



**Privacy Impact Assessment Update
for the**

Electronic System for Travel Authorization

DHS/CBP/PIA-007(c)

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Abstract

The U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) is publishing this update to the Privacy Impact Assessment (PIA) for the Electronic System for Travel Authorization (ESTA) in order to provide notice of a new information sharing and access agreement with the National Counterterrorism Center (NCTC) due to the March 2012 release of the *Guidelines for Access, Retention, Use and Dissemination by the National Counterterrorism Center and other Agencies of Information in Data sets Containing Non-Terrorism Information* (AG Guidelines).

Introduction

ESTA is a web-based system that DHS/CBP developed in 2008 to determine the eligibility of aliens to travel by air or sea to the United States under the Visa Waiver Program (VWP) pursuant to Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, codified at 8 U.S.C. § 1187(a)(11), (h)(3). This eligibility determination is made prior to an alien's boarding a carrier en route to the United States, and it includes making a determination as to whether the alien's travel poses a law enforcement or security risk. Applicants submit their biographical information and answer eligibility questions using the ESTA website. This allows CBP to make a determination about the applicant's eligibility to travel to the United States under the VWP after vetting the information against selected security and law enforcement databases, using CBP TECS¹ and the Automated Targeting System (ATS).² In addition, ATS retains a copy of ESTA application data to identify potential high-risk ESTA applicants.

Pursuant to the National Security Act of 1947, as amended, the National Counterterrorism Center (NCTC) "serve[s] as the central and shared knowledge bank on known and suspected terrorists and international terror groups, as well as their goals, strategies, capabilities, and networks of contacts and support," 50 U.S.C. § 404o. In order to enhance information sharing, the President issued Executive Order 13388, *Further Strengthening the Sharing of Terrorism Information to Protect Americans* (October 27, 2005), which provides that the Head of each agency that possesses or acquires terrorism information shall promptly give access to that information to the Head of each other agency that has counterterrorism functions. The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (Pub. L. No. 108-458), as amended, places an obligation on U.S. government agencies to share terrorism information with the Intelligence Community (IC), including NCTC. In certain instances, DHS shares the entire dataset with an IC member in order to support the counterterrorism activities of the IC and to identify terrorism information within DHS data.

¹ DHS/CBP/PIA-009 TECS System: CBP Primary and Secondary Processing, December 22, 2010, available at <http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs.pdf>.

² DHS/CBP/PIA-006b Automated Targeting System Update, June 1, 2012, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats006b.pdf.



In 2011, DHS began sharing the entire ESTA dataset with NCTC under a Memorandum of Understanding (MOU). In 2013, DHS and NCTC entered into a new Memorandum of Agreement (MOA) that supersedes the 2011 MOU and augments privacy protections related to transparency, redress, and oversight. The MOA permits NCTC to use ESTA information to facilitate NCTC's counterterrorism efforts and helps to ensure travel authorizations are not issued to individuals who pose a threat to national security. This information sharing also aligns with DHS's mission to prevent and deter terrorist attacks. The MOA includes a number of safeguards to ensure the data is only used for the purposes explicitly permitted under the MOA, this PIA, and the DHS/CBP-009 Electronic System for Travel Authorization System of Records Notice (SORN), 77 FR 44642, July 30, 2012.³ The MOA also limits the amount of time the information is maintained at NCTC, ensures proper information technology security is in place during and after transmission of the ESTA information to NCTC, requires training for staff accessing ESTA, and provides for routine reporting and auditing of NCTC's use of the information.

Reason for the PIA Update

DHS/CBP is updating the existing DHS/CBP/PIA-007 ESTA⁴ to provide notice of a new information sharing and access agreement with NCTC developed after the release of NCTC's new AG Guidelines.⁵ Under Executive Order 12333, *United States Intelligence Activities* (December 8, 1981), as amended, IC elements are required to have guidelines approved by the Attorney General of the United States for the collection, retention, and dissemination of information concerning United States Persons (U.S. Persons).⁶ These guidelines outline temporary retention periods during which an IC element must determine whether it can continue to retain U.S. Person information, consistent with Executive Order 12333 and the purposes and procedures outlined in its guidelines.

In March 2012, the Attorney General of the United States approved *Guidelines for Access, Retention, Use and Dissemination by the National Counterterrorism Center and other Agencies of Information in Datasets Containing Non-Terrorism Information* (AG Guidelines).⁷ These Guidelines establish an outside limit of five years for NCTC's temporary retention of U.S. Person information obtained from the datasets⁸ of other federal departments and agencies. The purpose

³ Available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-07-30/html/2012-18552.htm>.

⁴ The existing DHS/CBP/PIA-007 ESTA was first published on June 2, 2008, and updated subsequently on July 18, 2011, and July 18, 2012.

⁵ The purpose of this 'temporary retention' period is to allow NCTC sufficient time to determine whether the U.S. Person information it receives from other federal departments and agencies is terrorism information.

⁶ NCTC's Guidelines use the definition of U.S. Person provided in Executive Order 12333, which states that a U.S. Person is "a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." See Executive Order 12333, Section 3.5(k).

⁷ See NCTC's AG Guidelines, available at http://www.nctc.gov/docs/NCTC_Guidelines.pdf.

⁸ In the context of DHS's information sharing relationship with NCTC, a "dataset" refers to a collection of

of this temporary retention period is to allow NCTC sufficient time to determine whether the U.S. Person information it receives from other federal departments and agencies is terrorism information.⁹ The AG Guidelines allow NCTC to retain all information in the datasets it receives for the full temporary retention period,¹⁰ whereby the information may be “continually assessed” against new intelligence to identify previously unknown links to terrorism.¹¹ NCTC may only retain U.S. Person information within such datasets beyond the temporary retention period if the information is “reasonably believed to constitute terrorism information.”¹²

In light of the new AG Guidelines, NCTC requested that DHS re-evaluate its information sharing and access agreements with NCTC. DHS does not attempt to collect information on U.S. Persons as part of ESTA. However, NCTC’s request included all of DHS-NCTC agreements in which DHS datasets are transferred in their entirety to NCTC, including the 2011 MOU to share ESTA information.

The AG Guidelines preserve the Department’s authority to negotiate with NCTC the terms and conditions of information sharing and access agreements relating to, among other things, “privacy or civil rights or civil liberties concerns and protections.”¹³ One such protection is the amount of time NCTC may retain DHS data that does not constitute terrorism information. With this in mind, DHS developed a Data Retention Framework of Factors to determine appropriate temporary retention periods for DHS datasets on a system-by-system basis. This Framework includes factors related to the sensitivity of a dataset and operational considerations. Factors related to the sensitivity of a dataset include: the circumstances of collection, the amount of U.S. Person information in the dataset, and the sensitivity of the particular data fields (e.g., sensitive personally identifiable information) that are requested. Operational factors include: the mission benefits to DHS, the mission benefits to NCTC, and any limitations for the DHS data steward

information about a set of individuals that DHS has gathered during its routine interactions (e.g., screening travelers, reviewing immigration benefit applications, issuing immigration benefits) with the public. Consequently, DHS datasets contain information about individuals who have no connection to terrorism. A dataset may constitute all the records in a Privacy Act System of Records, or a portion of the records therein.

⁹ NCTC’s AG Guidelines use the statutory definition of “terrorism information” in Section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004, which states “the term ‘terrorism information’—(A) means all information, whether collected, produced, or distributed by intelligence, law enforcement, military, homeland security, or other activities relating to: (i) the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals, or of domestic groups or individuals involved in transnational terrorism; (ii) threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations; (iii) communications of or by such groups or individuals; or (iv) groups or individuals reasonably believed to be assisting or associated with such groups or individuals; and (B) includes weapons of mass destruction information.” 6 U.S.C. § 485(a)(5).

¹⁰ As noted later in the PIA, the Guidelines allow departments and agencies to negotiate with NCTC the terms and conditions of information sharing and access agreements, which may establish a temporary retention period that is less than five year outside limit established by the AG Guidelines. DHS’s agreement with NCTC for ESTA information establishes a temporary retention period of two years for reasons explained later in the PIA.

¹¹ See NCTC’s AG Guidelines, available at http://www.nctc.gov/docs/NCTC_Guidelines.pdf.

¹² See NCTC’s AG Guidelines, available at http://www.nctc.gov/docs/NCTC_Guidelines.pdf.

¹³ See NCTC’s AG Guidelines, available at http://www.nctc.gov/docs/NCTC_Guidelines.pdf.

(e.g., DHS's own retention period for the dataset). Using the Data Retention Framework of Factors, DHS and NCTC agreed to a two year temporary retention period for all ESTA information provided to NCTC. This temporary retention period is the same temporary retention period established in the 2011 MOU and matches DHS's own retention period for ESTA information.

The 2013 MOA augments the privacy protections of the 2011 MOU with NCTC. The MOA augments privacy protections related to transparency, redress, and oversight. To promote transparency, the MOA requires DHS and NCTC to develop public PIAs that provide notice regarding the existence and contents of the MOA and to cooperate to promote transparency through efforts such as joint presentations to Congress and the DHS Data Privacy and Integrity Advisory Committee. With respect to redress, the MOA requires NCTC to establish a redress mechanism for individuals whose PII has been retained as terrorism information. The redress process will direct any request for correction or redress to DHS for resolution, as appropriate. For any records corrected by DHS through this process, NCTC will correct those records in its possession when it receives a notification of the correction from DHS. To increase oversight, DHS and NCTC have refined the quarterly reporting requirements regarding NCTC's use and retention of the DHS information. Additionally, the MOA allows DHS to assign an on-site oversight representative to NCTC to provide intelligence, data stewardship, privacy, civil rights, and civil liberties oversight of the handling of DHS information by NCTC.

Privacy Impact Analysis

The System and the Information Collected and Stored within the System

There is no change in the collection of ESTA records.

Uses of the System and the Information

There are no changes to the uses of the information.

Retention

The DHS retention period for ESTA has not changed.

NCTC's temporary retention period for ESTA information has not changed. Pursuant to the MOA, NCTC is allowed to temporarily retain ESTA records for up to two years in order to identify terrorism information, in support of its counterterrorism mission and in support of the mission of DHS. The two year temporary retention period commences when DHS delivers the ESTA information to NCTC. When NCTC replicates ESTA information, the records will be marked with a "time-to-live" date, which will specify when the ESTA information will be deleted if it is not identified as terrorism information. NCTC will purge all ESTA records not determined to constitute terrorism information no later than two years from receipt of the record from DHS. This process will be audited as required under the MOA.

Since NCTC's AG Guidelines allow information to be "continually assessed" during the temporary retention period,¹⁴ NCTC may retain all ESTA information for two years, regardless of whether NCTC has made a terrorism information determination about a particular ESTA record, as it is possible that new intelligence or terrorism information will identify previously unknown terrorism information within that ESTA record. NCTC may retain ESTA records determined to constitute terrorism information in accordance with NCTC's authorities and policies, applicable law, and the terms of the MOA.

Internal Sharing and Disclosure

No changes have been made to internal sharing.

External Sharing and Disclosure

DHS has entered into an updated MOA with NCTC in order to facilitate NCTC's counterterrorism efforts and to identify terrorism information within ESTA. This information sharing also aligns with DHS's mission to prevent and deter terrorist attacks and helps to ensure travel authorizations are not issued to individuals who pose a threat to national security. This sharing is conducted pursuant to routine use K of the ESTA SORN, which states that DHS may share ESTA information with "federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security to assist in countering such threat, or to assist in anti-terrorism efforts."

A material condition for DHS's sharing ESTA information with NCTC is that the sharing must provide real and ongoing value to both NCTC's and DHS's missions. NCTC replicates ESTA information into its Counterterrorism Data Layer (CTDL) to support its counterterrorism efforts. The CTDL provides NCTC analysts "with the ability to search, exploit, and correlate terrorism information in a single environment."¹⁵ For example, NCTC analysts may run queries against ESTA information in the CTDL to identify terrorism information within ESTA. When ESTA information is determined to constitute terrorism information, NCTC will provide feedback to DHS, which DHS may use to support its mission to prevent and deter terrorist attacks.

Additionally, NCTC will conduct automated screening of all ESTA information to generate potential leads that may constitute terrorism information. NCTC analysts will review all of the potential leads to determine whether the ESTA information constitutes terrorism information. NCTC will process all ESTA records through this screening support process within the temporary retention period of two years to determine whether ESTA records constitute terrorism information. This screening support activity supports DHS's mission to prevent and

¹⁴ See NCTC's AG Guidelines, available at http://www.nctc.gov/docs/NCTC_Guidelines.pdf.

¹⁵ See "Information Sharing Environment Annual Report to the Congress: National Security Through Responsible Information Sharing," dated June 30, 2012. Available at: http://ise.gov/sites/default/files/ISE_Annual_Report_to_Congress_2012.pdf.

deter terrorist attacks and assists DHS in its assessment of the national security risk that may be posed by approving travel authorizations for individuals from countries participating in the VWP. Because this screening support assists DHS, the MOA includes provisions to allow DHS, in coordination with NCTC, to perform the review of the automated matches if NCTC resources or workload prioritization preclude it from providing this review.

DHS and NCTC continue explore methods for direct support to DHS's mission to prevent and deter terrorist attacks. Within a year of its signature, the new MOA requires DHS and NCTC produce a joint report regarding the prioritization of screening, Terrorist Identities Datamart Environment (TIDE) enhancement, and the analytic initiatives that leverage NCTC's holdings and provide value to the Department and the Intelligence Community. DHS and NCTC will provide interim reports quarterly to the Deputy Secretary of Homeland Security, Director of NCTC, DHS Under Secretary for Intelligence and Analysis, DHS Chief Privacy Officer, DHS Officer for Civil Rights and Civil Liberties, the DHS General Counsel, and the Office of the Director of National Intelligence (ODNI) Civil Liberties Protection Officer.

The MOA has strict safeguards to protect the PII provided to NCTC. These protections include training to be provided to NCTC users on the appropriate use of PII. In addition, DHS/CBP will provide annual and periodic training to appropriate NCTC personnel on the proper interpretation of the information contained in ESTA and on the proper treatment of information from certain categories that require special handling, such as Special Protected Classes records. To maintain or receive new access to ESTA information, NCTC personnel must complete this training. Additionally, the MOA allows DHS to assign an on-site oversight representative to NCTC to provide intelligence, data stewardship, privacy, civil rights, and civil liberties oversight of the handling of DHS information by NCTC.

The MOA stipulates that NCTC may not disseminate to third parties information derived from ESTA information, unless that information is identified as terrorism information. NCTC will maintain an electronic copy and accounting of the ESTA information that is disseminated, including to whom the information is disseminated and the purpose for the dissemination. However, if there is a question on ESTA information and its relationship to terrorism, NCTC may request permission from DHS to share this ESTA information with other intelligence agencies.

Notice

The system of records notice for ESTA was published on July 30, 2012, 77 FR 44642, and remains accurate and current. Routine use K covers this sharing.

Individual Access, Redress, and Correction

There are no changes to the access, redress, and correction procedures described in the ESTA PIA.



Technical Access and Security

No changes.

Technology

No changes.

Responsible Officials

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