly authorized by the individual about whom the record is maintained, or (c) pertinent to and within the scope of an authorized law enforcement activity.

The proposed maintenance of social media records in the DHS/USCIS-ICE-CBP-001 ("Alien Files") System of Records does not satisfy any of these three conditions.

**First**, there is no explicit authorization in any Federal statute for any surveillance, recording, or maintenance of records of social media activities. None of the statutes cited by the DHS as authority for the maintenance of this System of Records contains any explicit mention of

social media, much less explicit authorization for the maintenance of these records. It is irrelevant whether authorization might arguably be implicit in some general authority claimed by the DHS for monitoring of all aspects of the lives and activities of immigrants, visitors, and U.S. citizens who associate with them. The Privacy Act requires express statutory authorization.

**Second**, it is patently obvious that the maintenance of these records has not been “expressly authorized by ... the individuals about whom these records are maintained”.

The DHS has never asked for permission to “friend” or “follow” us on social media or to record what we say and who we associate with on social media in its permanent files about us – as would be required by this provision of the Privacy Act for this DHS activity to be permissible.

Implicit authorization does not satisfy the Privacy Act. Explicit authorization from those about whom records are kept, which DHS has neither sought nor obtained, is required.

The lack of even implicit statutory authorization or authorization from data subjects is especially clear with respect to U.S. citizens who “associate” with foreigners on social media.

Social media platforms have global reach. We do not normally know, and may not care, whether people we associate with on social media are U.S. citizens, permanent U.S. residents, holders of visas for entry to the U.S., foreign citizens and residents, or stateless persons.

“Relationship status” is a standard element of a Facebook profile, but “U.S. citizenship or immigration status” is not a typical or required element of a social media profile.

The DHS or other Federal agencies such as the Department of State may intend to question applicants for admission to the U.S. about their activities or IDs on social media.<sup>1</sup>

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1 See Comments to the Department of State of The Identity Project and Restore The Fourth, Inc., “60-Day Notice of Proposed Information Collection, Supplemental Questions for Visa Applicants, Form DS-5535 (October 2, 2017), <<https://papersplease.org/wp/wp-content/uploads/2017/10/IDP-DOS-supplemental-questions-2OCT2017.pdf>> and “FAQ: U.S. government monitoring of social media” (The Identity Project, October 2, 2017), <<https://papersplease.org/wp/2017/10/02/faq-u-s->

But the DHS does not ask U.S. citizens, before we friend or follow a foreigner on social media, whether we are aware that this person is not a U.S. person, and that our association with this person on social media will be subject to recording in permanent DHS “Alien Files” (even if we are a U.S. citizen) which are indexed and can be retrieved by full-text search including by name or social media ID, including by the name or social media identifier of any U.S. citizen.

**Third**, the maintenance of these social media records is not, “pertinent to and within the scope of an authorized law enforcement activity.”

With respect to whether this record-keeping is “pertinent to ... an authorized law enforcement activity,” whether any proposed use of this sort of information about pure speech and assembly is authorized by law or by the U.S. Constitution would be subject to strict scrutiny.

The Notice of Modified Privacy Act System of Records does not explain how or why the DHS believes that evidence about who U.S. persons associate with on social media, especially if they are not suspected of any crime, is pertinent to any authorized law enforcement activity.

“Keeping bad company” in person or on social media is not a lawful basis for denial of a visa, denial of entry to the U.S., or denial of an application for naturalized U.S. citizenship.

Our system of justice is founded on the notions of individual responsibility and of judgment for our own, and only our own, actions. Absent evidence of criminal conspiracy, collective judgment or guilt by association is anathema to our legal principles. Who we associate with is not, in most circumstances, relevant to whether we have committed a crime.

Even if the DHS were to establish that some of this record-keeping is, in some tenuous way, “pertinent to” some vaguely-inferred authority for social media surveillance for general law



enforcement purposes – which the DHS has not done, and which we do not believe it can do – the Privacy Act would also require that it be “within the scope” of that authorized purpose.

The scope of the record-keeping described by the Notice of Modified Privacy Act System of Records is essentially unlimited, and extends to essentially every individual in the world who interacts with other people on social media, including most U.S. citizens.

The Notice of Modified Privacy Act System of Records does not define who would be considered “associates” of an individual social media user, or limit the number of degrees of separation at which friends-of-friends or friends-of-friends-of-friends would be deemed “associates”. Many U.S. persons have some non-U.S. persons among their direct social media associates as friends, followers, commenters, etc. – often without knowing that they are not U.S. persons. Almost all social media users anywhere in the world, including U.S. persons, have at least some non-U.S. persons within a few degrees of indirect “association” on social media.

U.S. persons do not live in splendid isolation. We are all associates of non-U.S. persons.

This System of Records would still be labeled as “Alien Files”, but its contents would not be limited to information about “aliens”. Pursuant to the Notice of Modified Privacy Act System of Records, the “Alien Files” system of records would become a general system of dragnet surveillance of social media activities by all individuals worldwide regardless of citizenship.

Such dragnet social media surveillance of U.S. persons, not based on warrants or probable cause, is not within the scope of any authorized DHS law enforcement activity.

The DHS has no way to know, when information about social media activities is collected and recorded, whether the individuals to which it pertains are U.S. persons. In light of the addition of social media information to this system of records, the “Categories of Individuals

Covered by the System” must be amended, and a new Notice published in the *Federal Register*, giving the public fair warning that all social media users worldwide, regardless of citizenship, are potentially subject to having records of our activities included in this System of Records.

The DHS may claim that it will, in its discretion, exercise self-restraint and conduct only limited social media surveillance and record-keeping. But the Notice of Modified Privacy Act System of Records, which must be assessed on its own terms, contains no such limits, and no such limitation would be feasible. The Notice of Modified Privacy Act System of Records gives notice of practices which will be, and which may already be, in violation of the Privacy Act.

We doubt that social media surveillance can be conducted by the DHS in such a limited way that it would be consistent with the Privacy Act and the U.S. Constitution. But if the DHS believes that it can be so limited as to be legal, the DHS needs to publish a new System of Records Notice limited to lawful records before it starts operating such a system of records.

The possibility that the exercise on social media by any U.S. or foreign person of her rights to freedom of speech, freedom of the press, and freedom to assemble might be monitored and retained in a DHS system of records, searchable by names and identifiers including those of any U.S. person, and be “shared” by the DHS with third parties including other U.S. government agencies and other governments around the world, is already exerting a profound chilling effect on the exercise of First Amendment rights by individuals in the U.S. and around the world.

Operation of the modified system of records as described by the Notice of Modified Privacy Act System of Records would be in flagrant violation of the provisions of the Privacy Act limiting the keeping of records of activities protected by the First Amendment.

The Notice of Modified Privacy Act System of Records should be immediately rescinded, and any records collected pursuant to it should immediately be expunged.

Respectfully submitted,

**The Identity Project (IDP)**

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A project of the First Amendment Project

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