

May 2, 2007

Secretary of State Condoleezza Rice
U.S. Department of State
2201 C St., NW
Washington, DC 20520

Re: State Department Release of Privacy Impact Assessments

Dear Secretary Rice:

The Center for Democracy and Technology (CDT) requested from the State Department copies of two Privacy Impact Assessments: one on the U.S. electronic passport, and one on the proposed PASS card program.

CDT's concern is that the State Department has violated both the FOIA and the E-Government Act of 2002 by failing to release these two PIAs, or by failing to complete the PIAs as required by law.

CDT submitted a Freedom of Information Act request via the State Department's website on December 14, 2006.¹ We were then contacted in January of this year by the Program Manager for the Privacy Program who assured me that she would work on our requests.² Our attempts to follow up have been unsuccessful.

Privacy Impact Assessment for the U.S. Electronic Passport

In the PIA related to the collection of personal information from e-passports issued by *other* countries, released in August of last year, the Department of Homeland Security wrote:

¹ "How to Make a FOIA Request" <<http://foia.state.gov/foiareq/foialetter.asp>>. See also "Department of State Privacy Impact Assessments" <<http://foia.state.gov/piaOnline.asp>>.

² The Program Manager for the Privacy Program is Karen Hayman French

This PIA does not cover risks associated with the actual e-Passports. Any issues relating to the design or security and privacy controls employed will be the responsibility of the country issuing the passport. For example, in the case of U.S. issued e-Passports, the Department of State (DOS) is assessing the risks presented by the passports themselves and determining how best to mitigate them.³

CDT thus asked for the State Department's Privacy Impact Assessment that addresses the privacy and security risks of using short-range RFID and other technologies in the US e-passport. CDT has not received this PIA. The *Summary Privacy Impact Assessment* related to passport modernization does not address these specific concerns.⁴

It appears that the State Department began issuing the new passports even though the assessment of the technological privacy risks associated with e-passports had not been completed.⁵ Privacy Impact Assessments must be conducted *before* a new project is developed and launched in order for their analyses and recommendations to be meaningful.⁶ Therefore, we are concerned that the State Department's inability to provide a PIA may mean that it was, in fact, never completed.

Privacy Impact Assessment for PASS Card Program

The PIA for the Western Hemisphere Travel Initiative (WHTI), also issued in August of last year, failed to discuss the PASS Card specifically or the privacy and security risks of using the proposed long-range RFID technology.⁷ The WHTI PIA simply states:

The information will be collected by running the machine readable zone (MRZ) of the passport through a scanner-like reader or through the use of other technology like RFID chips in documents like the ePassport so as to minimize human error in inputting information into the system.⁸

³ Department of Homeland Security, *Privacy Impact Assessment Update for the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program, Authentication of e-Passports* (August 18, 2006) at 2 <http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_epassport.pdf>.

⁴ Department of State, *Summary Privacy Impact Assessment, Passport Modernization System* (Oct. 2004) <<http://foia.state.gov/SPIAS/20061.DOS.PIA.Summary.Passport-cleared.pdf>>.

⁵ Department of State, Office of the Spokesman, "Department of State Begins Issuing Electronic Passports to the Public," Media Note (August 14, 2006) <<http://www.state.gov/r/pa/prs/ps/2006/70433.htm>>.

⁶ See E-Government Act of 2002 [H.R. 2458] Pub. L. 107-347, §208, 116 Stat. 2921 (Dec. 17, 2002).

⁷ The Federal Register notice proposing the use of long-range RFID technology in the PASS Card was published on October 17, 2006 and the comment period closed on January 7, 2007. The public is waiting to hear what the State Department is going to do with this program since many people are opposed to the technology choice for privacy and security reasons.

⁸ Department of Homeland Security, *Privacy Impact Assessment for the Western Hemisphere Travel Initiative (WHTI)* (Aug. 11, 2006) at §2.3 <http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_whti.pdf>.

For this reason, CDT inquired as to whether a PASS Card-specific PIA had been conducted by the State Department and, if so, CDT requested a copy. To date, we have not received a copy of such a PIA nor verification of whether the PIA was ever written.

Freedom of Information Act

The Freedom of Information Act requires that an agency:

determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.⁹

CDT first submitted our FOIA request on December 14, 2006 via the State Department website. While the Privacy Program Manager acknowledged receipt of the FOIA request, we have not yet received a determination whether the State Department will fulfill our request.

E-Government Act of 2002

The E-Government Act of 2002 requires agencies to conduct Privacy Impact Assessments and afterward, “if practicable . . . make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.”¹⁰ This requirement “may be modified or waived for security reasons, or to protect classified, sensitive, or private information contained in an assessment.”¹¹

As a general matter, given that website publication is the primary means by which agencies should be making publicly available their Privacy Impact Assessments, it is inappropriate for the State Department to require individuals to submit written requests for copies of PIAs.¹² Similarly, the two PIAs that CDT requested should both have been completed by now, and should both be posted to the State Department’s website. We have not been informed that any of the above exceptions to such disclosure apply in whole or in part.

Conclusion

In summary, CDT again requests copies of two Privacy Impact Assessments:

- One that addresses the privacy and security risks of using short-range RFID and other technologies in the US e-passport; and

⁹ 5 U.S.C. §552(a)(6)(A)(i).

¹⁰ E-Government Act of 2002 [H.R. 2458] Pub. L. 107–347, §208(b)(1)(B)(iii), 116 Stat. 2922 (Dec. 17, 2002).

¹¹ *Id.* at §208(b)(1)(C).

¹² See “Department of State Privacy Impact Assessments” <<http://foia.state.gov/piaOnline.asp>>.

- One that focuses on the proposed PASS Card program specifically, and addresses the privacy and security risks of using long-range RFID technology.

CDT also asks that the State Department immediately change its policy and begin posting on the Department's website full and complete copies of its Privacy Impact Assessments. If certain exceptions apply to warrant full or partial *non-disclosure*, this should be made clear on the Department's website in reference to any given PIA.

We hope that you will address this matter urgently because decisions on these projects are being made *now* without the full transparency and understanding required by law.

Sincerely,

Sophia Cope
Staff Attorney/Ron Plesser Fellow
Center for Democracy & Technology

CC:

Joseph Lieberman

Chairman, Senate Homeland Security and Government Affairs Committee

Senator Susan Collins

Ranking Member, Senate Homeland Security and Government Affairs Committee

Representative Henry Waxman

Chairman, House Oversight and Government Reform Committee

Representative Tom Davis

Ranking Member, House Oversight and Government Reform Committee