

May 18, 2017

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Office of Management and Budget  
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Bureau of Consular Affairs, Visa Office  
U.S. Department of State  
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RE: Supplemental Questions for Visa Applicants, OMB Control Number 1405-XXXX, DS-5535  
Docket Number: DOS-2017-0019

To Whom It May Concern:

The American Civil Liberties Union (ACLU) submits these comments in response to the Department of State (Department) *Notice of Information Collection under OMB Emergency Review: Supplemental Questions for Visa Applicants*. The ACLU opposes the proposed questions in the notice and urges the Department to abandon them in their entirety. The proposed questions would needlessly expand the information sought from approximately 65,000 visa applicants each year, slowing the visa application process, impacting the privacy of millions of U.S. citizens and residents, and undermining free speech and expression. Moreover, the manner in which the Department seeks to implement this change is unlawful, as it fails to meet the standards for an emergency justification.

The Department seeks to expand the questions it asks of approximately 65,000 immigrant and nonimmigrant visa applicants annually by reaching further back into their travel, address, and employment histories; requiring information regarding siblings, children, spouses and partners; and, looking into their social media activities. This notice was published under the emergency review procedures—without a sufficient basis for an emergency justification. Furthermore, the proposed questions are overly broad and burdensome and do not include any standards or guidance regarding who will be asked these questions, thereby increasing the likelihood of inconsistent and ineffective determinations as well as bias and profiling within these visa adjudications. Finally, the notice provides no definitions or parameters with respect to the social media question, creating substantial concerns regarding the meaning or purpose of the question; the substantial impact of the question on privacy and freedom of speech and expression U.S. citizens and residents; and the use, storage, and retention of the information collected about visa applicants, U.S. citizens, and U.S. residents.

We urge the Department to abandon the proposed questions in their entirety. At a minimum, the Department must withdraw the current notice and seek expanded public comment through notice of proposed rulemaking. The Department's attempt to implement this change without providing

adequate information to the public or sufficient time for comment is irresponsible at best and disregards the crucial interests at stake.

### **I. The Department has no emergency justification for this notice.**

Under 5 C.F.R. § 1320.13(a)(1), an agency may request emergency processing by the Office of Management and Budget (OMB) regarding the collection of information in limited situations. Specifically, the agency must submit a written determination that (1) the collection of information is needed prior to the expiration of time periods established by the statute; (2) such information is essential to the mission of the agency; and (3) the agency cannot reasonably comply with normal procedures because public harm is reasonably likely, an unanticipated event has occurred, or the use of standard procedures is reasonably likely to prevent or disrupt the collection of information or to cause a statutory or court-ordered deadline to be missed.<sup>1</sup> These emergency approvals are “granted only rarely, and such requests are discouraged by OMB.”<sup>2</sup>

In this case, the Department requested emergency processing of this request for information with little to no basis under the law. The Department’s proffered emergency justification cites the President’s Memorandum for the Secretary of State, the Attorney General, and the Secretary of Homeland Security on heightened screening and vetting of applications for visas and other immigration benefits.<sup>3</sup> This memorandum referred back to Executive Order 13780, also signed on March 6, 2017, which barred individuals from six Muslim-majority countries and refugees.<sup>4</sup> The memorandum also directed these agencies to implement procedures “as soon as practicable” that would enhance the screening and vetting of applications for visas and other immigration benefits in order to increase the safety and security of the American people.<sup>5</sup> The emergency justification cites the general statement in the memorandum that “this Nation cannot delay the immediate implementation” of procedures to strengthen the safety and security of the country,

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<sup>1</sup> 5 C.F.R. § 1320.13(a)(1).

<sup>2</sup> Paperwork Reduction Act (PRA) Guide, Version 2.0, Office of Personnel Management (April 27, 2011) available at <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf>.

<sup>3</sup> Memorandum for the Secretary of State, the Attorney General, and the Secretary of Homeland Security, *Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People* (March 6, 2017) available at <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

<sup>4</sup> Executive Order Protecting the National from Foreign Terrorist Entry into the United States (March 6, 2017) available at <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>5</sup> Memorandum for the Secretary of State, the Attorney General, and the Secretary of Homeland Security, *Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People* (March 6, 2017) available at <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

and claims that allowing the ordinary time for review would result in the questions not being asked “for a matter of months” and would impede the purpose of the Presidential Memorandum.<sup>6</sup>

The Department’s cited justifications are not appropriate bases to invoke emergency processing for these substantial changes to the visa application process and the resulting impact on U.S. residents and citizens. Executive Order 13780 and the Presidential Memorandum were issued two months before this Federal Register notice, and similar directives were issued as a part of Executive Order 13769 (the original version of Executive Order 13780). Despite the months afforded to the agencies to determine ways to enhance visa screening, the Department has set forth no standards for this process and now provides the public with little time to comment. Moreover, federal courts have enjoined the implementation of provisions of the original and current executive orders, further calling into question these broad national security claims as a basis for an emergency justification.

The Department’s claims for an emergency justification fall short of the standard set forth in 5 C.F.R. § 1320.13(a)(1). It is imperative that the public be given a longer period to comment on these substantial changes that will impact approximately 65,000 applicants annually and many more U.S. citizens and U.S. residents through the normal process for review.

## **II. The proposed questions are overly broad and burdensome.**

The proposed questions seek information from applicants about their last 15 years of travel history, address history, and employment history as well as passport numbers for foreign passports, names and dates of birth for siblings, children, and current and former spouses or civil or domestic partners, and social media platforms, identifiers, phone numbers, and email addresses used by the applicant in the last five years.<sup>7</sup> Such questions clearly go beyond what is relevant or necessary to protect national security. For example, these questions go further into individuals’ histories than the security clearance forms for government employees and officials with access to highly classified information, including national security officials.<sup>8</sup> Additionally, the notice states that applicants will be asked the details of their travel, including domestic travel, if the consular officer believes they “have been in an area while the area was under the operational control of a terrorist organization”. Visa applicants will also be asked for the “source of funding” for their travel for the last fifteen years.

There is no rationale provided for asking any of these questions, nor does the Department specify how this information will be used. When and how will officers decide that information dating back 15 years needs to be acquired? How will an officer determine that it “appears” that the applicant was in a region which was under the operational control of a terrorist organization while the applicant was there? What funding will be assessed as legitimate and what will be

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<sup>6</sup> Emergency Memo/Justification, Supplemental Questions for Visa Applicants, OMB Number 1405-XXXX, DS-5535 (April 28, 2017) *available at* [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1405-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1405-001).

<sup>7</sup> Questions related to social media activities are discussed separately in Part IV.

<sup>8</sup> Questionnaire for National Security Positions, Standard Form 86, U.S. Office of Personnel Management, 5 CFR Parts 731, 732, and 736 (revised December 2010) *available at* [https://www.opm.gov/Forms/pdf\\_fill/SF86.pdf](https://www.opm.gov/Forms/pdf_fill/SF86.pdf).

suspect? How will officers be applying these standards? What training will they have regarding these new questions? By requiring that applicants provide this information for the last 15 years, these questions will make the application process more burdensome for applicants and will result in longer adjudication times and processing delays without any basis, rationale, or guidance as to how the information will be used.

The Department's notice also includes questions regarding "social media platforms and identifiers, also known as handles" used for the last five years. However, it provides no definitions for these terms. These terms must be defined more precisely in order for an applicant to understand how to answer adequately and so that the public better understands the scope of information to be collected and analyzed by the government. Terms such as "platform" and "identifier" can be interpreted broadly or narrowly, and "social media" is itself a broad term as well. It is not clear whether the Department intends this to include more obvious and frequently used platforms in the United States such as Facebook and Twitter, or whether it includes blogs, gaming, or dating applications as well. In order for applicants to answer these questions and for the public to understand the reach of the government into their personal habits, choices, beliefs, and expression, the Department must provide clarity regarding the scope of the information it is requesting.

The notice also indicates that the failure to provide responses to the proposed questions would "not necessarily result in visa denial" if the officer determines that the applicant has provided a credible explanation for not providing the information. It is not clear what qualifies as a credible explanation. For example, if an individual does not remember a trip from 14 years ago or the "source of funding" for the trip, or does not wish to provide a social media handle or does not remember one, will the visa be denied? Does "credible explanation" leave room for those who do not remember? What qualifies as a credible explanation?

The Department has provided no guidance as to the purpose of these questions, definitions of the terms used, application of the information gathered, or the impact of not providing the information. The only legitimate way for the Department to propose the collection of this information is through proposed notice and rulemaking subject to public comment, which must include definitions for these terms, the scope of the information being collected, and the ways in which it will be used so that the public may adequately comment.

### **III. The lack of standards governing who will be asked these additional questions will likely result in inconsistent and ineffective determinations as well as discriminatory profiling.**

According to the notice, immigrant and nonimmigrant visa applicants "who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities" will be asked these new questions. However, the notice sets out no basis or standards by which the Department will make such determinations. The Department alleges that approximately 0.5% of visa applicants, or 65,000 applicants annually, will "present a threat profile" that will necessitate the collection of this information. It further states that applicants will be asked the details of their travel if the officer believes they "have been in an area while the area was under the operational control of a terrorist organization." Without any

further elaboration or detail as to how these determinations will be made, these proposed questions are extremely vague and broad, making them likely to result in arbitrary, inconsistent, and ineffective determinations.

Furthermore, the President issued the Executive Order upon which the Memorandum and Federal Register notice are based in an attempt to single out and condemn Muslims. Given this discriminatory premise and the vague language in the notice, the proposed questions heighten the likelihood of discriminatory profiling in visa determinations and the unjust targeting of people of particular backgrounds such as their faith or national origin. Executive Order 13769 and Executive Order 13780 were an attempt to implement President Trump's pledge to target Muslims, using national origin as a proxy. It must also be noted President Trump has repeatedly called for "ideological certification" or testing and "extreme vetting" while making specific reference to Islam, Muslims or people from Muslim-majority countries, and terrorism.<sup>9</sup> Additionally, other programs and policies that have used similarly vague terminology to determine threat have unjustly targeted and resulted in the disparate and discriminatory treatment of Muslim, Arab, South Asian, and Middle Eastern community members, such as surveillance and watchlisting. To create an unjustified layer of screening without any basis or standard would likely create yet another discriminatory effect on these communities.

By failing to articulate standards for imposing such additional questioning or how the information will be used, the Department creates the risk of inconsistent and ineffective determinations and heightens the threat of discrimination and profiling of visa applicants.

#### **IV. The notice lacks parameters or guidance regarding the request for social media information.**

The Department has proposed a social media-related question, requesting "social media platforms and identifiers, also known as handles, used during the last five years." The notice provides no other information regarding the definitions of these terms; how the information will be stored, retained, or used; and what information will be gathered about U.S. citizens and residents without their consent. As recently as February 2017, the Office of the Inspector General (OIG) issued a report concluding that the Department of Homeland Security's (DHS) social media screening pilots do not have clear success criteria, and that DHS therefore may not be able to design an effective social media screening program.<sup>10</sup> The OIG also recommended that DHS develop and implement "well-defined, clear, and measurable objectives and standards" to evaluate its social media screening pilot programs.<sup>11</sup> The Department must develop similar

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<sup>9</sup> See Los Angeles Times Staff, *Transcript: Donald Trump's Full Immigration Speech* (Aug. 31, 2017) available at <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html>; Rebecca Shabad, *Donald Trump Calls for "Extreme" Ideological Screening Test for New Immigrants* (Aug. 15, 2016) available at <http://www.cbsnews.com/news/donald-trump-proposes-ideological-test-immigration-u-s/>.

<sup>10</sup> Office of Inspector General, *DHS' Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-Term Success (Redacted)*, OIG-17-40 (Feb. 27, 2017) available at <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

<sup>11</sup> *Id.*

standards prior to proposing these questions in a notice. It must also provide detailed implementation plans and then allow the public a meaningful opportunity to comment.

A. Officer assessments will be subjective and based upon unreliable or circumstantial evidence.

According to the notice, the proposed questions seek to “resolve an applicant’s identity or to vet for terrorism or other national security related visa ineligibilities” where there is a need for enhanced scrutiny. However, the lack of clarity in the questions, definition of terminology, the scope of the information being collected, and the ways in which it will be used make the collection of this information unreliable and subject to abuse. The decision-making regarding visas will itself become more uncertain because it will involve a wide array of social media information about applicants as well as other individuals.

Moreover, decision-making based on social media information will inevitably be subjective. In evaluating applicants’ responses to the social media question, officers will determine whether applicants are worthy of visas without limitations or guidelines regarding how to interpret such information. This subjective decision-making process would offer little or no opportunity to learn the basis for a denial and no transparency about the information being collected on applicants and their U.S.-based contacts and correspondents. In sum, it would add a layer of scrutiny to certain visa applicants without articulable basis, creating a complex, wide-ranging, capricious, politically-charged, and highly subjective assessment without providing detail or standards as to how the assessments will be carried out.

B. Information will be gathered about millions of U.S. citizens and residents without their consent.

Given that the Department is collecting a broad swath of information that is poorly defined and lacking clear guidelines for use, such collection will enable the Department to search the internet for an applicant’s contacts. Inevitably, this information will also include the identities of U.S. citizens and residents who are connected in some fashion to the visa applicant. According to the notice, approximately 65,000 applicants will be affected annually, which means there are likely to be millions of U.S.-based contacts, the vast majority of whom have done nothing to cause the government to scrutinize their actions and communications and all of whom will have done nothing to consent to the collection of their personal information.

The Department’s proposed questions request information regarding social media platforms and identifiers, which would result in the collection of a massive amount of personal communications and information about the individuals with whom they are communicating. It will result in the Department deriving data on millions of contacts—many of them U.S. citizens and residents—who happen to be connected by social media whether as a friend on Facebook, a follower on Twitter, or perhaps a match on a dating application or website. Through this mechanism, information would be collected on U.S. citizens and residents without their knowledge.

For the Department to move forward with dramatic changes to the visa process that result in information collection impacting millions of U.S. citizens and residents without providing adequate information or time for public comment poses incredible risks to the privacy of individuals throughout the nation.

C. There is no guidance or plan regarding the use, storage, or retention of the information collected.

There is no indication in the notice regarding how the data of visa applicants, U.S. citizens, and U.S. residents will be used, stored, retained, or shared with other agencies across government or private entities. Any proposal with such a substantial impact on our immigration processes and privacy must address how the data derived from social media identifiers will be collected, disseminated, and retained, so that the public may have an opportunity to comment.

Regarding visa applicants, the Department provides no guidelines regarding how any information collected will be used or when the requested information will result in the denial of a visa. In theory, the Department might exclude an applicant based on information gleaned from social media contacts, “likes” of particular statements or articles, retweets of others’ statements, or even online purchases. There is no information as to whether the Department will assess an individual’s social media comments, contacts, evidence of travel or studies, or professional achievements or failures. Based upon the notice, the applicant will not know what information has been collected or how it is being perceived or used, which also means that the applicant has no way of rebutting false presumptions or information interpreted out of context. Equally unclear is how the applicant’s social media contacts’ information will be used and whether they will also be scrutinized, logged, and monitored by the government regardless of having applied for an immigration benefit or whether they are a U.S. citizen or resident. Without such guidance, we are left to assume that someone could be excluded even if they are unaware of an indirect connection to someone who is considered suspect.

If such a denial occurs due to information gleaned from social media identifiers, it remains unclear if the applicant will have an opportunity to correct any erroneous, misleading, or unsubstantiated information derived from the identifiers that generated the denial. Aside from the personal or business impact on the applicant’s travel plans, the retention of any such corrupted information within any databases maintained by the Department or other governmental entities could cause similar or other incorrect decisions in other circumstances. Having a meaningful opportunity to correct the record will benefit not only the applicant, but also the reliability of the information on which the government depends in carrying out its mission.

For U.S. citizens and residents caught up in this data collection, it will be even more difficult to make sure the government is not drawing incorrect conclusions about their contacts and activities. The notice makes no reference to its intended plans for the information derived from researching the social media identifiers. If the Department or another agency identifies any U.S. citizen or resident through the use of social media identifiers provided on a visa application, it should promptly purge any record of that person’s identifiable information. If

the government seeks to retain any such record, the government should provide notice to that U.S. person as well as an opportunity to verify that the information is accurate and to challenge its inclusion. Failure to provide such an opportunity would undermine the privacy of millions of U.S. citizens and residents. The Department must provide that plan and offer an opportunity for public comment.

The Agency must provide detailed information on its plan to allow applicants to collect information derived from using social media identifiers and on its plans to retain and share information on U.S. citizens and residents and offer an opportunity for public comment.

D. There will likely be a chilling effect on the free speech and expressions of U.S. citizens and U.S. residents.

Individuals decide to travel to the U.S. for many different reasons—to engage in business, visit family, speak at a conference, or pursue an education to name a few. Certainly tourism is one of the leading draws of foreign visitors and a leading economic driver in many parts of the country. Each such visit has a discrete and tangible economic and cultural benefit—both to the country and often to the visitor as well. Any action that would make such visits less attractive to the traveler or less likely to occur is one that should be discouraged. By asking all visitors to reveal their social media identifiers, with the understanding that the U.S. government will be examining their online activity and contacts, we are making our country less hospitable and we are making our visitors more likely to be secretive, even if their activities pose no threat to our country.

Even more importantly, such actions encourage U.S. citizens and residents to be more circumspect in connecting with those outside the United States.<sup>12</sup> To the extent an individual can control to whom they are connected online, anyone who is concerned about personal privacy or anyone who is reluctant to share personal beliefs or comments with government investigators will be less likely to engage online. Whether in large or small degree, it will cause law-abiding U.S. citizens and residents to consider restricting their online activity. Furthermore, those who are actually engaged in terrorism will simply take additional steps to hide their communications, making this information collection ineffective. There will be relatively little to gain from such a process and a massive impact on our immigration system and processing as well as the privacy of the U.S.-based contacts of these applicants.

We urge the Department to seek public comment on the anticipated impacts of the proposal on the speech and associative practices of U.S. citizens and residents, and how the chilling effect of the proposal might harm American business, tourism, and cultural institutions.

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<sup>12</sup> See PEN America, Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor (Nov. 12, 2013); Karen Turner, Mass Surveillance Silences Minority Opinions, According to Study, Wash. Post, (Mar. 28, 2016) available at [https://www.washingtonpost.com/news/the-switch/wp/2016/03/28/mass-surveillance-silences-minority-opinions-according-to-study/?utm\\_term=.2ac61c2bfb25](https://www.washingtonpost.com/news/the-switch/wp/2016/03/28/mass-surveillance-silences-minority-opinions-according-to-study/?utm_term=.2ac61c2bfb25) (last accessed May 10, 2017).



## V. Conclusion

The Department's proposed supplemental questions are problematic, procedurally and substantively. Rather than publishing a proposed notice of rulemaking for this expansion of visa processing, the Department took months to propose a series of problematic and vague requests under the umbrella of an emergency notice. Without an adequate emergency justification, these proposed questions reach deep into the histories of visa applicants without any parameters or guidance regarding when, how, and to whom these questions will apply, creating an environment ripe for profiling and discrimination. The Department states no plan for the use, storage, or retention of this information and disregards the privacy and free speech rights of millions of U.S. citizens and residents.

The ACLU opposes the changes proposed in the notice and urges the Department to abandon them in their entirety.

Sincerely,



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National Political Director



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