

August 25, 2008

Mr. Hugo Teufel, III
Chief Privacy Officer
Department of Homeland Security
Washington, DC 20528

**Re: Comments on Non-Federal Entity Data System (NEDS)
System of Records Notice (SORN) [73 Fed. Reg. 43462]
Docket No. DHS-2007-0016¹**

Via: www.regulations.gov

Dear Mr. Teufel:

The Center for Democracy & Technology submits these brief comments to highlight key privacy implications of the new NEDS database (and related systems), which has been created to support Custom & Border Protection's (CBP) use of border crossing documents issued by non-federal entities pursuant to the Western Hemisphere Travel Initiative, such as the RFID-enabled, state-issued "Enhanced Driver's License" (EDL). We are also separately submitting comments on the companion Border Crossing Information (BCI) SORN [73 Fed. Reg. 43457, Docket No. DHS-2007-0040]² (comments attached here as an Appendix).³

According to the NEDS and BCI SORNs, as well as the Privacy Impact Assessment,⁴ when an individual presents an EDL at the border, CBP will access that person's biographical

¹ NEDS SORN: <http://edocket.access.gpo.gov/2008/E8-17126.htm>.

² BCI SORN: <http://edocket.access.gpo.gov/2008/E8-17123.htm>.

³ The *Washington Post* recently reported on these two SORNs. See Ellen Nakashima, "Citizens' U.S. Border Crossings Tracked; Data From Checkpoints To Be Kept for 15 Years" (Aug. 20, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/19/AR2008081902811_pf.html.

⁴ *Privacy Impact Assessment for CBP Procedures for Processing Travel Documents at the Border* (July 2, 2008), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_borderops.pdf.

information (to verify identity and citizenship) by either linking to the NEDS database that has been pre-populated with state EDL data, or by “pinging” in real-time the state EDL or motor vehicle database. That biographical information will then be copied, border crossing details will be recorded, and both sets of data will be placed in the BCI database. Our privacy comments relate to this system of collecting and sharing EDL holders’ personal information.

* **Privacy risks of storing personal information in multiple locations.** The NEDS SORN does not explain why some states will give an advance copy of their EDL databases to CBP to pre-populate NEDS, while other states will allow CBP to “ping” their EDL databases each time an EDL is used to cross the border. Of these two models, it appears that “pinging” a state database in real-time to electronically verify identity and citizenship *when an individual chooses to use an EDL at the border* would provide greater privacy protection for that individual’s personal information. As it now stands, a person’s EDL biographical information will be stored in two places: in the state motor vehicle database *and* in CBP’s NEDS database, *even if that person never uses the EDL to cross the border* (and possibly in a third location – the BCI database – if an EDL is used to cross the border).⁵ Having copies of personal information needlessly stored in two databases creates an undue risk that it will be subject to unauthorized disclosure or misuse.

In light of the greater privacy risks of creating the NEDS database, DHS should work with states to adopt the real-time “ping” model, or, better yet, have the State Department (rather than individual states) vet citizenship, as it does for the passport. Both alternatives would preempt the need for the NEDS database, enabling personal information to be held in one location (i.e., State Department or state motor vehicle databases) and accessed by CBP only as needed (i.e., when someone uses an EDL to cross the border). The State Department alternative would also alleviate any potential concerns about the wisdom or technical feasibility of the federal government (i.e., CBP) linking to state computer systems.⁶

* **Unclear limits on accessing personal information held in state databases.** For those states that decide against giving CBP an advance copy of their EDL databases, CBP will have to “ping” state databases in real-time when an EDL is used to cross the border in order to access biographical data for purposes of verifying the traveler’s identity and citizenship. The NEDS SORN makes clear what limited personal information will be provided by states to pre-populate the NEDS database.⁷ However, the NEDS SORN expressly does *not* apply to the second model, that is, when CBP must “ping” in real-time state EDL databases to collect personal information. (p. 43464, *infra* note 12) So the question remains, what will CBP have direct access to in state EDL or motor vehicle databases under the second model? The BCI SORN lists data that “may”

⁵ See PIA Section 1.3 (CBP will “maintain a separate database containing each governmental entity’s [state’s] RFID enabled border crossing travel document data set as a separate portion of the database, whether or not all persons in the database are choosing to cross the border at any given time.”)

⁶ CDT made similar suggestions in our testimony before a Senate Homeland Security Subcommittee in April 2008 (p. 5). <http://www.cdt.org/testimony/20080429scope-written.pdf>

⁷ The NEDS database “will contain the following information, to the extent provided to CBP by the participating document-issuing authority” (p. 43464)

be collected and stored in the BCI database. (p. 43459) CDT urges DHS to clearly state that CBP, when directly “pinging” state databases for EDL biographical information, will not also have access to other personal information associated with a person’s driver’s license record such as driving history or sensitive source or “breeder” documents electronically stored by the state motor vehicle department (which some states might do pursuant to the REAL ID Act).⁸

* **Undisclosed uses of NEDS data pursuant to MOUs.** CDT is pleased that, with regard to EDL biographical information given to CBP in advance to pre-populate the NEDS database, DHS “has chosen not to publish routine uses pursuant to [the Privacy Act] 5 U.S.C. 522a(b)(3),” and that DHS “has limited the sharing of NEDS data to the statutory disclosures permitted under 5 U.S.C. 552a(b).” (p. 43464) However, the NEDS SORN, in describing the purpose of the NEDS database, states that data “held within NEDS will be maintained and used in accordance with the individual memorandum of understanding/agreement with each issuing entity.” (p. 43463)⁹ CDT urges DHS to make clear that the respective MOUs/MOAs with states will not include additional, as-yet-undisclosed purposes or uses for the NEDS data. To enhance transparency, DHS should also post the MOUs/MOAs with states and other non-federal entities on the DHS website.

* **Excessive uses once NEDS data is transferred to BCI.** The NEDS SORN acknowledges that, “To the extent data derived from NEDS is subsequently transferred to other systems of record (e.g., upon presentment of a travel document in conjunction with a border crossing), that data may be used in a manner consistent with the system of records notice published for the receiving system of records.” (p. 43464) Thus, once EDL biographical information is transferred from NEDS to BCI following a border crossing event, that personal data will be subject to the 15 “routine uses” listed in the BCI SORN, which include potential disclosures to other federal and state agencies, foreign governments, courts and civil litigants, the news media and the public. (pp. 43459-43460) Thus, strong privacy protections for the NEDS database itself become meaningless once a person uses an EDL to cross the border and personal information held in NEDS is then transferred to the BCI database. As more fully explained in our comments on the BCI SORN (Appendix), CDT believes the list of “routine uses” is overbroad and urges DHS to narrow its scope to those uses reasonably related to assessing admissibility to the U.S. and whether a traveler poses a security threat.

* **Excessive period of data retention once NEDS data is transferred to BCI.** CDT is pleased that EDL biographical information will only be retained in the NEDS database “for the duration of the validity of the travel document.” (p. 43465) However, once EDL biographical information is transferred from NEDS to BCI following a border crossing event, that personal data will be retained for 15 years (in the case of U.S. citizens and permanent residents) pursuant to the BCI SORN. (p. 43461) As more fully explained in our comments on the BCI SORN

⁸ See Public Law 109-13, §202(d)(2) (May 11, 2005).

⁹ See also PIA §1.6 (“NEDS information will be provided to CBP by the various issuing authorities pursuant to the terms of separately negotiated Memoranda of Understanding, and *CBP’s use of this data will be in accordance with the grant of access to the issuing authorities’ data* and the terms of the NEDS SORN.”) (emphasis added).

(Appendix), CDT believes that the 15-year retention period for storing both biographical data and border crossing history is excessive, and we urge DHS to shorten the amount of time.

* **Lack of sufficient notice to EDL holders.** We acknowledge that DHS, by publishing the NEDS and BCI SORNs, is fulfilling its obligation under the Privacy Act¹⁰ to notify the public that certain information (i.e., biographical and border crossing data) will be accessed, copied/collected and stored (and potentially shared) by CBP when an individual crosses the border.¹¹ The NEDS SORN explains that the NEDS database will be pre-populated with EDL biographical information provided to CBP by some states, and that such information will be copied and placed in the BCI database along with details of a person’s border crossing whenever an EDL is used to cross the border.¹² (p. 43463) The BCI SORN explains that if a person uses an EDL to cross the border but that biographical information is not already in the NEDS database, CBP will “ping” a state’s EDL database in real-time to access and copy the EDL biographical data, which in turn will be placed in the BCI database along with details of the person’s border crossing. (p. 43458) The BCI SORN goes on to explain that personal information in the *BCI database* – including EDL biographical information either copied from NEDS or directly from state motor vehicle databases – will then be stored for 15 years (in the case of U.S. citizens and permanent residents) (p. 43461) and be subject to a wide range of “routine uses” and broad disclosure rules (pp. 43459-43460).

While DHS may be meeting Privacy Act notice requirements, CDT questions whether state residents – in states that opt for the NEDS “pre-population” model – who wish to get an EDL will in fact be properly notified during the application process that their personal information, voluntarily handed over to state motor vehicle departments for purposes of getting a driver’s license, will also be copied by the federal government (i.e., CBP) and stored in the NEDS database *regardless of whether the EDL is ever used to cross the border*. We also wonder whether state residents – in states opting for *either* the NEDS “pre-population” model, or the real-time “ping” model – will be properly notified during the EDL application process that when they do use the EDL to cross the border, their personal information and border crossing history will be stored for 15 years and be subject to a myriad of uses (pursuant to the BCI SORN). CDT urges DHS to require states in the MOUs/MOAs to properly notify EDL applicants of the details of the sharing of personal information between states and CBP.

* **State collection of border crossing data.** CDT acknowledges that both the NEDS and BCI SORNs can only address how the federal government (in this case, CBP) will handle personal information pursuant to the Privacy Act. However, a key privacy question is whether *state motor vehicle departments* will record individuals’ border crossing information each time

¹⁰ 5 U.S.C. §552a(e)(4).

¹¹ *See also* PIA Section 6.1.

¹² The NEDS SORN expressly does not cover the real-time “ping” model: “Individuals holding travel documents issued by authorities that do not provide CBP with a copy of this information (or only provide CBP with real-time access to document-specific information in their databases at the time such document is presented for border crossing purposes) are *not covered by NEDS*, as the information underlying their travel document has not been provided in advance to CBP.” (p. 43464) (emphasis added)

CBP “pings” their databases when an EDL is presented at the border, and thereby create a log of a person’s travel history.¹³ States have no apparent need for such travel information and CDT urges DHS to prohibit states, pursuant to MOUs/MOAs, from collecting such data. Moreover, as mentioned above, State Department vetting of citizenship for purposes of creating an EDL for cross-border travel would preempt concerns about connecting state and federal computer systems.

CDT appreciates the opportunity to submit these brief comments.

Sincerely,

/s/

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Attached Appendix: Comments on Border Crossing Information (BCI)
System of Records Notice (SORN), 73 Fed. Reg. 43457
Docket No. DHS-2007-0040

¹³ CDT raised this issue in our testimony before a Senate Homeland Security Subcommittee in April 2008 (p. 5). <http://www.cdt.org/testimony/20080429scope-written.pdf>