

Before

**U.S. CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY**

Washington, DC 20229

Intent To Request Approval
From OMB of One New [sic]
Public Collection of
Information: Certification of
Identity Form (TSA Form
415); TSA-2013-0001-0075,
FR Doc. 2016-26958

**COMMENTS OF THE
IDENTITY PROJECT
(IDP) AND THE
CYBER PRIVACY
PROJECT (CPP)**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

Cyber Privacy Project (CPP)

<<http://www.cyberprivacyproject.org>>

January 9, 2017

CONTENTS

- I. Introduction
- II. About the commenters
- III. This proposal implicates freedom of movement, a statutory, constitutional, and internationally recognized human right.
- IV. The notice does not satisfy the requirements of the Paperwork Reduction Act for approval of a collection of information from members of the public.
 - A. The TSA does not currently require travelers to provide ID documents to fly. Such a new requirement is outside the scope of OMB authority to approve a collection of information, and requires TSA rulemaking pursuant to the APA.
 - B. TSA Form 415 and the associated verbal information collection are not new, and therefore cannot be approved by OMB as a “new” collection of information.
 - C. Would-be commenters have been told that the comment deadline has passed, depriving them of the opportunity for comment required by the PRA.
 - D. No documentation concerning this request is available at Reginfo.gov, depriving members of the public of meaningful notice or opportunity to comment.
- V. The history of TSA Form 415 and the associated verbal collection of information from travelers by the TSA shows a failure to comply with the PRA, APA, or Privacy Act.
- VI. The current use of Form 415 and the additional associated information collection violate the Paperwork Reduction Act.
- VII. The TSA greatly underestimates, without adequate foundation, the burden of the proposed information collection.
- VIII. The current and proposed verbal and written information collection from travelers violates the Privacy Act.
- IX. Conclusion and recommendations

I. INTRODUCTION

The Identity Project (IDP) and the Cyber Privacy Project (CPP) submit these comments in response to the notice and request for comments, “Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)”, docket number TSA-2013-0001-0075, FR Doc. 2016-26958, published at 81 *Federal Register* 78624-78625 (November 8, 2016).

The notice fails to satisfy the requirements of the Administrative Procedure Act (APA), the Paperwork Reduction Act (PRA), and the Privacy Act. The notice miscategorizes the proposal, fails to provide adequate or accurate notice to the public, and includes materially false statements about the proposal and the history and status of TSA Form 415.

The notice attempts to use the PRA procedures for approval of a form to effect a sweeping, highly controversial, substantive change in the scope of authority over air travelers claimed and exercised by the TSA. Even if such a change were authorized by a valid statute, it would require a different procedure: notice-and-comment rulemaking by the TSA pursuant to the APA. The significance of these procedural violations is heightened because the proposal implicates the ability of individuals to exercise their right – pursuant to Federal statutes, the U.S. Constitution, and international human rights treaties – to travel by air by common carrier.

The proposal for approval of TSA Form 415 and of this information collection by OMB should be withdrawn. The TSA should cease and desist from its years-old and continuing unlawful use of Form 415, and the additional associated verbal information collection, without the required OMB approval. If this proposal is submitted to OMB, it should be rejected as procedurally, substantively, and legally deficient and unjustified, and as a violation of the

fundamental statutory, Constitutional, and human rights of air travelers. If the TSA believes such a proposal is warranted, it should propose it through APA notice-and-comment rulemaking.

II. ABOUT THE COMMENTERS

A. The Identity Project (PapersPlease.org)

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.

B. The Cyber Privacy Project

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.

III. THIS PROPOSAL IMPLICATES FREEDOM OF MOVEMENT, A STATUTORY, CONSTITUTIONAL, AND INTERNATIONALLY RECOGNIZED HUMAN RIGHT.

Freedom of movement ("the right of the people... peaceably to assemble") is recognized by the First Amendment to the U.S. Constitution.

The right of U.S. citizens to travel between states is among the "privileges and immunities" protected by Article IV of the U.S. Constitution, and is a "liberty" protected by the

due process requirements of the 5th and 14th Amendments. “The original conception of the travel right is explicitly stated in Article IV of the Articles of Confederation and remains in force in the parallel article of the U.S. Constitution. Travel embodies a broadly based personal, political, and economic right that encompasses all modes of transportation and movement.”¹

The right to travel is also recognized in Article 12 (freedom of movement) of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. In addition, Article 17 of the ICCPR recognizes a right to protection against "arbitrary or unlawful interference with ... privacy."

The TSA, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking: Executive Order 13107, “Implementation of Human Rights Treaties,” directs all executive departments and agencies to “maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully.”

In addition to the general Constitutional right to travel, there is an explicit mode-specific Federal statutory right to travel by air. “The public right of freedom of transit through the navigable airspace” is guaranteed by the Airline Deregulation Act of 1978, codified at 49 USC § 40101, 40103. The same statute expressly requires that the Administrator of the TSA (exercising powers described in the statute as those of the Administrator of the FAA, but reassigned to the TSA as part of the creation of the TSA and the Department of Homeland Security), “shall consider” this right in carrying out agency functions, which include rulemaking.

1 Richard Sobel, The Right To Travel And Privacy: Intersecting Fundamental Freedoms, 30 J. Marshall J. Info. Tech. & Privacy L. 639, 640 (2014) <<http://repository.jmls.edu/jitpl/vol30/iss4/1>>.

It is essential to keep these rights in mind in assessing the proposed (and in fact, as discussed further below, longstanding and ongoing) information collection from travelers. To the extent that responding to this information collection (or providing responses that the TSA or its contractors deem acceptable) is made a condition of the exercise of the right to travel by common carrier, it is a condition on the exercise of a fundamental statutory, Constitutional, and international treaty right, and therefore subject to strict scrutiny.²

IV. THE NOTICE DOES NOT SATISFY THE REQUIREMENTS OF THE PAPERWORK REDUCTION ACT FOR APPROVAL OF A COLLECTION OF INFORMATION FROM MEMBERS OF THE PUBLIC.

Instead of providing actual notice of what the agency has done, is doing, and proposes to do, and how concerned members of the public can obtain more information, the notice concerning this proposed information collection published in the *Federal Register* contains materially false statements concerning the proposal and the agency's actions.

These material misstatements deprive the public of meaningful notice of what has actually happened and is happening, and of the opportunity to provide informed comment on the agency's past, present, and proposed future actions.

In addition, to the extent that – for whatever reason – those promulgating the notice genuinely believed these falsehoods, they were ignorant of essential and material elements of the administrative and factual record necessary for non-arbitrary agency decision-making.

² This is merely a summary of some of the fundamental rights implicated by air travel by common carrier. As discussed further below, this proceeding is a request for approval of a form, not a proposal for regulations to require air travelers to present, possess, or be eligible to acquire acceptable government-issued ID credentials, or to identify themselves. We reserve the right to submit more detailed comments concerning the right to travel, the standard of review for conditions or restrictions on the exercise of this right, and the effect on this right of ID requirements for common carrier air travel if the TSA proposes rules to impose such a requirement.

A materially false notice does not satisfy the notice requirements of the PRA. A decision by agency officials ignorant of these facts would be arbitrary and capricious.

In addition, each of the false statements in the notice discussed below constitutes a violation of the “Information Quality Act” (IQA), Section 515 of the Consolidated Appropriations Act, 2001, Public Law 106–554, and the guidelines for implementation of this statute promulgated by OMB and the Department of Homeland Security (DHS).³

These comments constitute a “complaint[] ... regarding the accuracy of information disseminated by” the TSA. In accordance with the IQA, we request that this complaint be included in reporting by the TSA and DHS to OMB of “the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency.”

A. The TSA does not currently require travelers to provide ID documents to fly. Such a new requirement is outside the scope of OMB authority to approve a collection of information, and requires TSA rulemaking pursuant to the APA.

According to the notice in the *Federal Register*:

TSA requires individuals to provide an acceptable verifying identity document in order to proceed through security screening, enter the sterile area of the airport, or board a commercial aircraft.

In fact, the TSA does not require, and the law does not authorize the TSA to require, that would-be travelers provide any verifying identity documents. According to longstanding practice, people who do not provide any verifying identity document travel by air every day –

3 See OMB Agency Information Quality Guidelines, <https://www.whitehouse.gov/omb/inforeg_agency_info_quality_links>; DHS Information Quality Standards, <<https://www.dhs.gov/information-quality-standards>>; and TSA Information Quality Standards, <<https://www.tsa.gov/information-quality-standards>>. Since the TSA has not responded to informal requests for correction of the notice, petitions for correction of the inaccurate information in the notice are being prepared for submission to DHS.

typically after being required to complete and sign TSA Form 415 and answer questions about what information is contained in the file about them obtained by the TSA from Accurint.⁴

The TSA's current policy permitting people to fly without ID if they submit to more intrusive search was described as follows by the 9th Circuit Court of Appeals in *Gilmore v. Gonzales*⁵, based on review of TSA documents submitted *ex parte* and under seal:

The identification policy requires airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter.⁶

The identification policy requires that airline passengers either present identification or be subjected to a more extensive search. The more extensive search is similar to searches that we have determined were reasonable and "consistent with a full recognition of appellant's constitutional right to travel."⁷

As discussed in more detail in Parts V and VI of these comments below, the TSA has provided, in response to our Freedom of Information Act request, only incomplete and badly munged portions of its records of how many people fly without ID every day.

But the first interim response to this request, containing images of redacted excerpts from the TSA "IVCC [ID Verification Call Center] Daily Summary" for May 6, 2014, is instructive.⁸

On that date, 175 people were reported to the IVCC as having sought to proceed through TSA checkpoints without initially presenting ID that the checkpoint staff found acceptable.

4 See the more detailed discussion of these ongoing practices below in Part V of these comments.

5 435 F. 3d 1125 (9th Circuit 2006), cert. denied, 127 S. Ct. 929 (2007). Plaintiff-Appellant Gilmore is the founder of the Identity Project, one of the organizations submitting these comments.

6 *Gilmore v. Gonzales*, 435 F. 3d 1125 at 1141.

7 *Gilmore v. Gonzales*, 435 F. 3d 1125 at 1155.

8 This first interim response contained four images of "pages" of records pertaining to a single day, although we had requested all such records for all dates. We received this first interim response almost two years after submitting our FOIA request. Three and half years after we submitted this request, the TSA still has not completed its response. See request and all interim responses to date at <<https://archive.org/details/TSOC-ID-Verification-Reports>> and discussion of the status of this request in Note 22 below.

Of these 175 people, only three were denied access. The other 172 – more than 98% of those who sought to fly with no ID or with unacceptable ID – were allowed to do so.

In light of this current TSA policy and these facts, what the notice should say is:

TSA is proposing to require individuals to have been issued a verifying identity document acceptable to the TSA, or reside in a state that the TSA has deemed compliant with the REAL-ID Act or that TSA has granted a discretionary extension of compliance with the REAL-ID Act, in order to proceed through security screening, enter the sterile area of the airport, or board a commercial aircraft.

When the substance of the proposal is stated accurately, the notice is fundamentally deficient. Approval for this change in requirements to travel (not a mere continuation of, or change in, an information collection) is being requested from the wrong agency, through the wrong procedure, and without an adequate basis.

A change in the requirements for air travel by common carrier – such as the proposed and entirely new requirement for each would-be traveler to provide the TSA with a verifying identity document or attest that they have been issued by some government agency with such a document or reside in a state that the DHS has deemed compliant with the REAL-ID Act or has granted an extension of compliance – could properly be initiated only through a Notice Of Proposed Rulemaking (NPRM) by the TSA in accordance with the procedural requirements of the APA.

If such an NPRM were promulgated for public comment, we and many others would object to the proposal. It exceeds the statutory authority of the TSA and is contrary to the statutory duty of the TSA to recognize the public right of transit by air, the Constitution, and U.S. obligations pursuant to international human rights treaties.

In addition, such a rule would not be related to any legitimate aviation security interest. According to the notice:

TSA is updating the identity verification process for travelers who arrive at an airport security checkpoint without an acceptable verifying identity document... so that it is generally only available to travelers who certify that they—

- Reside in or have been issued a driver's license or state identification card by a state that is compliant with the REAL ID Act or a state that has been granted an extension by DHS; or
- Have been issued another verifying identity document that TSA accepts.

It's important to understand just what the TSA is saying, and the import of the practice the notice describes. If the TSA were to promulgate such a rule, travelers would still be able to fly with no ID at all, just as they are today. This would still be true, as it is today, for individuals who have never been issued, or applied for, any government-issued ID. But it would only be permissible, under a rule such as the TSA is contemplating, for individuals without ID to fly if they reside in a state that issues ID acceptable to the TSA.

The essential idea is to discriminate between people who don't have or apply for state-issued ID cards, on the basis of how their states of residence treat those who do apply.

Variations in the practices followed by states in issuing driver's licenses and ID cards, or whether data about those driver's licenses and ID cards is shared with other states, provide no legitimate basis for differential treatment, on the basis of state of residence, of those individuals who do not have state-issued ID. Whatever claims the TSA might make about security benefits of these ID issuance procedures or their use as a basis for discrimination between holders of ID cards issued by different states, the state of residence of an individual who does not present ID bears no rational relationship to whether that individual poses a threat to aviation safety.

To put it another way, there is no reason to think that a person who has not chosen to apply for state ID as a resident of compliant state X posed less of a threat to aviation security than an individual who has not chosen to apply for state ID as a resident of noncompliant state Y.

Why, given the lack of any rational relationship of state of residence to aviation security, would the TSA discriminate between people who have not been issued with state ID on the basis of their state of residence, or on the basis of how that state treats people who, unlike these individuals, apply for or are issued with state ID?

The only apparent explanation for this otherwise perverse-seeming practice is that the TSA's real purpose in making this change is to coerce states to comply with the REAL-ID Act by punishing residents of states whose governments don't comply.

This is both an impermissible purpose and an impermissible practice. The Federal government has no authority to order states to enact legislation on matters within the jurisdiction of the states. The TSA has no authority to discriminate between residents of different states on the basis of the choices made by their state governments on matters within state jurisdiction.

We reserve the right to raise these and all other objections if and when such an NPRM is promulgated.

But this PRA notice in the *Federal Register* is not an NPRM. OMB is not authorized to approve substantive changes – or, for that matter, to approve any changes – in TSA regulations.

The only plausible interpretation of the false statement in the notice is to mislead OMB and the public, evade the requirement for public notice and comment, and use the innocuous-seeming device of a request for approval of an information collection to affect a

fundamental and profoundly controversial change in substantive TSA requirements and the rights of travelers.

The TSA does not have the authority to rule by decree, or to create a regulatory *fait accompli* by making new statements about what it seeks to require. Valid rulemaking requires the promulgation of rules, in accordance with the procedural requirements of the Administrative Procedure Act, Constitutional due process, and the procedural and substantive standards applicable pursuant to U.S.-ratified international human rights treaties.

If the TSA wants to "make it so" that each air traveler is required to provide an acceptable verifying identification document, or that air travel without ID be permitted only for residents of certain states specified by the DHS, the TSA must properly propose such a regulation, providing notice of what it proposes to require and of the basis for its claimed authority to require it.

Whether or not the TSA proceeds with such a rulemaking – which, to be clear, we don't think it should, and would oppose – OMB must reject this purported request for approval of an information collection as exceeding the scope of OMB authority, pursuant to the PRA, for approval of a collection of information.

B. TSA Form 415 and the associated verbal information collection are not new, and therefore cannot be approved by OMB as a “new” collection of information.

The notice describes TSA Form 415 and its use as "a new Information Collection Request (ICR) abstracted below that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act (PRA)."

But while TSA Form 415 has never been submitted to, nor approved by, OMB, neither the form, its use, nor the additional information collection associated with its use are "new". As chronicled in detail in Part V of these comments below, TSA Form 415 and its unnumbered predecessor form(s), and the associated verbal collection of information from travelers, have been in use since at least 2008.

Submission of a form or other proposed ICR to OMB for approval after it has been in use for more than eight years is not, by any plausible interpretation of the law, "in compliance with" the PRA, which requires OMB approval prior to the first use of a form or information collection.

The proposed submission to OMB should be described as a request for approval of an ICR that has been conducted unlawfully without OMB approval since at least 2008.

Given the extensive experience of the TSA and the public with this form and information collection, it would be arbitrary and capricious for OMB to approve it without review of its extensive track record. And proper notice and comment would include an invitation to members of the public to comment on their experiences with this form and information collection.

Without proper notice that this form and information collection have already been in use, potential commenters might think that they would have to speculate about its effects, and might not realize that there is an extensive agency record and body of public experience that could form the basis for better informed comments concerning the request for OMB approval.

In addition, potential commenters are likely to scrutinize the proposal more closely and critically if they know that the agency has been acting illegally for many years.

A new notice should be promulgated, properly describing this as a request for approval of an ICR that has been conducted unlawfully without OMB approval since at least 2008. A new opportunity for public comment should be provided following that notice.

C. Would-be commenters have been told that the comment deadline has passed, depriving them of the opportunity for comment required by the PRA.

The notice published in the *Federal Register* was posted "for comment" on Regulations.gov at <<https://www.regulations.gov/document?D=TSA-2013-0001-0075>>. But since the notice was first posted, that Web page has falsely described it as "Comment Period Closed", and has not included any comment submission button, link, or form.

We have been contacted by several members of the public who would have prepared and submitted comments, but did not do so, in reasonable reliance on Regulations.gov (which is read by far more people than the printed *Federal Register*) as an authoritative official source of information concerning notice and comment on proposed rules and agency actions.

We and other members of the public contacted the TSA staff person named in the notice, within days of the error appearing on Regulations.gov, to alert the agency that comments were not being accepted. The TSA has failed to have the false statement on Regulations.gov corrected.

TSA staff told us that, contrary to the plain language at the top of the page on Regulations.gov, comments were in fact open and would be accepted by email through January 9, 2017. But members of the public would have no reason to read further in the notice or attempt to submit comments by email once they read that the comment period had already closed.

Members of the public are entitled to rely on Regulations.gov for authoritative information about official Federal agency notices and opportunities for comment. Most members of the public, including many who have contacted us, assumed after consulting Regulations.gov that they were too late to submit comments. Most members of the public would not bother to prepare or try to submit comments by email after being told, through the official Federal government Web portal used for such purposes, that the comment period had already expired.

When the official Federal portal for comments is closed to comments throughout the "comment" period, there is no meaningful opportunity to comment. A new notice and opportunity for comment must be provided before any valid agency action can be taken.

D. No documentation concerning this request is available at Reginfo.gov, depriving members of the public of meaningful notice or opportunity to comment.

The notice claims that, "The ICR [Information Collection Review] documentation is available at <http://www.reginfo.gov>." This claim is false: No information concerning this information collection has yet been submitted to OMB, and no information whatsoever concerning it is available at <http://www.reginfo.gov>, on any publicly-accessible Federal website, or from the TSA, even if it is specifically requested. The TSA contact designated in the notice has confirmed to us that no information other than that which was published in the *Federal Register* notice is available to would-be commenters or other members of the public.

It is critical for both the eventual reviewers of this request at OMB and any subsequent court reviewing this administrative action to be aware that the public has not been given actual

notice of, and an opportunity to comment on, any of these documents. They will only be submitted to OMB or posted at <http://www.reginfo.gov> *after* the close of public comments.

Despite our requests and diligent attempts to obtain, review, and comment on the allegedly supporting documentation referred to in the notice, it has been withheld from us.

A new opportunity for public comment must be offered after this documentation is made available to the public and public notice of its availability has been promulgated.

V. THE HISTORY OF TSA FORM 415 AND THE ASSOCIATED VERBAL COLLECTION OF INFORMATION FROM TRAVELERS BY THE TSA SHOWS A FAILURE TO COMPLY WITH THE PRA, APA, OR PRIVACY ACT.

In light of the false characterization of TSA Form 415 as "new" in the notice, and the notice that elides any discussion of the extensive experience of the TSA and the public with its use and with the additional associated information collection, we find ourselves obliged to supply a summary of the background facts that should have been included in the notice, and that need to be considered by OMB, commenters, and any subsequent reviewers.

The PRA requires approval by OMB and assignment of an OMB "control number" prior to the commencement of any systematic collection of information (whether by printed or electronic form or verbal questioning) from more than ten members of the public. The PRA also requires the inclusion of that OMB control number on the form itself, and requires other specified notices to each individual from whom information is to be collected.

The Privacy Act requires promulgation of a System Of Records Notice (SORN) describing what data is to be collected from what sources, and how it is to be used, and makes it a criminal offense to maintain a system of records about individuals without first doing so.

The APA requires public notice and an opportunity to comment on proposed regulations before they are finalized.

In 2008, when the TSA implemented the "procedures" involving the first version of Form 415, and the additional associated collection of information, the TSA did none of these things.

Rather than operate in accordance with the law, here's what the TSA actually did:

Following its standard operating procedure of rulemaking-by-press-release, the TSA announced changes to "Airport ID Requirements" on its website on June 5, 2008.⁹ These were stated as "requirements", which would imply either statutory requirements or regulations adopted through notice-and-comment rulemaking pursuant to statutory authority. But neither the press release on the TSA website nor the subsequent TSA blog posts¹⁰ about these new purported "requirements" cited to any current or proposed regulations or statutory authority.

Hundreds of public comments were posted in the TSA blog in response to these blog posts, and many more comments were submitted to the TSA through its blog, but not published.

Since the only notice of the new ID "requirements" provided by the TSA was on its website and in its blog, and since the only opportunity provided for public comment was on that blog, the complete record of comments on this topic submitted to the TSA blog – including those

9 "TSA Announces Enhancements to Airport ID Requirements to Increase Safety", June 5, 2008, <http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm>, archived at <http://web.archive.org/web/20080610051740/http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm>

10 "New ID Requirements Begin Tomorrow", June 20, 2008, <<http://www.tsa.gov/blog/2008/06/new-id-requirements-begin-tomorrow.html>>; "New ID Requirements: The First 48", June 23, 2008, <<http://www.tsa.gov/blog/2008/06/new-id-requirements-first-48.html>>; "ID Update and Word on the Blog", June 27, 2008, <<http://www.tsa.gov/blog/2008/06/id-update-and-word-on-blog.html>>; all archived at <<http://web.archive.org/web/20080630050739/http://www.tsa.gov/blog>>.

that weren't published – is part of the administrative record of this rulemaking which should be made public and submitted to OMB for consideration.

Notwithstanding the absence of statutory authority, rulemaking, or rules, the TSA and its contractors began asking selected air travelers to complete the form later known as TSA Form 415, and collecting additional information verbally from them, on June 21, 2008.¹¹

On information and belief – based on published incident reports¹², unpublished reports provided to the Identity Project, and TSA reports disclosed to the Identity Project (and discussed further below), in most or all cases when a traveler is asked or required to complete Form 415 or its unnumbered predecessor form(s), the traveler is also asked a selection of questions from a standard list, the answers to which are compared with records from a commercial data broker.¹³

The day the TSA began using this form, June 21, 2008, the Identity Project requested "a copy of TSA's new identification requirement and all documents relating to it," pursuant to the Freedom Of Information Act (FOIA), and requested expedited processing of that request.¹⁴

11 See, "First Reports Of What It's Like Flying Without ID Arrive", June 24, 2008, <<https://papersplease.org/wp/2008/06/24/first-reports-of-what-it%E2%80%99s-like-flying-without-id-arrive/>>. What we believe to be the first version of the form later known as TSA Form 415 was first published by the Identity Project on our website on July 28, 2008, at <<https://papersplease.org/wp/2008/07/28/dhs-ignores-omb-government-approval-process-on-tsa%E2%80%99s-questionnaire-form-for-travelers-without-id/>> and as part of a blog post the same day, "DHS Ignores OMB Government Approval Process on TSA's Questionnaire Form for Travelers Without ID", July 28, 2008, <<https://papersplease.org/wp/2008/07/28/dhs-ignores-omb-government-approval-process-on-tsa%E2%80%99s-questionnaire-form-for-travelers-without-id/>>. So far as we know, no version of Form 415 or of any of its unnumbered predecessor(s) has ever been published by the TSA.

12 See e.g. "First Reports Of What It's Like Flying Without ID Arrive", June 24, 2008, <<https://papersplease.org/wp/2008/06/24/first-reports-of-what-it's-like-flying-without-id-arrive/>>.

13 See, "Accurint exposed as data broker behind TSA 'ID verification'", November 9, 2015, <<https://papersplease.org/wp/2015/11/09/accurint-exposed-as-data-broker-behind-tsa-id-verification/>>. An identity thief familiar with the data broker's records pertaining to an individual would typically be better able to tell the TSA or TSA contractors what the data broker's file alleges than would the actual individual, who probably has never seen the data broker's records and has no idea what inaccurate allegations they contain.

14 FOIA request later assigned request number TSA08-0723, <https://papersplease.org/wp/wp-content/uploads/2008/06/tsafoiareq62108_final.pdf>, discussed in and linked from blog post, "TSA Changes Airport ID Requirement; ID-Less Could Be Denied Right to Fly", June 23, 2008, <<https://papersplease.org/wp/2008/06/23/tsa-changes-airport-id-requirement-id-less-could-be-denied-right-to-fly/>>.

Despite the FOIA deadline and the request for expedited processing, the TSA did not produce any responsive documents until more than six months later. On January 12, 2009, the TSA provided us with five redacted pages of excerpts from the TSA "Screening Management SOP", Revision 3, May 28, 2008 (Implementation Date: June 30, 2008), "Appendix 2: Travel Document and ID Checks".¹⁵ Notably, the TSA's response to this FOIA request did not include any version, even in redacted form, of the form later known as TSA Form 415, even though the form was clearly responsive to our request for all "documents relating to" the ID requirement and could not plausibly be claimed to be exempt, in its entirety, from disclosure pursuant to FOIA. There was no mention in these records of any request for OMB approval for this form.¹⁶

On January 31, 2011, we made another request, pursuant to FOIA, for "the most recent version of the document" later known as TSA Form 415 and "any records related to requests for approvals of this form by OMB, any OMB control number assigned to any version of this form, or the potential need for such approval."¹⁷

This time, the TSA delayed responding for even longer, more than two years. Finally, on May 9, 2013, the TSA disclosed a version of one side of "TSA Form 415, August 2008 [File: 400.7.2]", with no OMB control number or PRA notice, and 51 redacted pages of email messages, some of them discussing Form 415 as a two-sided form although no portion of any version of the back side of the form was disclosed.¹⁸

15 Later published at <http://www.papersplease.org/wp/wp-content/uploads/2009/05/tsa_id_sop.pdf>, linked from and discussed in blog post, "TSA releases (censored) ID checking procedures", May 26, 2009, <<https://papersplease.org/wp/2009/05/26/tsa-releases-censored-id-checking-procedures/>>.

16 See discussion of this and other requirements in our blog, "TSA 'identity verification' procedures", July 8, 2008, <<https://papersplease.org/wp/2008/07/08/tsa-identity-verification-procedures/>>.

17 Later designated as FOIA request TSA11-0344.

18 Form 415 at <<http://papersplease.org/wp/wp-content/uploads/2013/05/tsa-form-415.pdf>>; FOIA response at <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa11-0344-response-9may2013.pdf>>, linked from and discussed in blog post, "TSA never got OMB approval for 'Certification of ID' (Form 415)", May 29, 2013, <<https://papersplease.org/wp/2013/05/29/tsa-never-got-omb-approval-for-certificate-of-id-form-415/>>.

One of the email messages included in that response to our FOIA request was from "OIMP Director" (sender and recipient email addresses redacted), dated February 10, 2011, and was apparently sent in response to our FOIA request. The "Subject:" header, unredacted, was "Re: 3600 - FOIA, Request TSA11-0344 (REPLY/NOTICE)".

This message¹⁹ stated:

Relative to **TSA Form 415, Certification of Identity**, indications were the form was to be completed by TSA officials via phone collection rather than issued to persons to complete. Consequently, it was understood that Paperwork Reduction Act (PRA) was not applicable and OSO, as the requesting office, did not request PRA (OMB submission).

For questions re: PRA, pls contact OIT's [redacted], TSA PRA Officer.

It's obvious by inspection of the form that no competent person who had seen the form could have made this statement in good faith. Every version of the form has had a line for the signature of the individual traveler, and it is not credible that anyone believed that "TSA officials via phone collection" were expected to sign the form in the name of the traveler.

To summarize this history, the current notice of TSA intent to seek OMB approval for continued use of TSA Form 415 comes after many years of TSA withholding of the form itself and the policies (if any) related to its use, even when they were specifically requested; failure to provide public notice or opportunity for public comment on these "requirements"; and failure to submit any version of this form for OMB approval, even when that was considered and when multiple versions of the (unapproved) form had been in use for many years.

¹⁹ Available at <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa-form-415-omb.pdf>>, linked from and discussed in blog post cited in Note 11, *supra*.

VI. THE CURRENT USE OF FORM 415 AND THE ADDITIONAL ASSOCIATED INFORMATION COLLECTION VIOLATE THE PAPERWORK REDUCTION ACT.

The Paperwork Reduction Act, 44 USC § 3507 (a)(1), provides that, “An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information, (1) the agency has” carried out a series of steps, none of which have yet been taken with respect to TSA Form 415, “(2) the Director [of OMB] has approved the proposed collection of information ... ; and (3) the agency has obtained from the Director a control number to be displayed upon the collection of information.”

The PRA further provides that, “Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if – (1) the collection of information does not display a valid control number assigned by the Director [of OMB] in accordance with this chapter; or (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.” (44 USC § 3512)

The TSA is an agency subject to the PRA. Freedom of travel is a right, and denial or interference with air travel by common carrier is clearly a “penalty” within the meaning of this section of the PRA.

Each time since 2008 that TSA employees or contractors, or local law enforcement officers relying on (false) allegations by TSA staff or contractors that completion of Form 415 or responses to additional standardized verbal "ID verification questions" were “required” by Federal law or TSA regulation as a condition of passage, have delayed, detained, or prevented a

would-be traveler from passing through a TSA or contractor checkpoint or boarding a common carrier airline flight, they have acted in flagrant violation of the PRA (in addition to other Federal statutes and Constitutional and human rights treaty provisions).

How often has this happened, during the years that TSA Form 415 and the associated verbal information collection from travelers have been in use? We don't know, although we have made diligent efforts to find out, and are entitled to know.

No portion of the administrative record that should have been considered by the agency decision-maker (and which it would be arbitrary and capricious not to have considered), made available to the public for comment, and reviewed by OMB and any eventual reviewing court, has been published by the TSA. As with TSA Form 415 itself, and the list of questions used for the associated verbal information collection, records of the actual experience of use of TSA Form 415 and the associated verbal information collection have been made available to the public *only* to the extent that they have been obtained and posted online by the Identity Project.

Meaningfully informed agency decision-making, public comment, or review of forms and practices that have been engaged in since 2008 cannot be conducted without access to the agency's records of those many years of agency experience and its impact on the public. These records must be made available to the public by the TSA, and an opportunity provided for the public to comment on them and use them as the basis for informed comment on any proposed rules or information collection, before OMB can properly review or approve this request.

The TSA's May 9, 2013 response to our FOIA request TSA-11-0344,²⁰ included an example of a "TSOC ID Verification Report". On June 14, 2013, we requested all records pertaining to any such report "or similar log, record, report, or e-mail message indicating the

²⁰ See Note 10, *supra*.

numbers of ID checks, numbers of ID checks resulting in a 'not verified' outcome, or numbers of checks resulting in a 'denied' outcome, including but not limited to any aggregated reports for these quantities over any time periods, any guidelines or instructions for the preparation of such reports or the categorization of events or outcomes for reporting purposes, and any e-mail messages mentioning such reports or reporting protocols."²¹

The TSA again dragged its feet, this time for almost two years, before beginning to respond. We received a first (redacted and badly munged) interim response on May 6, 2014. Three and a half years after we made our request, the TSA still has not completed its response.²²

This request stated, "With respect to any e-mail messages included in the responsive records, I specifically request access to and copies of the complete informational content of the underlying electronic records, in their full and complete form including all headers and attachments, fully expanded e-mail addresses, full addresses for address 'aliases', full lists for 'distribution list' aliases, and all related metadata." In extensive discussions with the TSA FOIA office during the years this request has been pending, we have repeatedly requested that access to

-
- 21 FOIA request later designated 2013-TSFO-01016, June 14, 2013, <<https://papersplease.org/wp/wp-content/uploads/2013/06/foia-tsoc-id-verify-report.pdf>>, linked from and discussed in blog post, "How many people fly without ID? How many are denied the right to fly?", June 14, 2013, <<https://papersplease.org/wp/2013/06/14/how-many-people-fly-without-id-how-many-are-denied-the-right-to-fly/>>. Copies of this FOIA request and all interim responses to date are at <<https://archive.org/details/TSOC-ID-Verification-Reports>>.
- 22 The TSA's "Check Status of [FOIA] Request" Web page, <<https://www.dhs.gov/foia-status>> has generally shown a date one month in the future, which is moved back each month by another month. It appears to be a robotic sham, not based on actual estimates. It's often completely broken. As of this writing, for example, it displays the following "status" information and expected date of completion of agency action for this request:
- "The number you entered is 2013-TSFO-01016
Request Number: 2013-TSFO-01016
Received Date: 06/20/2013
Request Status: Documents Added
Estimated Delivery Date: 12/27/2016
Closed Date:
Check performed on 01/05/2017 12:12:22 AM EST
Status information is current as of 01/04/2017"

In other words, the "current" TSA estimate is that its response will be completed in *negative* one week's time. Estimates of the TSA's belief in its ability to travel backward in time are not useful to FOIA requesters.

and copies of all responsive electronic records be provided in their native form, as bitwise copies of the records as found on digital devices or storage media.

The TSA has yet to provide any responsive email messages, in any format.

Instead of complying with the requirement of the FOIA statute to produce responsive records in any format in which they are requested and can readily be reproduced (it is obviously easier to to reproduce electronic files as bitwise digital copies than in any other format), the TSA appears to have followed the following munging and substitution procedure: (1) Extract each attached file and separate it from the email message, (2) view the extracted file in an application (such as a word processing program, spreadsheet application, etc.) in "print view" mode, (3) capture a screenshot image of each "page" of the "print view" of the file, (4) create a new PDF file, (5) paste the screenshot images into the new PDF file, in random (or unexplained) order, and then (6) substitute the newly-created PDF image file for the underlying electronic records.

This procedure strips out all file metadata, and replaces text and tabular data with images. It obfuscates the structure and format of the underlying records, and greatly complicates the task of parsing, tabulation, or statistical analysis of the records. And it wastes agency time and effort, delaying the already overdue agency response to the FOIA request.²³

²³ The TSA's record of bad faith, delay, failure to produce records in the requested format, and substitution of newly-created (and less useful) records for responsive records should be assessed in the context of the TSA's record of personal animus and actual malice, explicitly stated in writing in the TSA's own records (obtained and published by the Identity Project) toward individuals associated with the Identity Project and these requests. See "How the TSA treats FOIA requesters it doesn't like", September 5, 2013, and documents linked from that article including libelous email message to staff of the TSA FOIA office from TSA Privacy Officer Peter Pietra, December 17, 2009, <<https://papersplease.org/wp/wp-content/uploads/2013/09/pietra-17dec2009.png>> and our appeal of the TSA's "response" to FOIA request TSA10-0676, <<https://ia601003.us.archive.org/0/items/TSA100676AppealAttach4SEP2013/TSA10-0676-appeal-attach-4SEP2013.pdf>>.

Whatever the causes for the TSA's delay and failure to date to properly process and respond to this FOIA request, the comment period should be extended until at least 60 days after the completion of this response, including any administrative appeal and/or judicial review.

While the administrative record available to us for review and comment is incomplete, the redacted and munged fragments disclosed to date by the TSA provide significant clues as to the nature, scope, and inappropriateness of the ongoing verbal information collection ("administrative interrogation") of travelers by the TSA.

Although the TSA has never sought – and even now is not explicitly seeking – OMB approval for this verbal information collection, OMB approval was and still is required.

The PRA explicitly applies to all information collection, "regardless of form or format":

[T]he term "collection of information" ... means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for ... answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States.²⁴

It appears from the TSA records disclosed to date that identical questions have been posed to ten or more individuals by TSA staff and contractors, including without limitation:²⁵

1. Names of Other Residents at Address?
2. Neighbor's Names?
3. Names of Associates
4. Phone Number?
5. Judicial District?

²⁴ 44 U.S. Code § 3502(3)(A).

²⁵ See, "How does the TSA decide if you are who you say you are?", June 9, 2016, <<https://papersplease.org/wp/2016/06/09/how-does-the-tsa-decide-if-you-are-who-you-say-you-are/>>.

6. County of Residence?
7. Previous County of Residence?
8. Previous Address?
9. Other States of Residence?
10. Company Worked?
11. Name of Past Employer?
12. Employment History?
13. Sporting License?
14. Recreational License?
15. Mother's Middle Name and DOB?
16. Mother's Occupation?
17. Father's Name and DOB?
18. Names of Relatives?
19. Relative's Dates of Birth?
20. City of Relative's Residence?
21. Vehicles Registered?
22. Mother's Vehicles?
23. Relative's Motor Vehicle Information?
24. Make and Model of Vehicle?

Being unable or unwilling to answer each of the questions above, or providing answers that the TSA considered inconsistent with the (unverified, "garbage in, garbage out") data

provided by the commercial data broker Accurant, is cited in TSA ID Verification Call Center reports as having been the basis for denial of passage through TSA or contractor checkpoints.

It would be premature and impermissible for OMB to approve this ongoing unlawful verbal information collection unless and until it is properly submitted for approval. That request should include a complete list of the standard questions proposed to be asked. But on its face, the list above strongly suggests an entirely inappropriate and overbroad program of interrogation, with no relationship to or likely utility – much less necessity – for any lawful TSA function.

VII. THE TSA GREATLY UNDERESTIMATES, WITHOUT ADEQUATE FOUNDATION, THE BURDEN OF THE PROPOSED INFORMATION COLLECTION.

According to the notice:

TSA estimates that approximately 191,214 passengers will complete the TSA Form 415 annually. TSA estimates each form will take approximately three minutes to complete. This collection would result in an annual reporting burden of 9,561 hours.

The notice gives no indication whatsoever of the basis for these estimates, the manner in which they were calculated or derived, or the evidence (if any) supporting them.²⁶

As noted above, the claim that this is a “new” information collection strongly suggests that the agency personnel preparing the notice were unaware that this information collection has been going on for more than eight years, or of the records of this extensive experience. Especially in the absence of any other disclosed basis for these estimates, they should be given little deference if they were prepared by personnel unfamiliar with the extensive existing records.

²⁶ We find it especially odd that an estimate presented entirely without supporting evidence or a description of the estimating methodology is specified to a precision of six significant digits.

As discussed above, many of those those records – which include more than eight years of reports to TSA headquarters records of the duration, to the minute, of each incident in which a traveler is required to complete TSA Form 415 – have been unlawfully withheld from us despite having been requested more than three years ago pursuant to FOIA.

However, the records that have been disclosed by the TSA to date in partial response to our FOIA request²⁷ suggest that the TSA’s estimate of three minutes per incident is far too low. As discussed above, part of the process of “completing” Form 415 is responding to a series of questions posed by telephone by personnel at the TSA ID Verification Call Center.²⁸ The TSA has provided no estimate of the average time to complete this verbal information collection. Based on review of the TSOC ID Verification Reports released by the TSA to date, we believe that the average time per incident required to complete the entire information collection, including the verbal information collection and the written TSA Form 415, is closer to thirty minutes than three minutes.

It is also clear from the TSOC ID Verification Reports released by the TSA to date that the TSA’s estimate of 191,214 is so much higher than the number of individuals currently being required to complete this form that it cannot have been based on these records or past experience.

Currently, the TSA requires any traveler who does not present ID credentials the TSA deems “acceptable” to complete TSA Form 415 and respond to verbal information collection.

How many travelers is that likely to be? The current number is much less than 191,214 per year. The only clue as to why that might change is the following statement in the notice:

²⁷ This request and all interim responses to date are at <<https://archive.org/details/TSOC-ID-Verification-Reports>>.

²⁸ Sometimes checkpoint staff hand the phone to the traveler and have the traveler speak directly with IVCC personnel. Sometimes checkpoint staff play a game of “telephone” and relay questions and answers back and forth between the IVCC and the traveler, creating a risk that errors in restatement will lead to denial of travel.

TSA will begin implementing the REAL ID Act at airport security screening checkpoints on January 22, 2018. Starting on that day, TSA will not accept state-issued driver's licenses and other state-issued identification cards from states that are not compliant with REAL ID Act requirements unless DHS has granted the state a temporary extension to achieve compliance.

If the TSA does not accept driver's licenses or ID cards issued by states that are not compliant with REAL-ID Act requirements, all air travelers presenting driver's licenses or ID cards issued by those states will be required to complete Form 415 and answer IVCC questions.

We can only guess that the TSA's estimate is somehow derived from its political prediction of which states will eventually comply with the REAL-ID Act.

But current and historical numbers suggest that the TSA's estimate of likely state noncompliance with the REAL-ID is far too low. That estimate probably reflects wishful agency thinking about a hoped-for, but unlikely, reversal of the public sentiment reflected in state policy.

More than a decade after the enactment of the REAL-ID Act, at most twelve of 55 U.S. jurisdictions (states, U.S. territories, and the District of Columbia) might be compliant.

One of the statutory elements of the REAL-ID Act is that each state that issues any compliant driver's licenses or ID cards must, "Provide electronic access to all other States to information contained in the motor vehicle database of the State" including, "at a minimum — (A) all data fields printed on drivers' licenses and identification cards issued by the State; and (B) motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses."²⁹

The only system currently available, under development, or reasonably foreseeable as enabling compliance with this provision of the REAL-ID Act is the "State-to-State" (S2S) system operated by the American Association of Motor Vehicle Administrators (AAMVA). S2S

²⁹ Real ID Act, Title II, Section 202(d)(12), available at <<https://www.dhs.gov/xlibrary/assets/real-id-act-text.pdf>>.

includes the national “State Pointer Exchange System” (SPEXS). SPEXS is the centralized, privatized, outsourced national ID database which includes information about each and every driver’s license or ID issued by any compliant state.³⁰

According to AAMVA, the first state to participate in S2S was Wisconsin in 2015.³¹ Only a total of twelve states currently participate in S2S.³² Since no state not participating in S2S has any other way to comply with the database access requirement of the REAL-ID Act, at most those twelve states – not including any of the most populous states – are currently compliant.

Many of the remaining states are barred by state constitutional provisions and/or state statutes from uploading their state ID databases to SPEXS or otherwise complying with the REAL-ID Act. Public sentiment remains opposed to a national ID card or national ID database.

In light of the low compliance more than a decade after the enactment of the REAL-ID Act of 2005, we expect that the majority of jurisdictions are likely to remain nonparticipants in SPEXS, and thus noncompliant with the REAL-ID Act, a year from now on the TSA’s self-imposed “deadline” of January 22, 2018. Because those are likely to continue to include most of the most populous states, we expect that at least 75% of U.S. air travelers as of that date will continue to be residents of noncompliant states. And even if we assume that one-third of them will present a passport or some other Federally-issued ID, that would still mean that roughly half of all air travelers would be residents of noncompliant states with no “acceptable” ID. All of these travelers would be required to complete Form 415 and answer IVCC questions.

30 See, “How the REAL-ID Act is creating a national ID database”, February 11, 2016, <<https://papersplease.org/wp/2016/02/11/how-the-real-id-act-is-creating-a-national-id-database/>>.

31 Email to the Identity Project quoted in “The real state of compliance with the REAL-ID Act”, February 24, 2016, <<https://papersplease.org/wp/2016/02/24/the-real-state-of-compliance-with-the-real-id-act/>>

32 AAMVA, “State to State (S2S) Verification Services: Jurisdictions’ S2S Testing & Implementation Current Status”, <<http://www.aamva.org/State-to-State/#Participation>>, accessed January 6, 2017.

In 2015, the most recent year for which data has been released, the TSA “screened” 708 million travelers.³³ If half of them have no acceptable ID and consequently are subjected to this information collection, that would be about 350 million people a year. And if answering the IVCC questions and filling out Form 415 takes about thirty minutes per person, the total annual burden of the proposed information collection would be about 175 million hours.

That’s obviously unrealistic. The real burden of this proposal is that it would create such long delays at TSA checkpoints as to effectively shut down the U.S. air transportation system. It should be assessed by OMB, and by the public, on that basis.

The TSA will undoubtedly say that this won’t happen because residents of noncompliant states who don’t present Federally-issued ID will simply be turned away from airports. But as discussed in Part III of these comments above, there is no statutory or regulatory basis for such TSA denial of access to travel by air.

VIII. THE CURRENT AND PROPOSED VERBAL AND WRITTEN INFORMATION COLLECTION FROM TRAVELERS VIOLATES THE PRIVACY ACT.

The Privacy Act , 5 U.S. Code § 552a (e)(7), provides that each agency 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."

³³ Press release, “TSA releases 2015 statistics”, January 21, 2016,
<<https://www.tsa.gov/news/releases/2016/01/21/tsa-releases-2015-statistics>>.

As discussed above, records of how, when, and where we travel are, *per se*, records of how we exercise the right to assemble (however, whenever, and wherever we choose) guaranteed by the First Amendment. In addition, many of the questions listed above (which we only know about because records were maintained by the TSA of who was asked these questions, whether they answered, and whether their answers were deemed "acceptable") pertain to how individuals exercise rights of assembly, association, and other rights protected by the First Amendment. Questions asked of would-be travelers such as "Names of Associates?" clearly implicate the right to freedom of association, as do others of the questions mentioned in these records.

Questioning by TSA staff and contractors is an administrative interrogation, not a law enforcement function.³⁴ Neither most TSA checkpoint staff nor TSA contractors are law enforcement officers. So this record-keeping cannot be justified under the second fork of the Privacy Act test as, "within the scope of an authorized law enforcement activity," even if these questions were pertinent to such a purpose, which on their face they do not appear to be.

The maintenance of these records would thus be permissible under the Privacy Act only if it was "expressly authorized by statute". But whatever strained theory of *implicit* authorization the TSA may try to construct, this record-keeping is not *explicitly* authorized by any statute.

34 It's not clear what, if any, authority might exist for "administrative interrogation". Case law on administrative searches invariably assumes that those individuals subjected to administrative searches have the absolute right to stand mute. In the only cases of which we are aware that have upheld administrative interrogation at drunk-driving or immigration checkpoints, these have been upheld only on the basis that individuals were not required to respond to any such questions, and must be allowed to proceed after only a brief delay in the absence of evidence – independent of their silence – sufficient to support a law enforcement detention or arrest. We are aware of no case law upholding compelled responses to administrative interrogation by the TSA or its contractors, or the denial of passage by common carrier or imposition of other penalties for non-response. Statutory authority for "screening" is neither a general warrant for search nor a general subpoena for testimony. The obligation of travelers to submit to "screening" cannot validly be construed as an obligation to submit to any search or respond to any interrogatories declared by the TSA or checkpoint staff to constitute "screening". This proceeding is not a rulemaking, but these issues would need to be addressed in the rulemaking if the TSA were to propose rules that would require travelers to respond to administrative interrogatories.

There is nothing in Federal statutes authorizing the TSA to identify travelers, much less explicitly authorizing the keeping of records pertaining to travelers' identities.

Indeed, it has been the consistent and explicit (and correct) position of the TSA itself, whenever the issue has arisen in litigation, that no Federal statute or TSA regulation requires travelers to have or display an ID credential in order to pass through TSA checkpoints.

This was the argument made by the TSA in *Gilmore v. Gonzales*.³⁵ It was the TSA's own argument, and the evidence submitted by the TSA itself, *ex parte* and under seal, which persuaded the 9th Circuit Court of Appeals that Mr. Gilmore could have flown with no ID as a "selectee"³⁶ if he submitted to more intrusive search. That factual finding that TSA policy and practice would have allowed Mr. Gilmore to fly without ID was critical to the Court's decision that Mr. Gilmore's Constitutional right to travel had not been violated.

This was also the testimony under oath of a TSA "Lead Checkpoint Security Officer" familiar with the TSA's ID procedures in the criminal trial of *State of New Mexico v. Phillip Mocek*.³⁷ "You don't have to show ID. You can fly without ID. We have a procedure for that."

To the extent that the TSA's notice in the *Federal Register* explains or attempts to offer any purported justification for the proposed new ID requirement, it is the following:

To ensure that the identity verification process described above does not become a means for travelers to circumvent implementation of the REAL ID Act, TSA is updating the process...

This is, at most, an argument that the REAL-ID Act somehow *implicitly* authorizes the TSA to impose an ID requirement to fly. It does not point to any *explicit* statutory authorization

³⁵ See Notes 5-7, *supra*, and accompanying text.

³⁶ 435 F. 3d 1125 at 1133 (2007).

³⁷ Criminal Case 2573709, Bernalillo County Metropolitan Court. No transcript of the trial was prepared. Audio recordings made by the Identity Project with the permission of the court are available at <<https://papersplease.org/wp/2011/01/24/audio-state-of-new-mexico-v-phillip-mocek/>>.

for such an ID requirement to fly, and thus fails to satisfy the requirements of the Privacy Act.

This statement in the notice also fundamentally misconstrues the REAL ID Act.³⁸

The REAL-ID Act pertains solely to *which* ID credentials are considered acceptable for Federal purposes. The REAL-ID Act does not itself impose or change any requirements for when, where, or for what purposes ID is required. The REAL-ID Act contains no authorization for the TSA or any other agency to impose new ID requirements.

The REAL-ID Act is implicated only in circumstances in which *other* valid Federal statutes or regulations require acceptable ID. Neither when the REAL-ID Act of 2005 was enacted, nor today, does any statute or regulation purport to impose or purport to authorize the TSA to impose any such requirement for air travel.

Circumvention of the REAL-ID Act would consist of passing off some non-compliant ID as acceptable, or engaging in some activity that requires ID – like operating a motor vehicle, and unlike traveling as a passenger on a common carrier – without having ID. A traveler who has no ID, or who does not present any ID, is not representing some other ID as being compliant with the REAL-ID Act, or as acceptable for any Federal purpose. Such a traveler is doing nothing to circumvent the REAL-ID Act.

In the absence of any valid statute or regulation requiring ID to fly, the REAL-ID Act is simply not implicated by air travel by those who do not have, or do not chose to present, any ID.

Flying without ID is a lawful everyday activity. Flying without ID does not constitute circumvention of the REAL-ID Act any more than living, working, playing, moving from place to place, or engaging in any other activities of life without having been issued or being in

38 Public Law 109-13, Division B – REAL ID Act of 2005, 119 Stat. 231, 302–23 (May 11, 2005).

possession of ID credentials – where those activities are not subject to valid ID requirements as a condition of licensing or otherwise – constitutes circumvention of the REAL-ID Act.

IX. CONCLUSION AND RECOMMENDATIONS

The TSA should withdraw this application. If it does not do so, OMB should reject it. And the TSA should cease and desist from any attempt to require ID to travel by common carrier, or to claim that the REAL-ID Act of 2005 or any other Federal statute requires, or authorizes the TSA to require, that air travelers have or provide ID.

Respectfully submitted,

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

The Cyber Privacy Project

<<http://www.cyberprivacyproject.org>>

_____/s/____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

January 9, 2017