

The Identity Project

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Comments of the Identity Project to the Port of Seattle Commission for the Commission meeting of March 10, 2020, regarding policies and procurement of systems 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 (1) the proposal to authorize the Executive Director of the Port to approve a contract for acquisition by the Port of shared-use Port-owned facial recognition systems for departure gates at Sea-Tac International Airport,² and (2) the draft by Port staff of recommendations proposed to the Biometrics External Advisory Group regarding “Non-Federally Mandated Biometrics for Passenger Processing Recommendations”³.

The proposed procurement and deployment would violate Federal law, the norms of Fair Information Practices (FIPPs), and the professed “principles”, including FIPPs, of both the Port and US Customs and Border Protection (CBP). It should be rejected, and the RFP for this project should be withdrawn or, at a minimum, postponed.

1. We have been unable to find any agendas, minutes, or notices of meetings of the Committee on Biometrics on the Port website.
2. “Authorization for the Executive Director to (1) award and execute a contract for a Biometric Air Exit system for up to 30 international boarding gates at Seattle-Tacoma International Airport; and (2) implement Executive policies for regulating the use of biometric air exit systems at Port facilities. Contract authorization includes (1) procuring hardware, software, vendor implementation services, and recurring maintenance fees for up to ten years; and (2) using port staff for construction and implementation; Total project cost for authorization of \$5,715,000 is comprised of project costs of \$2,715,000 and recurring maintenance costs for up to ten years estimated at \$3,000,000 budgeted in annual operating budgets.” Item 8a of agenda for Port of Seattle Commission meeting of March 20, 2020, <https://meetings.portseattle.org/portmeetings/attachments/2020/2020_03_10_RM_Agenda_Linked.pdf>.
3. “Port of Seattle Public-Facing Biometrics Policy, Non-Federally Mandated Biometrics for Passenger Processing Recommendations, Draft as of February 28, 2020.” We have been unable to find this document anywhere on the Port website, including on the Biometrics External Advisory Group page, but a copy was provided to us by one of the members of the BEAG. This document should, of course, be posted for public review and comment before any decision is made about it.

There is already ample evidence that the proposed biometric departure gate systems would – like the current biometric arrival and departure systems used at Sea-Tac – violate Federal laws,⁴ FIPPs⁵, and the professed principles of the Port⁶ and of CBP⁷.

None of the issues raised in our comments of February 25, 2020, have been addressed. None of the violations of Federal law by CBP we pointed out have been corrected. So far as we can tell, no changes have been made or are contemplated to bring CBP's actions into compliance with Federal law, with FIPPs, or with either the Port's or CBP's professed principles, whether or not the Port proposal is approved:

1. Having the Port, airlines, or any other third party – rather than CBP itself – operate the cameras and collect photos for CBP use violates the explicit mandate of the Privacy Act that this data be collected directly from individuals by a Federal agency if it is used (as it is in this case) as part of the basis for making decisions about access to Federal rights (such as Federally-licensed air travel).
2. CBP still fails to provide the notices required by the Paperwork Reduction Act – including notice of the right not to respond to any Federal collection of information that does not display a valid OMB Control Number – at biometric arrival and departure stations at Sea-Tac or any other airport.
3. CBP's regulations exempting the systems of records in which it stores facial images from the provisions of the Privacy Act regarding rights of access, accounting for disclosures, and civil remedies render these systems in violation of FIPPs and the professed principles of the Port and of CBP.⁸

4. See the analysis of ongoing violations of the Privacy Act and the Paperwork Reduction Act in our February 25, 2020, comments to the Port Commission and the BEAG, <<https://papersplease.org/wp/wp-content/uploads/2020/02/IDP-SEA-Port-Comm-25FEB2020.pdf>>. Neither of these statutes and none of the issues we raised are mentioned in the RFP, the proposal for action by the Commission, or the Port staff draft of recommendations.

5. FIPPs are expressly endorsed by both the Port "principles" and CBP's "requirements."

6. Port of Seattle Commission, Motion 2019-13, adopted December 10, 2019, <https://www.portseattle.org/sites/default/files/2019-12/Motion%202019-13_Biometrics%20Principles.pdf>

7. U.S. Customs and Border Protection, "Biometric Air Exit Business Requirements, Version 2.0, January 2020." Although this document is incorporated by reference in the RFP and the proposal for action by the Port Commission, it has not been posted on the Port website and was first provided to us on March 8, 2020. On information and belief, this document was not provided to, and has not been reviewed or discussed by, the members of the BEAG.

8. CBP's "Biometric Air Exit Business Requirements" explicitly incorporate and endorse "DHS FIPPs" as "Appendix B", including that "DHS should... provide appropriate mechanisms for access, correction and redress for DHS's use of PII [Personally Identifiable Information]." These are exactly the rights that CBP has revoked by promulgating Privacy Act exemption rules.

It isn't just that CBP is violating the Privacy Act, or that collecting facial images and sending them to CBP would make the Port complicit in this violation of Federal law. The violation of the Privacy Act by CBP lies specifically in CBP's outsourcing the collection of this personal data to the Port, airlines, or any other non-Federal entities.

This provision was and is included in the Privacy Act for good reason. The Port should heed it, and make CBP comply with Federal law by collecting any personal data it uses for making decisions about individuals, including facial images of travelers, directly from those individuals. CBP could collect this data itself at Sea-Tac, as it does at some other airports. It doesn't want to, but it has clearly demonstrated that it could do so.

If there is one lane at a departure gate, or on arrival, where a uniformed CBP agent is photographing travelers, and one lane without a Federal law enforcement officer with a camera, travelers will have a much clearer and more informed choice – and one that, unlike the proposal before the Port Commission, might comply with the Privacy Act.

Some Port staff, in their proposals to the BEAG and the Port Commission, have suggested that by owning and operating facial recognition systems the Port would have more control over signage and other notices provided to the public to enable more informed consent and mitigate the harm to the public of CBP's (illegal) activities.

But in fact, the proposed procurement would have exactly the opposite effect. By agreeing to comply with CBP's "Requirements" – which are explicitly incorporated by reference in the RFP and the proposal for action by the Port Commission – the Port would be tying its own hands and committing itself to display CBP's signs – regardless of their truth or falsehood or their compliance with the law – and not to display any signage, make any announcements, or provide any information not approved by CBP.

Item 8 of CBP's "Requirements" would prohibit the Port from posting any signs or distributing any communications pertaining to CBP's use of biometrics without CBP's prior approval.

Item 13 of CBP's "Requirements" would obligate the Port to post whatever signage CBP demands, regardless of whether the Port considers it inaccurate, misleading, or incomplete.

In effect, these provisions would amount to a (self-imposed) gag order not to criticize CBP, and a (self-imposed) agreement to serve as a mouthpiece for CBP propaganda, regardless of its truth or falsehood. Rather than enabling the Port to mitigate the harms of CBP's (illegal) practices through more or better signs or announcements, the proposed action by the Port Commission would prevent the Port from doing so.

If CBP fails – as it has failed to date at Sea-Tac and all other airports with biometric departure gates – to post the notices required by the Paperwork Reduction Act, informing individuals, regardless of citizenship or immigration status, of their right not to

respond to any Federal collection of information that does not display a valid OMB Control Number and PRA notice, the Port itself should post such notices at all gates. But the Port won't be able to do so without CBP approval (which wouldn't be likely to be granted) if the Port Commission approves the proposal on your agenda for action today.

The issues discussed above – the illegality of CBP's actions and the incompatibility of the proposal with FIPPs or with the principles professed by both the Port and CBP – already provide more than sufficient basis for the Port Commission to reject the proposal before you, and to direct that the RFP be withdrawn.⁹

But even if you are not yet prepared to withdraw the RFP (amended to make clear to potential bidders that the Port is not committed to such a project, and that no final decision will be made until the Port completes its policy-development process), it would be premature to approve or authorize approval of any procurement contract.

None of the applicable airline or Port privacy policies (if such exist, which remains in doubt) or contracts with CBP (again, if such exist) have been disclosed.¹⁰ The only relevant CBP documents which have been disclosed are non-binding, aspirational secondary-source documents. These include Privacy Impact Assessments, which should be, but in the case of CBP typically are not, descriptions of policies and practices defined in specified and publicly-disclosed laws, regulations, and contracts. These secondary sources also include CBP's "Business Requirements", which may or may not accurately describe the provisions of not-yet-disclosed and possibly nonexistent contracts with airlines, the Port, and system vendors, and which describes practices directly contrary to the Fair Information Processing Practices stated by CBP in the same document.

While the item on your agenda for action today concerns the procurement of Port-owned cameras at departure gates to collect and send photos of passengers to CBP, we would like to take this opportunity to provide a preliminary comment on the Port staff draft of recommendations concerning "Non-Federally Mandated Biometrics for Passenger Processing".

Missing from that draft is any explanation of the purpose or justification for airlines to identify passengers, independent of any Federal mandate.

9. In our comments to you of February 25, 2020, we pointed out the statements in the RFP regarding a Port "commitment" to deploy biometric exit systems. Amendment 2 to the RFP states that, "The airport will be providing a Biometric Air Exit platform at an initial thirty gates for airline use. The platform will be a multi-use solution of airport provided infrastructure." There is still no indication in the RFP that the Port might decide not to acquire or deploy such a system. The continued failure to provide such notice to potential bidders continues to place in question the good faith and open-mindedness of Port staff with respect to this decision.

10. The Identity Project still has received no response to our overdue Freedom Of Information Act request for any CBP contracts with airlines pertaining to facial images of passengers, which was attached to our comments to you of December 10, 2019, <<https://papersplease.org/wp/wp-content/uploads/2019/12/IDP-SEA-Port-Comm-10DEC2019-attach.pdf>>.

Airlines could, and did, operate for decades without requesting ID from passengers. Airlines began asking (but not requiring) passengers to identify themselves only when they were ordered to do so by the FAA (the predecessor of the TSA). The only lawful reason for airlines to ask passengers for ID is to satisfy a government mandate.

As common carriers, airlines are required to transport all passengers, regardless of who they are, and are required to sell tickets at prices determined by a public tariff.

An airline cannot lawfully “reserve the right to refuse service”. It cannot lawfully personalize prices or charge different prices based on passengers’ identities.

So why do airlines think they “need” to identify passengers at all, by any means?

One cannot assess the justification (or lack thereof) for biometric identification of travelers for non-Federally mandated purposes without first assessing the justification (or lack thereof) for identification of travelers generally for such purposes.

This assessment is entirely absent from the draft recommendations for Port policy, but is essential.

We urge you to reject, or at least to postpone until the current policy development process is complete and the relevant policies and contracts are made public, authorization of procurement of facial recognition systems for deployment at Sea-Tac.

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