

The Identity Project

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Comments of the Identity Project to the Port of Seattle Commission for the Commission meeting of February 25, 2020, regarding policies for automated facial recognition at Sea-Tac Airport

Members of the Port of Seattle Commission, Port of Seattle Commission Committee on Biometrics, and Biometrics External Advisory Group¹:

The Identity Project (PapersPlease.org) thanks you for the opportunity to comment on the actions being taken to implement your resolution of December 10, 2020, regarding use of automated facial recognition at the Port of Seattle, including the Request For Proposals (RFP) posted by the Port for shared-use Port-owned facial recognition systems for airline use at departure gates at Sea-Tac International Airport² and the draft by Port staff of recommendations proposed to the Biometrics External Advisory Group³.

We are concerned that:

1. The Port has, according to the RFP, already made a “commitment” to U.S. Customs and Border Protection (CBP) to deploy a biometric exit system at all gates of the new International Arrival Facility (IAF) at Sea-Tac;
2. The RFP requires bids to be submitted months before the biometrics policies and procedures which bidders will be required to comply with are finalized;

1. Information about the BEAG has been posted at <https://www.portseattle.org/page/biometrics-external-advisory-group>>. But that Web page does not appear to be linked from anywhere on the Commission section of the Port website or any of the Port’s blog posts or news releases, so it’s not clear how members of the public would find it. We have been unable to find any agendas, minutes, or notices of meetings of the Committee on Biometrics on the Port website.

2. RFP 19-86, “SEA Airport Biometric Air Exit System”, posted January 31, 2020, at <https://hosting.portseattle.org/sops/#/Solicitations/Detail/c1451f2a-7544-ea11-8141-005056bd5ab4>>.

3. “Draft, Port of Seattle Public-Facing Biometrics Policy Biometric Air Exit Recommendations, March 31, 2020”, posted February 2020 at https://www.portseattle.org/sites/default/files/2020-02/Biometrics_Report_Biometrics_Air_Exit_Recommendation.pdf>.

3. The Port staff draft of recommendations proposed to the Biometrics External Advisory Group contains material misstatements of law and fact; and
4. Neither the RFP nor the draft recommendations include any of the Port, airline, biometrics vendor, or CBP policies or notices (if any such policies exist) which would apply to the collection and use of facial images at biometric exit stations.

According to the RFP⁴, “SEA has issued a letter of commitment to deploy a permanent biometric system for departing international flights.... The primary objectives of the Biometric Air Exit system project include: Ability for SEA to meet its committed obligation to the CBP of installing a Biometric Air Exit system.”

This “letter of commitment” is not included in the RFP package on the Port website, and was not mentioned during the Commission meeting of December 10, 2019.⁵

Commissioners who voted for the resolution on biometrics adopted at that meeting stated that the resolution was intended to leave open all possibilities including that the Port might decide not to permit deployment of any public-facing biometrics. That suggests either that Commissioners were unaware of the “letter of commitment” mentioned in the RFP, or did not believe that it was binding on the Port.

If Port staff believed that a “letter of commitment” already issued by the Port to CBP ruled out some policy options being discussed by Commissioners, Port staff should have raised this during the meeting on December 10, 2019 – if not sooner. The failure to do so raises a substantial question as to whether the Port has acted in good faith.

Now that it has been pointed out, the Port may wish to disclaim the official statement in its RFP of this “commitment” – just as, after we pointed it out, CBP disclaimed the official notice in its regulatory agenda of its intent to promulgate regulations requiring US citizen travelers to submit to mug shots.⁶

But even if the RFP is now revised, this statement in the RFP – issued well after the adoption of the Commission’s policy on public-facing biometrics – suggests that some Port staff didn’t get the memo, and still take the outcome of the Port’s “review” of public-facing biometrics for granted. The boosterism toward biometric identification of travelers evident in this and others of the Port’s prior statements regarding these programs casts further doubt on the impartiality of Port staff and their ability to conduct or oversee an open-minded assessment of biometric passenger identification systems.

4. Note 2, *supra*, “RFP 19-86 (SEA Airport Bio Air Exit System).pdf” at 40, 41

5. We understand that a request to the Port for disclosure of this letter pursuant to the Washington Public Records Act (PRA) is pending.

6. The Identity Project, “DHS postpones plan for mug shots of innocent US citizen travelers” (December 5, 2019), <<https://papersplease.org/wp/2019/12/05/dhs-postpones-plan-for-mug-shots-of-innocent-us-citizen-travelers/>>.

Is the Port's current policy-development process a good-faith effort to determine what, *if any*, use of public-facing biometrics should be permitted on Port property?

Or is it merely window-dressing for decisions that are already *faits accomplis*?

The Port cannot legally say one thing about its intentions and commitments (or lack thereof) to prospective bidders through its formal RFP, while disclaiming the intentions and commitments in the RFP in other informal communications.

Such actions would invite challenges to the eventual contract award, or to the decision not to award any contract, by disappointed bidders who relied on the RFP.

If the intentions expressed in the 2018 letter from the Port which was explicitly referenced in the RFP no longer reflect the Port's intentions, and if the Port does not consider itself committed to deploy or procure any public-facing biometric systems, then a formal amendment to the RFP must immediately be issued, explicitly disclaiming the intentions stated by the Port in the 2018 letter to CBP.

The amendment to the RFP should explicitly inform potential bidders that the statements regarding "commitments" in the original RFP are incorrect; that the Port does not consider itself committed to deploy or procure any public-facing biometric systems; that no binding contractual commitments will be entered into until after the completion of the current policy-development process; and that the Port may not award any contract at all based on the RFP.

Even if it is amended with respect to the Port's (lack of) commitment to biometric exit systems, the RFP for new biometric exit systems requires bids to be submitted and contemplates the award of a contract before the Port's policies for biometrics are finalized. This would prevent vendors from knowing or factoring into their bids what those policies might require or prohibit. It would also prevent those yet-to-be-determined policies from forming the basis for the Port's bid assessment and contract award.

If it is not withdrawn entirely, the RFP should be amended so as not to require the submission of proposals until a reasonable time after the Port completes the current biometrics policy-development process, and not to contemplate the award of a contract until a further reasonable time after that, to allow the Port to assess bidders' proposals to comply with those policies.

Further question as to what previously-undisclosed decisions have already been made is raised by the statement in the Port staff draft of recommendations proposed to the Biometrics External Advisory Group⁷, "SEA's International Arrivals Facility will incorporate facial recognition for almost all arriving passengers (other than those U.S.

7. Note 4, *supra*, at 25

citizens who opt out.”

It’s not clear what the basis is for this statement of what the IAF “will” incorporate for “almost all” arriving passengers. Many, perhaps most, passengers arriving at SEA on international flights are U.S. citizens. CBP has neither requested nor received approval from the Office of Management and Budget (OMB) for any collection of facial images or other biometric data pertaining to any U.S. citizens traveling by air, whether on arriving or departing international or domestic flights.

Unless affected individuals are provided with an applicable OMB-approved PRA notice including an OMB Control Number, any such collection of information, even if voluntary, is in flagrant violation of the Paperwork Reduction Act of 1980.

This includes the current illegal collection of biometric (facial image) data of arriving U.S. citizens at the Automated Passport Control (APC) kiosks at SEA. No OMB approval has been obtained and no OMB Control Number or PRA notice applicable to collection of photographs of U.S. citizens is provided to APC kiosk users.

This also includes all current collection of biometric data by CBP from departing airline passengers, regardless of their citizenship or immigration status, including the ongoing illegal CBP biometric exit operations at certain international gates at SEA.⁸ No OMB approval has been applied for or granted, and no OMB Control Number or PRA notice is provided, at any of the current biometric exit stations at departure gates.

Any CBP collection of biometric data from any departing passengers, or from arriving U.S. citizens, would require new approval from OMB and new on-site notices.

If CBP has given notice to the Port of Seattle of its intention to seek approval from OMB for collection of facial images or other biometric data from arriving U.S. citizens or any departing passengers, the Port and CBP should fully disclose those plans,

In the meantime, the Port should withhold approval of any CBP or other Federal collection of biometrics unless and until it is approved by OMB, and the approved PRA notices can be reviewed by the Port and members of the public.

The Port staff draft of recommendations proposed to the Biometrics External Advisory Group falsely claims that, “In fact, U.S. Customs and Border Protection (CBP) is Congressionally mandated to implement a biometric exit and entry screening process for all international passengers.”⁹

No basis for this claim is provided, and none exists. In fact, the Congressional mandate for biometric entry and exit systems is limited to non-U.S. citizens.

8. Note 3, *supra*, at 5

9. Note 3, *supra*, at 3

In our written testimony submitted to the Port of Seattle Commission on December 3, 2019,¹⁰ and in a blog post the same day,¹¹ we pointed out that CBP had given official notice that it intended to propose regulations requiring U.S. citizens to submit to biometric exit processing. Within two days, in response to public and Congressional outrage, CBP announced that it had no such intention and would withdraw its notice.¹²

Since no such regulations have been proposed or reviewed, it would of course be premature for the Port of Seattle to assume that, even if proposed, they would be upheld.

The false claim that any collection of biometrics from traveling U.S. citizens is Congressionally mandated is completely unsupported, and should be removed from the recommendations of the Biometrics External Advisory Group and other Port documents.

At SEA, as at every other U.S. airport or port of entry, biometric entry and exit is Congressionally mandated only for non-U.S. citizens. The Port cannot pass the buck to a fictitious “Congressional mandate” for the Port’s own decision not merely to allow, but to operate, systems to collect facial images and/or other biometric data about U.S. citizens.

The Port’s plans to procure and deploy biometric traveler identification systems, and to share biometric data of travelers with both CBP and airlines, are especially troubling in light of the absence from the draft policies and procedures of any mention of the Port, CBP, airline, or vendor privacy policies (if any) applicable to such data.

According to the generally accepted norms of Fair Information Practices¹³, “transparency”, “voluntariness”¹⁴, and “ethics” with respect to the collection and use of personal data – which are among the core principles of the Port of Seattle Commission’s resolution on public-facing biometrics – include the right of data subjects to access, on request, information about themselves.

10. Available at <<https://papersplease.org/wp/wp-content/uploads/2019/12/IDP-SEA-Port-Comm-10DEC2019-attach.pdf>>.

11. The Identity Project, “Seattle Port Commission to consider rules for airport facial recognition” (December 3, 2019), <<https://papersplease.org/wp/2019/12/03/seattle-port-commission-to-consider-rules-for-airport-facial-recognition/>>.

12. The Identity Project, “DHS postpones plan for mug shots of innocent US citizen travelers” (December 5, 2019), <<https://papersplease.org/wp/2019/12/05/dhs-postpones-plan-for-mug-shots-of-innocent-us-citizen-travelers/>>.

13. See Pam Dixon, World Privacy Forum, “A Brief Introduction to Fair Information Practices”, <<https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/>>.

14. “Voluntariness” depends on consent, and meaningful consent requires informed consent. The ability to know what data has been collected about oneself, and with whom it has been shared, is an essential prerequisite to any possibility of informed consent.

In the U.S. Privacy Act, the European Union General Data Protection Regulations (GDPR)¹⁵, and the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA)¹⁶, these rights also include, as they should, the right of a data subject to obtain, on request, an accounting of disclosures of such data to third parties.

The RFP for biometric exit systems should require the submission of this information with respect to the bidder and any other data controllers or processors.

The procedures for review of any current or proposed biometric traveler identification system, including review of any RFP or proposal, should specifically and explicitly require disclosure to the public and review by the Port of each of the following:

- A) The System Of Records Notice (SORN), as published in the *Federal Register*, for each system of Federal records in which biometric information pertaining to travelers and collected through the system is or would be stored;
- B) Any Federal regulations or Notice Of Proposed Rulemaking (NPRM) promulgated by the agency responsible for each such system of records, which exempts or proposes to exempt the system of records from any of the requirements of the Privacy Act regarding access to records by individuals, access to an accounting of disclosures, or civil remedies;
- C) The OMB Control Number and the Paperwork Reduction Act (PRA) notice approved by OMB as part of its issuance of that control number for each collection of biometric information from individuals, including voluntary or involuntary collections of information from U.S. or non-U.S. citizens;
- D) The Port privacy policies applicable to personal information generally and biometric data in particular collected or processed by the Port, including by or at Port-owned and/or Port-operated biometric entry, exit, or boarding stations, including the means available to individuals to access information about themselves and to obtain redress for violations of these policies;
- E) The privacy policy of each airline participating in any current or proposed public-facing biometric system, as stated in its tariff or conditions of carriage, including the means available to individuals to access information about themselves and to obtain redress for violations of these policies; and

15. Several airlines based in the European Union operate flights to and from SEA. Personal data collected or processed at SEA, or anywhere in the world, by or on behalf of EU-based airlines is subject to the GDPR. "Common-use" systems and equipment for collection or processing of personal data at SEA must comply with the GDPR if they are to be usable by or for such airlines.

16. PIPEDA applies to personal data pertaining to passengers on flights between the U.S. and Canada, regardless of the country where the airline operating the flight is based. "Common-use" systems and equipment for collection of personal data at SEA must comply with PIPEDA if they are to be usable for such flights.

F) The privacy policies of any Port and/or airline vendors, contractors, subcontractors, or service providers that will store or process biometric data, including the means available to individuals to access information about themselves and to obtain redress for violations of these policies.

Many of these policies and notices do not yet exist, precluding any review by the Port, much less approval, of biometric systems that lack them.

While CBP has promulgated SORNs for several systems of records in which biometric data pertaining to travelers is or might be stored, CBP has also promulgated or proposed rules exempting each of these systems from the requirements of the Privacy Act for individuals to be able to access information about themselves, to obtain an accounting of disclosures, and to obtain redress through civil remedies.¹⁷

A Federal system of records that has been exempted from these requirements is, *per se*, in violation of generally-accepted Fair Information Practices and the Port's criteria for public-facing biometrics of transparency, voluntariness, and ethics.

So far as we can determine, no OMB approval has been applied for or obtained by CBP for collection of biometric information from U.S. citizens at points of entry or exit or at departure gates. No PRA notices have been approved, or are in place, for such collections, including those already ongoing at APC kiosks and departure gates at SEA.¹⁸

The absence of any enforceable policies guaranteeing data subjects' rights of access to their own personal data and to an accounting of disclosures to third parties is sufficient to establish conclusively that the current and proposed biometric entry and exit systems do not comply with the norms of Fair Information Practices or the Port's principles, and should not be approved, acquired, or deployed by the Port of Seattle.

The Port has published a privacy policy applicable to personal information collected through the PortSeattle.org website. But we have been unable to identify any Port policy for personal information generally, or biometric data specifically, collected by the Port about travelers or other Port visitors.

Airline privacy policies we have reviewed do not mention biometric data, and are freestanding documents not included in airlines' tariffs or conditions of carriage and therefore of dubious enforceability. As we discussed in our written comments to your

17. See the discussion of these exemptions in our written public comments to the Port of Seattle Commission of December 10, 2019, note 9, *supra*.

18. PRA notices are especially critical to voluntariness because they are required to include explicit notice that individuals are not required to respond to any Federal collection of information that does not include a valid (and thus publicly verifiable) OMB control number.

meeting of December 10, 2019¹⁹, airlines have an ongoing history of pervasive violations of Fair Information Practices, for which travelers have had no means of redress.

So far as we are aware, no airline has published a tariff which would make provision of any biometric data a condition of carriage. Any such provision would raise substantial questions of compliance with the duties of a common carrier to transport all passengers and with the public right of freedom of transit by air, as recognized by international treaty and Federal law. The U.S. Department of Transportation has not yet had an opportunity to review any such tariff provision. It would be premature for the Port of Seattle to presume that, if published, such a tariff provision would be approved.

The RFP should be withdrawn, unless and until these CBP, Port, airline, and vendor policies are established, reviewed by the Port, and found to comply with the principles established by the Port's resolution on public-facing biometrics.

Finally, we would like to note our vehement disagreement with the following portion of the Port staff recommendations proposed to the Biometrics External Advisory Group²⁰:

CBP is using facial recognition for departing international passenger at SEA on departing Lufthansa, Hainan, Emirates and Virgin Atlantic flights; therefore, the ultimate decision for the Port Commission is whether the Port wants CBP to continue to conduct this activity at our airport, or whether they would prefer Port and/or airline staff conduct these screenings.... Where the Port lacks authority to mandate compliance with particular policies, the recommendation is to work collaboratively with these stakeholders to achieve voluntary compliance where appropriate, and/or highlight how these stakeholders' own policies match Port principles.

The history of "constructive engagement" with governments, agencies, or entities engaged in violations of human rights and civil liberties is almost uniformly negative. "Constructive engagement" enables and perpetuates bad actions and bad actors. Disengagement, denunciation, and ostracism have generally proven more effective, and in many cases are the only ethically defensible courses of action.

Our extensive experience with CBP on these issues gives us no basis whatsoever for confidence that CBP will "voluntarily" comply with legal or ethical norms.

On the contrary, collaboration with these efforts to violate travelers' rights will only serve to lend the Port's imprimatur to these activities and allow CBP to use the Port as a public-facing shield against being held accountable for its actions.

19. Note 9, *supra*.

20. Note 3, *supra*, at 5.

It is for good reason that the Privacy Act -- in a provision²¹ which has been completely ignored by CBP in developing and deploying biometric entry, exit, and departure systems – requires that, “Each agency that maintains a system of records shall – ... collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs.”

The Port should heed this lesson, and require CBP to do its own data collection.

The Port can, and should, require that any collection of biometric data about travelers by the Port and/or by airlines as Port tenants be completely and explicitly separate from any collection or sharing of biometric data by or with CBP.

As we²² and other organizations including the ACLU²³ have observed, many of the problems with the emerging common vision²⁴ of airlines, airports, and government agencies for shared-use biometric systems stem precisely from their shared character.

“Common-use” systems and the commingling of data collected for use by different entities – some Federal (CBP), some state or local (the Port), some private but regulated as common carriers (airlines), some private and unregulated (system vendors) – create particular problems with respect to both transparency and voluntariness.

In such an environment of shared data use and public-private partnerships, it is much harder for travelers to know which information is being requested or demanded, the legal bases on which information is requested or demanded, which entities will receive which information, the policies applicable to its use, and the procedures for redress if those policies are violated, with respect to each of the “partners” involved.

Especially for foreigners and travelers who are not native speakers of English, it is difficult even with the clearest separation and signage to be sure which requests for information by people in uniforms come from the government and which from private entities, which can be declined without penalty, and which are required by law. “Informed consent” or “voluntariness” is a sham in such a context.

21. 5 U.S.C. §552a (e)(2).

22. The Identity Project, “CBP expands partnership with airlines on facial recognition” (August 28, 2018), <<https://papersplease.org/wp/2018/08/28/cbp-expands-partnership-with-airlines-on-facial-recognition/>>.

23. “U.S. Customs and Border Protection’s Airport Face Recognition Program”, White Paper by Jay Stanley, ACLU’s Speech, Privacy, and Technology Project (February 2020), <<https://www.aclu.org/other/aclu-white-paper-cbps-airport-face-recognition-program>>.

24. The Identity Project, “Airports of the future: surveillance by design” (December 17, 2019), <<https://papersplease.org/wp/2019/12/17/airports-of-the-future-surveillance-by-design/>>.

And it is difficult or impossible for anyone to choose to consent to provide information to some of those entities, but not others. What if, for example, an individual is willing to provide biometrics to the airline, but not to CBP? Or vice versa?

We hope that our comments will help you to understand why the public-facing biometrics principles you have adopted require the rejection of Port participation in the current and proposed biometric entry, exit, and boarding programs.

We remain available to members of the Commission, Port staff, and the Biometrics External Advisory Group to provide our expertise and assistance.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project