

**Before the
TRANSPORTATION SECURITY ADMINISTRATION
DEPARTMENT OF HOMELAND SECURITY**

Washington, DC 20229

Intent To Request Approval
From OMB of One New
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),
FREEDOM TO TRAVEL USA, FIAT FIENDUM, INC.,
NATIONAL CENTER FOR TRANSGENDER
EQUALITY (NCTE), RESTORE THE FOURTH, INC.,
PATIENT PRIVACY RIGHTS, DEFENDING RIGHTS
AND DISSENT, THE CONSTITUTIONAL ALLIANCE,
PRIVACY TIMES, AND JUST FUTURES LAW**

May 19, 2020

I. INTRODUCTION

The undersigned organizations concerned with freedom of travel, identification, privacy, human rights, and civil liberties 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. 2020-06011, published at 85 *Federal Register* 16122-16124 (March 20, 2020).

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 and the associated verbal collection of information.

The notice attempts to use the PRA procedures for approval of a form to introduce 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 to travel by air by common carrier, a right recognized by Federal statute, the U.S. Constitution, and international human rights treaties.

The proposed revised form is represented as somehow related to implementation of the REAL-ID Act of 2005. But travelers have not been, and are not now, required to show any ID to fly, and nothing in the REAL-ID Act has changed or would change that.

The proposal for approval of TSA Form 415 and of this information collection by OMB should be withdrawn.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 collection of information, including both Form 415 and additional associated verbal information collection, without the required OMB approval. If this proposal is submitted to OMB, it should be rejected as premature while other requests for review are already pending; 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. Freedom To Travel USA

Freedom To Travel USA is an unincorporated, non-partisan grassroots civic association. It is concerned with the many documented violations of personal privacy and dignity that have occurred – and continue to occur – as a result of the Transportation Security Administration’s (TSA) decision over the last decade to adopt progressively more intrusive screening procedures for airline passengers. With hundreds of members nationwide, Freedom to Travel USA believes

that air travel in America should be free not only from security risks but also from the risk of unreasonable searches, as provided under the Fourth Amendment to the U.S. Constitution. Freedom to Travel USA thus advocates for airline passenger screening procedures that have already proven effective, are of limited intrusiveness, maintain privacy, and enable the dignified treatment of passengers with special needs like seniors and disabled persons.

C. Fiat Fiendum, Inc.

Fiat Fiendum, Inc., is a 501(c)(3) nonprofit tax-exempt corporation devoted to promotion of direct and liquid democracy, enabling better voter empowerment, public interest journalism, government transparency and accountability, individuals' civil rights, public interest litigation, civil rights education, and related issues.

D. National Center for Transgender Equality (NCTE)

National Center for Transgender Equality (NCTE) is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people. Since 2003, NCTE has been engaged in educating legislators, policymakers and the public, and advocating for laws and policies that promote the health, safety and equality of transgender people.

E. Restore The Fourth

Restore the Fourth, Inc. (Restore the Fourth) is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to 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 curiae* briefs in significant Fourth Amendment cases, and maintains a congressional scorecard on surveillance and privacy.

F. Patient Privacy Rights

Patient Privacy Rights' purpose is to honor and empower the individual's right to privacy through personal control of health information wherever such information is collected and used. We educate, collaborate and partner with people to ensure privacy in law, policy, technology, and maximize the benefits from the use of personal health information with consent.

G. Defending Rights and Dissent

Defending Rights & Dissent (DRAD) is a national not-for-profit public education and advocacy organization based in Washington, DC. The mission of the organization is to make real the promise of the Bill of Rights for everyone.

H. The Constitutional Alliance

The Constitutional Alliance is a community of individuals and organizations working as a nonpartisan team whose stated mission is "preserve state and national sovereignty, and the unalienable rights to life, liberty, and the pursuit of happiness as pronounced in the Declaration of Independence and protected under the Bill of Rights of the United States of America".

I. Privacy Times

Privacy Times is a leading provider of expert witness and expert consulting services regarding all matters relating to the privacy of financial and other consumer information. From

1981-2013, Privacy Times published a specialized newsletter covering the Privacy Act, Freedom of Information Act, FCRA, and a wide variety of information privacy issues.

J. Just Futures Law

Just Futures Law (JFL) is an immigration legal organization that provides legal support to grassroots and community organizations engaged in making critical interventions in U.S. deportation, detention, and privacy laws and policies. JFL staff maintains close relationships with human rights organizations and activists who seek to understand the scope and range of government surveillance and raise awareness around the criminalization of migration and travel. JFL staff have decades of experience in providing expert legal advice, written legal resources, and trainings for attorneys, community groups and advocates on the consequences of immigration and identity laws such as the REAL-ID Act.

III. THIS PROPOSAL IMPLICATES FREEDOM OF MOVEMENT, A RIGHT RECOGNIZED BY FEDERAL STATUTES, THE U.S. CONSTITUTION, AND INTERNATIONAL HUMAN RIGHTS TREATIES TO WHICH THE U.S. IS A PARTY, AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

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.”²

In addition to the general Constitutional and international treaty 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>>.
2. Executive Order 13107, December 10, 1998, <<https://www.govinfo.gov/content/pkg/WCPD-1998-12-14/pdf/WCPD-1998-12-14-Pg2459.pdf>>.

It is essential to keep these rights in mind in assessing the proposed (and in fact, as discussed further below, already 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.³

IV. THE NOTICE IS INACCURATE, INCOMPLETE, AND DOES NOT SATISFY THE REQUIREMENTS OF THE PAPERWORK REDUCTION ACT AND THE ADMINISTRATIVE PROCEDURE ACT FOR NOTICE AND A MEANINGFUL OPPORTUNITY FOR THE PUBLIC TO PROVIDE INFORMED COMMENTS.

Instead of providing actual notice of what the TSA has done and proposes to do, the notice published in the *Federal Register* contains statements some of which are materially false, and some of which are so incomplete as to deny the public a meaningful opportunity to provide informed comment on the proposal and the claims made about it in the notice.

A materially inaccurate notice and/or a materially incomplete notice does not satisfy the notice requirements of the PRA.

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

3. 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 and when the TSA proposes rules to impose such a requirement.

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).⁴

These comments constitute a “complaint[] ... regarding the accuracy of information disseminated by” the TSA. In accordance with the IQA, we request that the DHS correct these inaccurate statements through the issuance of a revised notice with a new comment period, and 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.

According to the notice:

All adult passengers 18 and over must show valid identification at the airport checkpoint in order to travel.

This statement is materially false. It is or reasonably should be known to be false by any TSA official sufficiently familiar with the relevant facts to be qualified to provide adequate notice of the proposal to allow the public to provide meaningful comments.

As discussed further below, this statement is directly contradicted by the arguments made by counsel for the TSA in litigation, the testimony given under oath by TSA staff, the evidence submitted by the TSA to Federal courts, the findings of fact made by Federal courts based on that

4. See OMB Information Quality Guidelines, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/iqg_oct2002.pdf>; DHS Information Quality Guidelines, <<https://www.dhs.gov/sites/default/files/publications/dhs-iq-guidelines-fy2011.pdf>>; DHS Information Quality Standards, <<https://www.dhs.gov/information-quality-standards>>; and TSA Information Quality Standards, <<https://www.tsa.gov/information-quality-standards>>.

evidence, the TSA records regarding people who fly without showing ID released in response to our Freedom Of Information Act (FOIA) requests, and the experience of the commenters and other travelers.

In fact, the TSA does not require, and the law does not authorize the TSA to require, that would-be travelers show any identity documents. According to longstanding practice, people who do not show any identity documents travel by air every day – typically after being required to complete and sign the current version of TSA Form 415 and answer questions about what information is contained in the file about them obtained by the TSA from data broker Accurint.⁵

The TSA’s current policy permitting people to fly without showing ID if they submit to more intrusive search was described as follows by the 9th Circuit Court of Appeals in *Gilmore v. Gonzales*, 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

The 9th Circuit found – based on the TSA’s own representations and proffered evidence – that the only condition for travel by air without ID was submission to a more intrusive administrative *search*.⁸

Later, in opposing Mr. Gilmore’s petition for certiorari to the U.S. Supreme Court, counsel for the TSA described this as “the identification-or-search requirement”, and specifically

5. See the more detailed discussion of these ongoing practices further below in these comments.

6. *Gilmore v. Gonzales*, 435 F. 3d 1125 at 1128.

7. *Gilmore v. Gonzales*, 435 F. 3d 1125 at 1137.

8. So far as we can tell, all discussion of administrative searches has assumed that an individual subjected to such a search is entitled to stand mute in the absence of some other legal basis for compelling responses to questions.

noted with approval that, “The court of appeals’ phrase ‘identification policy’ refers to both alternatives – either presenting identification or submitting to a more exacting search.”⁹

No “information collection” or requirement to respond to questioning is mentioned. So far as we know, no court has ever considered, much less approved, any claim of authority by the TSA to require travelers to respond to “administrative interrogation”. The current TSA notice provides no indication of any claim by the TSA of a legal right to demand answers to questions.

The TSA has provided, in response to a series of FOIA requests we made beginning in 2013, some of which remain pending and unanswered, only portions of its records of how many people fly without showing ID every day. But the first interim response to our FOIA request 2013-TSFO-01016, containing excerpts from the TSA “IVCC [ID Verification Call Center] Daily Summary” for May 6, 2014, is instructive.¹⁰

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.

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.

According to TSA logs and summaries for the years 2008, 2009, 2010, and 2011, which were included in the final interim release in 2017 of records responsive to this 2013 FOIA request, an average of 77,000 people each year – more than 200 a day – passed through checkpoints operated by the TSA and/or its contractors to board airline flights in the U.S.

9. Brief for the Federal Respondents in Opposition, *Gilmore v. Gonzales*, No. 06-211, November 2006, available at <<https://papersplease.org/gilmore/dl/20061113/Gilmore%20v.%20Gonzales%20gov.%20opo%20brief.pdf>>.

10. This first interim response contained 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 this request. See request and all responses at <<https://archive.org/details/TSOC-ID-Verification-Reports>>.

without showing ID, or with ID that the TSA and/or its contractors initially deemed “unacceptable”.¹¹

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

TSA is proposing to require that all adult passengers 18 and over must show an identification document acceptable to the TSA (or its contractors) at the airport checkpoint in order to travel, or must certify that they have been issued an identity document acceptable to the TSA (even if they do not have that document on their person at the checkpoint), in order to travel.

The notice is materially inaccurate, and materially deficient, in failing to give the public any notice of this proposed new requirement, and in falsely claiming that such a requirement is already in effect.

B. The proposal is for a new rule, not merely a new collection of information.

When the substance of the proposal is stated accurately, it is clear that the proposed change in prerequisites for the exercise of the right to travel by air is not a mere continuation of, or change in, an information collection. This change in requirements 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 an acceptable identity document or attest that they have been issued by some government agency with such a document – could properly be initiated only by Congress, or through a Notice Of Proposed Rulemaking (NPRM) by the TSA in accordance with the procedural requirements of the APA.

11. See analysis and links to source documents in blog post by the Identity Project, “Yes, you can fly without ID”, April 13, 2017, <<https://papersplease.org/wp/2017/04/13/yes-you-can-fly-without-id/>>.

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

We reserve the right to raise these and all other objections if and when such legislation is introduced or enacted, or 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 introduce 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 enactment of laws and 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 show an acceptable identification document or certify that such a document has been issued to them, the TSA must properly propose such a regulation, providing notice of what it proposes to require and of the statutory and Constitutional 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, and as inconsistent with both PRA and APA requirements for rulemaking when a collection of information requires new regulations.¹²

C. TSA Form 415 and the associated verbal collection of information are not “new”.

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).”

Neither TSA Form 415 nor the associated verbal collection of information have been submitted to or approved by OMB. But neither the form nor the additional information collection associated with its use are “new”. As chronicled further below, both 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.

In summary, the notice claims that the requirement for air travelers to show ID is already in effect, but that the information collection for which approval is sought is “new”.

In fact, it's just the reverse: The information collection including Form 415 and verbal questioning is already in effect, but the proposed ID requirement for air travelers would be new.

12. See PRA requirements for notice, comment, and agency and OMB review of “any proposed collection of information contained in a proposed rule” at 44 U.S. Code § 3507(d).

Submission of a form or other proposed ICR to OMB for approval after it has been in use for more than a decade 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 a newly modified version of an ICR that has been conducted unlawfully without OMB approval, with a variety of versions of forms, questions, and procedures, 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 them 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.

According to a footnote in the notice, “TSA Form 415 is currently exempt from the Paperwork Reduction Act.” Since the notice is silent as to the basis for this claim, we are unable to provide meaningful comment concerning the basis for this claim, other than that we believe it to be unfounded. In addition, as discussed below, the use of TSA Form 415 has always been part of a collection of information that includes both Form 415 and associated collection of answers

to verbal questions.¹³ It's unclear whether the TSA intends to seek separate approval from OMB of the current or a revised program of verbal questioning. But verbal questioning, even if the answers are not recorded or retained, is subject to the PRA. No claim of exemption from the PRA has been asserted with respect to the longstanding, and ongoing, verbal collection of information associated with the use of Form 415, and no exemption would apply. This continuing information collection is unlawful. It is not, and it should not be described as, "new".

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, and for a new rule. A new opportunity for public comment should be provided following that notice.

13. In litigation, counsel for the TSA have described this collection of information as follows: "For passengers like Plaintiff who do not present an acceptable form of identification, TSA does provide an alternative process for identity verification. This alternative process involves a passenger communicating both in writing and verbally as follows: first, the passenger must complete a Certification of Identity form by providing her name, address, and signature; and second, the passenger must verbally answer questions on a phone call with TSA's Identity Verification Call Center. See 81 Fed. Reg. 78,623, 78,624 (Nov. 8, 2016) (explaining the alternative identity verification process)." Reply Brief in Support of Motion to Dismiss Plaintiff's First Amended Complaint, *U.S. v. Plater*, No. CV 17-4297 VAP (JEMx), U.S.D.C., C.D. California (January 25, 2018), at page 5, available at <<https://www.courtlistener.com/recap/gov.uscourts.cacd.680711/gov.uscourts.cacd.680711.35.0.pdf>>. The use of "must" by the TSA makes clear that responding to this collection of information has been treated by the TSA as mandatory, and includes both Form 415 and responses to verbal questions. The *Federal Register* reference is to the notice of intent to submit Form 415 to OMB for approval. Neither Form 415 nor the associated verbal collection of information had been, or has yet been, submitted to or approved by OMB. No claim was made under the PRA in this case, however, so this issue was not addressed in the Court's opinion. In this pleading, the TSA cited *only* to the "Notice of Intent to Request Approval from OMB for a Collection of Information as the basis for the procedure and requirement, confirming that the intent of that Notice, like that of the current Notice, was to impose a new requirement and establish a new procedure, not merely to obtain approval for a form.

D. The public has not been provided with either the proposed Form 415, the questions proposed to be asked as part of the verbal collection of information, or the procedures for the collection of information from air travelers.

The notice does not include, and the TSA has not disclosed, even when requested, any of the following:

1. The current or the proposed revised version of TSA Form 415.
2. The questions currently asked, or the revised questions proposed to be asked, of travelers at airport checkpoints operated by the TSA and/or its contractors.
3. The procedures currently followed, or the revised procedures proposed to be followed, by the TSA and/or its contractors to collect this information from travelers through Form 415 and verbal questioning.
4. The numbers of travelers who have been required to complete TSA Form 415 and/or respond to associated verbal questions, the time required to do so, and the outcomes of those incidents.
5. The TSA administrative record concerning this proposal and its predecessor proposal¹⁴, including the basis for, and any evidence supporting, the claims in the notice concerning the need for proposed use of this information, the likely number of respondents, and the burden of this collection of information.

14. "Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)", 81 *Federal Register* 78623-78624 (November 8, 2016). See comments of the Identity Project, <<https://papersplease.org/wp/wp-content/uploads/2017/01/IDP-form-415-9JAN2017.pdf>>.

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. The only versions of Form 415 available to the public are an unnumbered, undated version obtained by the Identity Project in July 2008¹⁵ shortly after this form and the associated verbal collection of information began, and a version dated August 2008¹⁶ (“File: 400.7.2”), released in 2013 in response to a FOIA request we made in 2011.¹⁷ These versions obtained and published by the Identity Project are more than eleven years old. We don’t know what the current form says, or what the proposed new version will say.

Following the publication of the current notice concerning Form 415 in the Federal Register, we contacted the TSA Paperwork Reduction Act Officer identified in the notice to request a copy of the proposed new version of the form. We received a reply by email:

The Transportation Security Administration (TSA) has received your email and voice mail, requesting a copy of the proposed revised TSA Form 415.

The form is not available to the public as it is not finalized.

It will be available when TSA submits the Information Collection Request to OMB for approval.¹⁸

Without knowing what the proposed “new” form will say, the public has no opportunity to provide meaningful comment on it. And if the proposed form has not been finalized, we do not know how the TSA has assessed whether each item proposed to be included on it is needed, or the burden of completing the form and responding to the associated questions.

15. Available at <https://papersplease.org/wp/wp-content/uploads/2008/07/certification-of-identity-form_checkpoint.pdf>; published in blog post, "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/>>.

16. Available at <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa-form-415.pdf>>.

17. Response to FOIA request TSA11-0344, <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa11-0344-response-9may2013.pdf>>; also 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/>>

18. Email message to the Identity Project from Christina A. Walsh, TSA Paperwork Reduction Act Officer, <TSAPRA@tsa.dhs.gov>, March 26, 2020, “RE: Certification of Identity (TSA Form 415)”.

As discussed further below, some of the questions which have been asked systematically as part of this ongoing, unapproved, and unlawful information collection have been disclosed in response to our FOIA request 2013-TSFO-01016, made June 14, 2013. We published a list of questions extracted from interim responses to this FOIA request in 2016.¹⁹ However, we do not know which of these and/or other questions are *currently* being asked as part of this collection of information, and we do not know what questions the TSA *proposes* to ask. Without the list of proposed questions, we cannot provide meaningful comment on them.

It appears likely that *some* of the current procedures for this collection of information are specified in the TSA's Standard Operating Procedures (SOP), including those for the Identity Verification Call Center (IVCC).

We requested the IVCC SOP on June 14, 2013 (FOIA request 2013-TSFO-01016). Almost five years later, on May 7, 2018, we received and published a redacted copy of the version of the IVCC SOP (Version 2.1, October 7, 2013) that had been in effect when the first search for records responsive to our FOIA request was made.²⁰ But aside from being redacted, that version is now six and a half years old, may not be current, does not indicate what changes are proposed, and does not include any of the forms or the questions to be asked of travelers.

Additional procedures are likely to be specified in the TSA's contract for the ID Verification Call Center (IVCC). A version of the "Statement of Work" for that contract, as of

19. "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/>>.

20. Available at <<https://papersplease.org/wp/wp-content/uploads/2018/05/IVCC-SOP-2013.pdf>>, and discussed in blog post, "TSA releases redacted ID verification procedures" (May 8, 2018), at <<https://papersplease.org/wp/2018/05/08/tsa-releases-redacted-id-verification-procedures/>>.

September 2017, has been published by the TSA.²¹ But that version also may not be current, does not indicate what changes are proposed, and does not include any of the forms or questions.

The notice claims that the proposed information collection is needed, and includes an estimate of the number of passengers who would be required to complete the form annually and the time required to complete the form. Those same claims were made in the notice for the earlier proposal for approval of Form 415.²² But none of the administrative record or the evidence, if any, supporting those estimates has been disclosed. No estimate is included of the number of passengers who would be required to respond to the associated verbal collection of information, the time required to do so, or the total burden of that portion of the information collection.

On March 1, 2017, we made a FOIA request to the TSA for records including:

the entirety of the administrative record related to this notice, including but not limited to any records used as the basis for any of the statements in the notice including estimates of the number of affected individuals, any records related to the legal basis for the notice or the proposed procedures described in the notice, any records related to the original notice of the TSA's "ID verification" program published on the TSA's website and in the TSA's blog in 2008, all comments including unpublished comments submitted to the TSA in response to this notice and blog post, and any records pertaining to TSA consideration of, or response to, any of those comments.²³

More than three years later, the TSA has not completed its response to this request.²⁴

Whatever the causes for the TSA's delay and failure to date to 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.

21. Available in the TSA's "FOIA Reading Room" at:

<https://www.tsa.gov/sites/default/files/foia-readingroom/tsa_call_center_contract_18fo00231rr.pdf>

22. "Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)", 81 Federal Register 78623-78624 (November 8, 2016).

23. TSA FOIA request 2017-TSFO-00159.

24. See all interim responses to date at <<https://archive.org/details/TsaForm415certificationOfIdentity/>>.

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 this information. These documents will only be submitted to OMB after the close of this 60-day window for public comments.

The Paperwork Reduction Act provides in relevant part:²⁵

With respect to the collection of information ... each agency shall— ...

(A) ... provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information, to solicit comment to—

(i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; [and]

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

The current notice fails to provide the public with sufficient information to provide informed comment on the proposal, including to “evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; [and] evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information.”

A new 60-day opportunity for public comment must be offered after the proposed form, the list of questions proposed to be asked, the proposed procedures for this collection of information, and the administrative record for this proposal and its predecessor proposal – including any evidence forming the basis for the assessments of need, utility, and burden – are made available to the public.

25. 44 U.S. Code § 3506 (c)(2).
The Identity Project (PapersPlease.org) et al.

V. THE REVIEWS WHICH HAVE BEEN REQUESTED AND WHICH ARE REQUIRED BY THE PRA AND THE INFORMATION QUALITY ACT (IQA) HAVE NOT BEEN COMPLETED.

The Paperwork Reduction Act (PRA) provides as follows:²⁶

(b) Any person may request the Director [of the Office of Management and Budget] to review any collection of information conducted by or for an agency to determine, if, under this subchapter, a person shall maintain, provide, or disclose the information to or for the agency. Unless the request is frivolous, the Director shall, in coordination with the agency responsible for the collection of information—

(1) respond to the request within 60 days after receiving the request, unless such period is extended by the Director to a specified date and the person making the request is given notice of such extension; and

(2) take appropriate remedial action, if necessary.

In January 2017, the Identity Project and other organizations and individuals requested, pursuant to 44 USC § 3517, that the Director of OMB review the ongoing use of Form 415 and the associated collection of “Identity Verification Call Center” information by the TSA.²⁷

More than three years after the statutory deadline for the Director of OMB to respond to this request, the signatories to this request have received no response whatsoever.

On January 11, 2017, the Identity Project submitted a complaint and request for correction pursuant to the Information Quality Act to the DHS Information Quality Office, at the e-mail address designated by the DHS and TSA for this purpose, <DHS.InfoQuality@dhs.gov>, for information disseminated by the TSA in the notice and request for comments, “Intent To

26. 44 USC § 3517

27. Letter to Shaun Donovan, Director, Office of Management and Budget (OMB), available at <<https://papersplease.org/wp/wp-content/uploads/2017/01/Coalition-letter-OMB-TSA-Form-415-2017.pdf>>.

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).

OMB Guidelines, as most recently updated and reinforced, “require agencies to establish administrative mechanisms to allow the public to submit a ‘request for correction’ (RFC) when disseminated information does not comply with agency guidelines , as well as an opportunity [to] request reconsideration of the agency’s initial decision on an RFC.... Revised procedures should, at minimum, provide that agencies will not take more than 120 days to respond to an RFC without the concurrence of the party that requested the correction.”²⁸

The Identity Project received no acknowledgment or response to our RFC for more than two and a half years. On August 27, 2019, after repeated status inquiries by email and fax, we received the following email message from <DHS.InfoQuality@HQ.DHS.GOV>:

Our most sincere apologies for the delayed response. Your last email was sent during the furlough in January and may have been overlooked. In addition, there has been turnover in the office.

Your email has been forwarded to the TSA PRA Office, pursuant to the PRA process to request public comments for TSA Form 415.

Thank you,

DHS OCIO Business Management Office Staff

We have received no further communication regarding this RFC. More than three years after we submitted our RFC, we have received no substantive response or notice of any decision with respect to our RFC by the DHS, TSA, or any other DHS component.

28. OMB Memorandum for the Heads of All Executive Departments and Agencies, M-19-15 (April 24, 2019), <<https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>>

It would be premature and inappropriate for the TSA to submit this request to OMB for approval, or for OMB to approve it, while both a requested and statutorily required review by OMB, and a request for correction of inaccurate information in the predecessor notice (and repeated in this notice) remain pending and years overdue for responses.

VI. 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, AND PRIVACY ACT.

In light of the false characterization in the notice of TSA Form 415 and the associated verbal collection of information as “new”, and the notice that elides any discussion of the extensive experience of the TSA and the public with the form and the additional associated verbal 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, 2008.²⁹ 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 posts³⁰ about these new purported “requirements” cited 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 at that time was on its website and in its blog, and since the only opportunity provided for public comment was

29. "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>.

30. "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>>.

on that blog, the complete record of comments on this topic submitted to the TSA blog – including those 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, 2008.³¹

On information and belief – based on published incident reports³², 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.³³

The day the TSA began using this form, June 21, 2008, the Identity Project made a FOIA request for “a copy of TSA’s new identification requirement and all documents relating to it.”³⁴

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,

31. 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/>>.

32. 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%e2%80%99s-like-flying-without-id-arrive/>>.

33. 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.

34. 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/>>.

2008), “Appendix 2: Travel Document and ID Checks”.³⁵ 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.³⁶

On January 31, 2011, we made another FOIA request 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.”³⁷

This time, the TSA delayed responding for 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 (or has since been disclosed).³⁸

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)”.

35. 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/>>.

36. 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/>>.

37. Later designated as FOIA request TSA11-0344.

38. 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>>.

This message³⁹ 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 a revised version 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 and the associated verbal collection of information had been in use for many years.

39. Available at <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa-form-415-omb.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/>>.

VII. THE CURRENT USE OF FORM 415 AND THE ADDITIONAL ASSOCIATED INFORMATION COLLECTION VIOLATE THE PRA.

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 and 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.

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.

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.⁴⁰

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:⁴¹

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

40. 44 U.S. Code § 3502(3)(A).

41. 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/>>.

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.

VIII. THE TSA FAILS TO PROVIDE ANY BASIS FOR ITS ESTIMATE OF THE BURDEN OF THE PROPOSED INFORMATION COLLECTION.

According to the notice:

TSA estimates that approximately 912,500 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 45,625 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.⁴²

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 a decade, 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.

The records that have been disclosed by the TSA to date in response to our FOIA requests 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.⁴³ 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, we believe that the average time per incident required to complete the entire information collection, including the

42. 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.

43. 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.

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 912,500 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 912,500 per year. The notice gives no clue as to why the TSA expects that number to change, making it impossible for us to offer meaningfully informed comment concerning the TSA estimate.

IX. 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."

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. 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.⁴⁴

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.

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 and ID credentials in order to pass through TSA checkpoints.

44. 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.

This was the argument made by the TSA in *Gilmore v. Gonzales*, as discussed earlier. 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” 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*.⁴⁵ “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 alternative identity verification process does not become a means for travelers to circumvent REAL ID requirements, TSA is revising Form 415 to ask additional questions concerning what type of physical identification the individual has.

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 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.⁴⁶

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

45. 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/>>.

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

for the TSA or any other agency to impose new ID requirements. While the REAL-ID section of the DHS website contains numerous other inaccurate statements⁴⁷, it correctly states that, “The Act does not require individuals to present identification where it is not currently required to access a Federal facility”.⁴⁸ The REAL-ID Act prohibits Federal agencies from “accepting” noncompliant ID credentials for any Federal purpose, including at airports. But as discussed above, the TSA does not currently require that travelers have “acceptable” ID, or any ID at all, to fly. Nothing in the REAL-ID Act grants any new authority to the TSA to require travelers to present ID, rendering irrelevant to airline passengers its changes to the criteria for “acceptable” ID in circumstances – which do not include TSA checkpoints – where ID is required.

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. Because the TSA has consistently maintained in litigation that no ID is required to fly, and that travelers may fly without ID provided that they submit to a more instructive search, no court has considered, much less approved, whether a requirement for travelers to show ID would be Constitutional.

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 in a private vehicle⁴⁹ or as a passenger of a common carrier –

47. See, e.g., “DHS posts new lies about the REAL-ID Act”, January 4, 2016, <<https://papersplease.org/wp/2016/01/04/dhs-posts-new-lies-about-the-real-id-act/>>.

48. Almost all airline terminals in the U.S. are operated by state or local government agencies, but the checkpoints operated by the TSA and/or its contractors are Federal facilities.

49. See *U.S. v. Landeros*, 913 F.3d 862, 9th Circuit, 2019, citing *Brown v. Texas*, 443 U.S. 47 (1979) and *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), and finding that passengers in private vehicles are not required to identify themselves to law enforcement officers: “The identity of a passenger, however, will ordinarily have no relation to a driver’s safe operation of a vehicle.... In short, *Brown* holds that an officer may

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 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.

X. CONCLUSION AND RECOMMENDATIONS

The TSA should not submit the proposed application for approval of a collection of information to OMB unless and until it has provided full notice of the proposal and a meaningful opportunity for the public to comment, which it has not done. If this application is submitted to OMB, 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.

not lawfully order a person to identify herself absent particularized suspicion that she has engaged, is engaging, or is about to engage in criminal activity, and *Hiibel* does not hold to the contrary. As explained above, the officers insisted several times that Landeros identify himself after he initially refused, and detained him while making those demands. At the time they did so, the officers had no reasonable suspicion that Landeros had committed an offense. Accordingly, the police could not lawfully order him to identify himself.”

The Identity Project (PapersPlease.org) et al.

Comments on Certification of Identity Form
(TSA Form 415)
May 19, 2020

Respectfully submitted,

/s/

Edward Hasbrouck, <eh@papersplease.org>

Consultant to IDP on travel-related issues

The Identity Project (IDP)

A project of the First Amendment Project

1222 Preservation Park Way, Suite 200

Oakland, CA 94612

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

Freedom To Travel USA

Wendy Thomson, <wthomson@fttusa.org>

<<http://fttusa.org>>

Fiat Fiendum, Inc.

Sai, <sai@fiatfiendum.org>

<<http://fiatfiendum.org>>

National Center for Transgender Equality (NCTE)

<<https://transequality.org/>>

Restore The Fourth, Inc.

Alex Marthews, National Chair, <rt4chair@protonmail.com>

<<https://www.restorethe4th.com>>

Patient Privacy Rights

Deborah C. Peel, MD, Founder & President

<<https://patientprivacyrights.org>>

Defending Rights & Dissent

<<https://rightsanddissent.org/>>

Constitutional Alliance

<<https://constitutionalalliance.org>>

Privacy Times

Evan Hendricks, President & Founder

<<http://privacytimes.com/>>

Just Futures Law

Yihong Julie Mao, <julie@justfutureslaw.org>

<<https://justfutureslaw.org/>>