



Homeland  
Security

September 30, 2011

OCT 11 2011

Edward Hasbrouck  
The Identity Project  
1736 Franklin Street, 9<sup>th</sup> floor  
Oakland, CA 94612

Re: CRCL Complaint No. 11-01-DHS-0044

Dear Mr. Hasbrouck:

On August 10, 2010, you wrote to the Office for Civil Rights and Civil Liberties (CRCL) at the U.S. Department of Homeland Security (DHS) to lodge a complaint alleging civil and human rights violations in recent DHS-issued Notices of Proposed Rule-Making (NPRMs) and Systems of Records Notices (SORNs). You alleged that the NPRMs and SORNs violate the U.S. Constitution, U.S. statutes, and/or the U.S. government's international treaty obligations, including but not limited to those under the International Covenant on Civil and Political Rights (ICCPR). On August 13, 2010, CRCL sought clarification from you as to whether you wanted CRCL to accept as a complaint the comments you had submitted to DHS on six NPRMs and two SORNs. On October 21, 2010, you confirmed your intention that your previously-submitted comments to those NPRMs and SORNs serve as the basis of your complaint.

Additionally, in your August 10, 2010 complaint submission, you included a letter you had received from the Transportation Security Administration (TSA) on July 22, 2010, regarding an earlier complaint alleging that TSA had violated the TSA Civil Rights Policy Statement, the U.S. Constitution, and Article 12 of the ICCPR when it issued its May 2008 TSA Screening Management Standard Operating Procedure (SOP). TSA's letter stated that the DHS Officer for Civil Rights and Civil Liberties is the Department's point of contact for Executive Order 13107. This Executive Order concerns the implementation of human rights treaties. Accordingly, you asked CRCL to reexamine TSA's conclusion that they were unable to find a human rights violation related to their 2008 Screening Management SOP as it was no longer in effect.

Before addressing how we have resolved your complaint, and in response to your various letters and emails to us, we note the following:

- As we previously informed you, your complaint has been docketed as number 11-01-DHS-0044 in the CRCL complaints database. Once a complaint is docketed in our system, it is included in the statistics and other complaints-related information that DHS and CRCL regularly submit to Congress. CRCL also utilizes this information when

preparing reports to international treaty monitoring bodies, but we do not typically describe or tally particular human rights complaints in such reports.

- Since a major revision of our website done in November 2010, CRCL has publicized its authority under Executive Order (EO) 13107 in two locations on the CRCL website. The EO is listed alongside CRCL's other legal authorities at [http://www.dhs.gov/xabout/laws/gc\\_1273522287782.shtm](http://www.dhs.gov/xabout/laws/gc_1273522287782.shtm). The EO is also noted on the CRCL web page that describes the work of its Immigration Section, at [http://www.dhs.gov/xabout/structure/gc\\_1270753945508.shtm](http://www.dhs.gov/xabout/structure/gc_1270753945508.shtm). We have more recently added references to EO 13107 and human rights on the web page about our complaint authority, at [http://www.dhs.gov/xabout/structure/gc\\_1280776157114.shtm](http://www.dhs.gov/xabout/structure/gc_1280776157114.shtm). We thank you for your suggestions on ensuring that the public is aware of our human rights role.

CRCL works vigorously to ensure that DHS component agencies and offices are aware of our authorities, including under EO 13107, and that component agencies and offices refer complaints that allege violations of civil and human rights to us as soon as possible. CRCL did not receive your comments in response to the six NPRMs and two SORNs until you submitted them to us, because you submitted them as regulatory-type comments and not as complaints. On December 30, 2009, CRCL received the complaint you sent to TSA and CRCL. In that matter, TSA was charged with reviewing the issues, and TSA sent you responses on February 4 and July 22, 2010. When you submitted TSA's responses to CRCL on August 10, 2010, CRCL opened the matter as a complaint per your request for CRCL review.

Turning to your complaint, it must be noted that your complaint was not an allegation of violations of a specific individual's civil or human rights, so CRCL has not investigated any particular facts. Nevertheless, CRCL has carefully considered each of your concerns. We have separated out nine discrete issues. The first concerns the handling of the complaint you submitted to TSA's Office of Civil Rights & Liberties and CRCL. The remaining eight issues concern the six DHS-issued NPRMs and two SORNs mentioned above. Proceeding in the ordinary course after you submitted these comments, DHS has issued all the relevant final rules, and both of the Systems of Records have entered into effect.

#### ***1. May 2008 TSA Screening Management Standard Operating Procedure***

First, you express dissatisfaction with the understanding and handling of a complaint you lodged on December 11, 2009, with the TSA Office of Civil Rights & Liberties (OCRL) and CRCL. This complaint alleged that the May 2008 version of the TSA Screening Management SOP discriminated on the basis of national origin in violation of the TSA Civil Rights Policy Statement, the U.S. Constitution, and Article 12 of the ICCPR. In January 2010, CRCL and TSA conferred and agreed that TSA would respond to your concerns. The SOP about which you complained was superseded in December 2009, and again in April 2010, and is thus no longer in effect. The Department's current screening system is based on individuated, real-time intelligence. In your August 10, 2010 correspondence to CRCL, you requested that CRCL review and, if appropriate, correct TSA's understanding of its obligation to investigate complaints that allege violations of the international treaties to which the United States is a party even if that policy or procedure is no longer in effect. Like TSA, CRCL uses complaints to find and address problems in current DHS policy and its implementation. Accordingly, having



reviewed the matter, we agree with TSA that it would not be useful to address the now-moot merits of this complaint.

- 2. *Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere*, 71 Fed. Reg. 46155 (proposed Aug. 11, 2006), docket no. USCBP-2006-0097. Final Rule published at 71 Fed. Reg. 68412 on Nov. 24, 2006.**

You alleged that this rule, by restricting the free movement of people in the Western Hemisphere, violates U.S. obligations under ICCPR Articles 12 and 21, the North American Free Trade Agreement (NAFTA) and the NAFTA Implementation Act, and the Charter of the Organization of American States (“OAS Charter”). The Office of Field Operations at U.S. Customs and Border Protection (CBP) and the Department of State’s Bureau of Consular Affairs addressed your concerns in the final rule’s discussion of comments, as follows: “By requiring a valid passport as an entry document, DHS and DOS [the Department of State] are not denying U.S. or non-U.S. citizens the ability to travel to and from the United States. Requiring sufficient proof of identity and citizenship through presentation of a passport or other acceptable document upon entry to the United States is fully within DHS and DOS’s authority pursuant to 8 U.S.C. 1182(d)(4)(B) and 1185(b).” CRCL concurs with this analysis, as this rule simply requires that a valid passport be presented at entry. Such requirements do not unnecessarily restrict or burden individuals’ freedom of movement and accordingly pose no threat under the international instruments you cite.

- 3. *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 72 Fed. Reg. 35088 (proposed June 26, 2007), docket no. USCBP-2007-0061. Final Rule published at 73 Fed. Reg. 18384 on Apr. 3, 2008.**

As above, you alleged that this rule, by restricting the free movement of people in the Western Hemisphere, violates U.S. obligations under ICCPR Articles 12 and 21, NAFTA and the NAFTA Implementation Act, and the OAS Charter. In the final rule’s discussion of comments, CBP and the Department of State’s Bureau of Consular Affairs addressed these concerns. CRCL concurs with their assessment, and understands that, as with the previous rule, this rule simply requires that a valid passport be presented at entry. Such requirements do not unnecessarily restrict or burden individuals’ freedom of movement. Furthermore, should U.S. citizens find themselves outside the U.S. without a passport, they may always contact the nearest U.S. embassy or consulate for assistance, including assistance with the issuance or re-issuance of her passport. Contact information for all U.S. embassies, consulates, and diplomatic missions is available online at <http://www.usembassy.gov/>.

- 4. *Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States*, 71 Fed. Reg. 40035 (proposed July 14, 2006), docket no. USCBP-2005-0003. Final Rule published at 72 Fed. Reg. 48320 on Aug. 23, 2007.**

You alleged that this rule violates the Regulatory Flexibility Act, the Privacy Act, the First Amendment to the U.S. Constitution, and Articles 12 and 21 of the ICCPR. As there is ongoing litigation on this topic, the DHS Office of the General Counsel and CRCL concur that the CRCL

complaints process is not an appropriate forum for resolution of these concerns. Thus, CRCL will not comment further on this issue.

**5. *Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program; Interim Final Rule and Solicitation of Comments, 73 F.R. 32440 (June 9, 2008), docket no. USCBP-2008-0003.***

You alleged that this rule exceeds CBP's statutory authority; improperly asserts U.S. jurisdiction over foreign soil; and violates EO 13107, ICCPR Article 12, the OAS Charter, and the Airline Deregulation Act of 1978, among other statutes. CRCL does not believe that your allegations of human rights violations have merit. Even if individuals have the right to leave the United States and return to their countries of nationality, no alien has a *per se* right to enter the United States. The rule therefore does not improperly inhibit the right of a Visa Waiver Program country national to leave his country.

**6. *United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"); Enrollment of Additional Aliens in US-VISIT, 71 Fed. Reg. 42605 (proposed July 27, 2006), docket no. DHS 2005-0037. Final Rule published at 73 Fed. Reg. 77473 on Dec. 19, 2008.***

You alleged that this US-VISIT-related rule violates ICCPR Articles 10, 12, and 21, the U.S. Constitution, the Privacy Act, and the Regulatory Flexibility Act. In the final rule's discussion of comments, the US-VISIT program responded to many of your allegations, noting most pertinently that a momentary delay at the port of entry does not constitute detention for purposes of the ICCPR. CRCL concurs with this analysis.

**7. *Secure Flight Program, 72 Fed. Reg. 48356 (proposed Aug. 23, 2007), docket no. TSA-2007-28572. Final Rule published at 73 Fed. Reg. 64018 on Oct. 28, 2008.***

You alleged that this rule violates ICCPR Articles 12 and 21, the First Amendment to the U.S. Constitution, the Privacy Act of 1974, the Airline Deregulation Act of 1978, and the Regulatory Flexibility Act. In the final rule's discussion of comments, TSA responded to your constitutional and international law-related concerns, noting that transportation security is a compelling national interest, and that individuals do not have a constitutional right to travel by a single, or even the most convenient, means. CRCL concurs with these points.

**8. *DHS/CBP-006, Automated Targeting System (ATS), 71 Fed. Reg. 64543 (proposed Nov. 2, 2006). Final rule published at 75 Fed. Reg. 5487 (Feb. 3, 2010).***

In the set of comments you submitted to CRCL, you argued that information about ATS disclosed in a *Time* magazine article, and not previously disclosed in the SORN, raises new alleged violations of the Privacy Act, the DHS Appropriations Acts, the Airline Deregulation Act, the U.S. Constitution, and the ICCPR. In this final rule, CBP and the DHS Privacy Office addressed several concerns related to the Privacy Act and the SORN process itself. The Privacy Office, not CRCL, is the appropriate DHS decisionmaker with respect to privacy issues. As far as additional human rights concerns, CRCL finds that ATS, as a CBP decision-support tool, does



not violate citizens' rights to freedom of movement and assembly under the ICCPR or the U.S. Constitution.

**9. *DHS/CBP-007, Border Crossing Information (BCI), 73 Fed. Reg. 43457 (proposed July 25, 2008). Final rule published at 75 Fed. Reg. 5491 (Feb. 3, 2010).***

You alleged that the BCI SORN is fundamentally flawed and violates the Privacy Act, ICCPR Article 12, and the First Amendment to the U.S. Constitution. In the final rule's discussion of comments, CBP and the DHS Privacy Office addressed several issues related to the Privacy Act and other legal and constitutional concerns. For example, the final rule noted that CBP's authority in this area is derived from 19 U.S.C. §§ 482, 1461, 1496, 1499, and 1581-83, and 8 U.S.C. § 1357. The rule further noted that the BCI system "does not violate the right of citizens to assemble." Again, the Privacy Office, not CRCL, is the appropriate DHS decisionmaker with respect to privacy issues. As far as additional human rights concerns, CRCL agrees that BCI does not threaten either a First Amendment or related human right.

CRCL has completed our review of your concerns. We found that for each of these NPRMs and SORNs, your concerns were evidently heard and addressed on the merits in the regular rule-making process, and your comments are part of the administrative record of that process. Procedurally, we conclude that the process DHS followed with respect to your comments was adequate. Additionally, we find no substantive human rights or civil rights violations in the matters described in your complaint (though, to repeat, we have declined to assess one moot issue, and another because it is currently being litigated).

Thank you for your time and concern with DHS processes and procedure.

Sincerely,



Margo Schlanger  
Officer for Civil Rights and Civil Liberties