

June 2, 2010

Ms. Mary E. Callahan
Chief Privacy Officer
Privacy Office
Department of Homeland Security
Washington, DC 20528

Public Comment on the Proposed Amendments re: Privacy Act System of Records, docket number DHS-2010-0031, Federal Register: May 3, 2010 (Volume 75, Number 84, page 23274) --Online Detainee Locator System ("ODLS")

Dear Ms. Callahan:

We submit the following comments to the Department of Homeland Security ("DHS") Privacy office regarding proposed action DHS-2010-0031, published in the Federal Register on May 3, 2010. These comments were compiled in consultation with and support from a wide range of local and national organizations involved in immigration detention service and advocacy.

We suggest modifications to the proposal before ODLS is deployed.

We welcome the development and deployment of the Online Detainee Locator System (ODLS) as a positive step in allowing "members of the public locate detainees in ICE custody." This service will be valuable for advocates and family members of ICE detainees, and will represent a substantial improvement over the practice in recent years where family members, advocates, and other interested persons have had to resort to multiple telephone calls to ICE field offices to try to locate those in custody. However, we also respectfully raise concerns about the usability and privacy implications of ODLS as described in the notice of amendment.

The issues raised in this Comment fall into five groups. First, the comment addresses misgivings about the search interface as currently described. Second, the comment raises questions about access for users whose principal language is not English. Third, the comment addresses concerns about the web interface and data tracking. Fourth, the comment requests clarification about how the ODLS will be used for "allowing family members and other individuals to deposit money in detainee accounts." Fifth, and finally, the comment offers suggestions for ensuring that sensitive information about vulnerable groups is not publicly available in ways that may jeopardize their safety.

I. We suggest modifications to the search interface and results output for improved functionality.

The notice describes two distinct search options for the ODLS, both of which are problematic in a range of ways. Search Option One requires the exact spelling of the first and last name of the detainee, AND the detainee's country of birth. Search Option Two requires the detainee's A-number AND the detainee's country of birth. Each of the three pieces of data requested for using the ODLS presents distinct problems. After explaining these problems, this section suggests an alternative search interface.

Both search options one and two require that the searcher enter the country of birth of the detainee. However, the country of birth may not be readily known by the detainee's family or attorney. For example, in Zadvydas v. Davis, 533 U.S. 678 (2001), the detainee was born to Lithuanian parents in a German displaced persons camp and neither country recognized him as having been born in their jurisdiction. This search field would likewise be problematic for anyone born in the former Soviet Union or Yugoslavia since their country of birth no longer exists. Country of origin would also be a problematic search field for people from countries like Burma / Myanmar that have names with politically charged ramifications.¹ Stateless peoples, such as Palestinians, would not readily be able to use the ODLS search interface. Similar problems would be presented for any detainee born in the border regions of Ethiopia and Eritrea where borders and national control of territory have long been in flux. In Latin America, for example, there are, or recently have been, more than a dozen border disputes² that would create complications for anyone from the border regions, especially indigenous peoples whose territorial identity predates, and rarely coincides with, modern political borders. Even where the country of birth is known, spellings may vary even in official U.S. government documents. For example, Ecuador is almost always spelled with a "c,"³ but some federal appellate courts have published opinions with alternate spellings such as "Equador."⁴ Native-born U.S. citizens have ended up in ICE detention and in some cases, have been illegally deported. Will the ODLS accept "United States of America" as a valid country of origin for a search query?

Beyond the factual question of the country of birthplace for a given detainee, the country of birth requirement also poses immigration due process problems. Some detainees may exercise their right not to inform ICE of their country of birth. In all removal proceedings, ICE bears the burden of proving alienage,⁵ which is often, but not always, tied to birthplace. Other detainees may be challenging admissibility of statements through suppression motions based on unlawful searches and seizures committed by ICE, 287(g)-designated officers, or state and local law enforcement officers. This is not a hypothetical proposition but has been the subject of recent and current litigation.⁶ Individual local or state policies may make these scenarios more commonplace if local law enforcement makes immigration arrests outside the bounds of a formal 287(g) agreement with ICE..⁷ In no case should a required search field in the ODLS be related to information that is part of ICE's burden of proof in removal proceedings. This principle has been long established in immigration law and practice. For example, the immigration regulations provide that an application for voluntary departure shall not be held to constitute a

¹¹ For example, the United Nations refers to the country as Myanmar, the official English translation imposed by the military junta in 1989, while the U.S. State Department still refers to the country by its earlier English name of Burma.

² Border disputes or confusions in Latin America in recent years include: Chile-Bolivia; Chile-Peru; Chile-Argentina; Argentina-Uruguay; Ecuador-Colombia; Ecuador-Peru; Venezuela-Guyana; Guatemala-Belize; Costa Rica-Nicaragua; and Brazil with all of its neighbors.

³ See, e.g. Travel.State.Gov, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1106.html.

⁴ Macias v. Gonzales, 172 Fed. Appx. 138 (9th Cir. 2006); Tobar v. U.S., 2008 U.S. Dist. LEXIS 2850 (D. Cal. 2008)

⁵ 8 U.S.C. § 1229a(c)(3).

⁶ See, e.g., Dewan Tawsik Bin Tarek v. Holder, 341 Fed. Appx. 742, 743 (2d Cir. 2009) (suppression motion based on various alleged constitutional, statutory, and regulatory violations when Tarek complied with special registration requirements); Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008) (suppression motion based on alleged regulatory violations). See also Immigration Judge decision available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Hartford-Deny1-1.31.08.pdf>

⁷ For example, Arizona Senate Bill 1070 (passed in April 2010) would give Arizona law enforcement broad power to detain anyone suspected of being in the U.S. illegally.

concession of alienage or deportability in any case in which the person in removal proceedings does not admit his alienage or deportability. See 8 C.F.R. 1240.49(e),

Search Option One additionally requires that the searcher enter the exact first and last name of the detainee. According to the notice, “ODLS only performs exact-match searches.” This means, for example, “a search for ‘Robert Smith’ will not return a detention record for ‘Robert Smyth’ or ‘Bob Smith.’” The exact match requirement, like the requirement for two search data points instead of just one, helps protect the privacy of all detainees. However, most detainees do not have names as simple and straightforward as “Bob Smith.” In many cases detainees may have names in languages that are not directly compatible with an English language alphabet search function. For example, names in Cyrillic, Chinese, Arabic, and many more may be difficult to transliterate into English alphabetic characters. Moreover, there may be numerous possible transliterations for such names and members of the public seeking to use ODLS may receive erroneous information about the person they are searching for simply because they cannot guess which combination of letters were entered on a detainee’s file by the official charged with transliterating the name. For example, the Arabic name خليل عبدالله could easily be transliterated into English as any of the following: Khalil Abdullah; Kalil Abdallah; Khaleel Abdula; Kaleel Abdalah. And the Chinese surname meaning “king” can be spelled “Wong” or “Wang” in English. The potential problems are endless with names from foreign languages with an alphabet distinct from the one used in English.

Exact-match spelling may even be a problem, albeit more limited, with Spanish or Latin American names. For example, the name Juan Pablo Sánchez Nuñez could be entered into the ODLS first and last name database numerous ways, including: Juan Sánchez; Pablo Sánchez; Juan Nunez; Juan Nunhez; Pablo Nunez; and so on. Nuñez has a letter that does not exist in English – ñ – which might easily confound members of the public hoping to use the ODLS system. Whereas in Latin America, Sánchez would be the paternal last name, in the United States that name might be read as though Nuñez were the paternal last name.

The traditional naming convention in Latin America is significantly different from that used in the United States. In the United States the name John Paul Jackson Smith could generally be interpreted as follows: John and Paul would be the given names; Jackson would be the mother’s family name; and Smith would be the father’s family name. For the purposes of ODLS the full name might be safely reduced to John Smith. In Latin America, however, Juan Pablo Juarez Santiago would generally be interpreted as follows: Juan and Pablo would be the given names; Juarez would be the father’s family name; and Santiago would be the mother’s family name. Depending on the country, all four names, or some combination of three might be regularly used for all formal or legal purposes. The problems that Latinos face with maintaining their naming traditions in the United States have been well-documented.⁸

In Latin America and beyond, it is increasingly common for individuals to have hyphenated names or names changed as a result of divorce and remarriage. Naming practices and conventions are both evolving and highly variable from one region of the world to another. Some families may have three or more surnames because of marriage, divorce, adoption, and guardianship dynamics. If a man and a woman get married, for example, he may keep his last name, she may add his to hers with a hyphen, they may adopt children and allow the children to

⁸ See Yvonne M. Cherenia Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 THURGOOD MARSHALL L. REV. 1 (1992).

keep their biological parents' last names. Thus, exact match name searching can be an impractical search field requirement, even for the bona fide searchers ODLS is designed for.

The second search option additionally requires the detainee A-number. This unique identifier number is extremely useful in identifying a specific individual once the searcher knows the A-number. However, family members using ODLS are unlikely to have an A-number at their fingertips at the time when they are most in need of a way to locate their loved ones in ICE custody: immediately after their loved one has been arrested and detained. Moreover, a simple inconsistency in the spelling of a detainee's name in the search field of ODLS with the spelling on ICE's records, might lead to a result indicating that the detainee being searched for is not in ICE custody at all. This creates a serious risk of misinforming people searching for their clients or loved ones.

We recognize the difficulty inherent in balancing privacy needs of detainees on the one hand with ease of searchability for users of the ODLS database on the other. However, the current search options are troubling because of the requirement to enter a country of birth, and the potential for transliteration and divergent name conventions to make ODLS unusable for locating some detainees. While the availability of two search methods and the use of two data points for each search method may be the appropriate framework, we suggest improvements to the ODLS search interface.

We developed our proposal after reviewing the inmate locator systems currently in use in each of the states correctional systems' online inmate locator systems. Our survey revealed that the federal Bureau of Prisons (BOP) inmate locator should be considered a floor rather than a ceiling for the ODLS. The BOP interface is considerably less useful than the majority of the state locator systems. First, the BOP name search requires exact match whereas almost all of the states allow for some flexibility in name inputs.⁹ Second, the BOP is limited to two search options (ID number OR name) while the majority of states allow users to choose among a range of search options.¹⁰ Third, an erroneous search in the BOP locator system returns the error message "Inmate Not Found," while many state systems provide more helpful guidance.¹¹

We suggest that for the ODLS, as proposed in the notice, searchers be required to enter two pieces of data in order to find information about a detainee. However, we recommend that instead of requiring a particular combination of data entries (*either* exact spelling of name and country of birth *or* A-number and country of birth), users be allowed to choose any two search fields from a wider range of possibilities. Specifically, the search field options should include:

⁹ See, e.g., online inmate locator's from Missouri (automatically retrieving common variant spellings so that, for example, a search for "Joh Smith" will yield results including "John Smith," "Johnathan Smith," "Johnny Smith" and so on) <https://web.mo.gov/doc/offSearchWeb/search.jsp>; North Dakota (searching by last name OR starting letters of last name so that a search for "Smi" will yield inmates with the last name "Smith") <http://www.nd.gov/doc/offenderlkup/index.asp>; South Carolina (offering a phonetic match search option for users who are unsure of how to spell an inmate's name so that a search for "Smyth" will yield inmates with the last name "Smith") <https://sword.doc.state.sc.us/incarceratedInmateSearch/>.

¹⁰ See, e.g., Florida (offering 12 search fields) <http://www.dc.state.fl.us/AppCommon/>; Georgia (offering 12 search fields) <http://www.dc.state.fl.us/AppCommon/>; New York (offering 7 search fields) <http://nysdocslookup.docs.state.ny.us/kinqw00>.

¹¹ See, e.g., Illinois (providing an error message AND possible explanations for why the query did not work AND phone numbers for who to contact for further assistance) <http://www.idoc.state.il.us/subsections/search/ListInmates.asp>; Nevada (providing an error message AND suggestions for what the searcher might have been looking for AND an email address to contact for further assistance) <http://www.doc.nv.gov/notis/search.php>; New York (providing an error message AND suggestions for what the searcher might have been looking for) <http://nysdocslookup.docs.state.ny.us/kinqw00>.

- Name – but not with the exact-match requirement
- A-number
- Year of birth
- State where apprehended by DHS

Four choices from which searchers can choose two before running a search would help ensure that ODLS serves its intended purpose while still protecting the personal information of detainees. The name search field should not require first and last name; nor should it require exact-match spelling because of the problems listed above. Instead, it should allow surname-only searches and yield results no matter which surname a searcher queries. ODLS should also yield results that *sound* like the search entered to account for the numerous ways to spell many names transliterated into English alphabet characters. The Iowa Department of Corrections has successfully implemented this type of search database.¹² Not only does the Iowa inmate locator webpage allow for creative spellings of names through SoundEx¹³ technology, but it also prevents automated programs from abusing the service through reCAPTCHA¹⁴ verification. The Iowa inmate locator is a good general model for ODLS' search interface.

Where the searcher has the A-number, it will be a problem-free and accurate search term. Year of birth is already captured and tracked in ENFORCE. State where apprehended by DHS is unlikely to be a disputed legal issue or have any bearing on ICE's burden of proof in removal proceedings but is an effective way to limit surplus search results so as to protect detainees' privacy. Including this option in the ODLS search fields would require ICE to track this data in ENFORCE and include a field for entering this data where none currently exists. However, this should be a minimal burden, given that ICE already maintains detailed records including information on where each detainee was detained. Some state inmate locators effectively use county of residence or commitment as a search field,¹⁵ and ICE should be able to do the same.

In addition, the information that a successful search through ODLS yields should be more varied and specific than is currently proposed in the notice. The notice indicates that the only possible search results will be: 1. "no records found;" 2. "in custody" with the relevant detention facility information; or 3. "not in custody." These three search results are insufficient. If a search yields an exact match for a detainee no longer in custody, the result should indicate how and when they were released. For example: Juan Bonilla, not in custody, voluntary departure, 05/05/2010; or Alfred Knox, not in custody, released on bond, 4/30/2010. This supplemental information will make ODLS significantly more useful for members of the immigration bar and family members of detainees.

Finally, we request that all individuals held on ICE detainers, pursuant to a 287(g) agreement, or in rural county jails be included in the ODLS search results. If ODLS is to be useful, it is essential that its search results include detainees held in these common situations as well.

II. We emphasize the importance of timely deployment of non-English language interface for ODLS.

¹² <http://www.doc.state.ia.us/OffenderInfo.asp>.

¹³ <http://www.doc.state.ia.us/SoundExDescription.htm>.

¹⁴ <http://recaptcha.net/popuphelp/>.

¹⁵ See, e.g., Ohio <http://www.drc.state.oh.us/OffenderSearch/Search.aspx>.

Many of the people using and relying on the ODLS will not speak English as a first language, or at all, and some may have limited literacy or internet skills. This is particularly true of family members of immigrant detainees. Thus it is essential that ODLS be available in multiple languages with a user friendly and text-light interface. The notice indicates that “The system will ultimately be available in several languages.” When will it be available and what will those languages be? We recommend that ODLS be launched in multiple languages including Spanish, Chinese, Vietnamese, Arabic, Somali and whichever other languages are most commonly spoken by detainees in ICE custody. We further recommend that the web interface be minimal in text and have graphics that facilitate language-neutral and low-literacy navigation. The Arkansas Department of Corrections inmate locator webpage is a good model of a user-friendly interface that allows easy, direct access to a range of search fields without unnecessary, complicating text or link-through pages.¹⁶ See Attachment 1.

In addition, we encourage the simultaneous deployment of a national toll-free phone number that would allow members of the public without internet access to use ODLS. The online system could be mirrored through a largely automated phone system in multiple languages. The telephone system would allow callers to enter an A-number and year of birth manually. Searchers using name or state of apprehension might require an operator to run the search for them. Providing a telephone interface for ODLS will ensure that it is usable by even those members of the public without internet access or literacy skills. Many immigrants have very long work days and often work multiple jobs, where they do not have access to internet. Many also do not have personal computers with internet access at home. Thus their internet access is limited to public libraries with limited hours typically corresponding to regular working hours. For these immigrants, an ODLS-phone option is essential to ensure they can avail themselves of the information furnished by ODLS. Without an ODLS phone option that is available during non-business hours, these immigrants will resort to multiple frantic calls to ICE field offices in desperate search for their loved ones.

The Executive Office for Immigration Review (“EOIR”) has long provided a 1-800 telephone option for people to determine the date and location of their next immigration court hearing. The EOIR hotline simply requires that the caller punch in the A-number. Many people in removal proceedings, particularly those without counsel, rely heavily on the EOIR hotline to know the next time they need to appear in immigration court. We urge ICE to develop a similar option in the ODLS.

III. We have privacy concerns about the web interface for ODLS and proposed collection of technical information.

The Privacy Impact Assessment for the ODLS notice indicates that ODLS will collect internet user information. Specifically the Assessment says, “ODLS collects limited technical information for each visit to the ODLS website, including the visitor’s Internet domain, Internet Protocol (IP) address.... Additionally, the ODLS website uses session cookies.” We are concerned about this unnecessary collection of private user information and the deterrent effect it may have on members of the public who would otherwise rely on ODLS. Moreover, it seems inconsistent with federal policy. Since 2000, it has been the policy of the federal government not to track or store such information. According to an Office of Management and Budget memo from that time:

¹⁶ http://www.adc.arkansas.gov/inmate_info/

Because of the unique laws and traditions about government access to citizens' personal information, the presumption should be that "cookies" will not be used at Federal web sites. Under this new Federal policy, "cookies" should not be used at Federal web sites, or by contractors when operating web sites on behalf of agencies, unless, in addition to clear and conspicuous notice, the following conditions are met: a compelling need to gather the data on the site; appropriate and publicly disclosed privacy safeguards for handling of information derived from "cookies"; and personal approval by the head of the agency.¹⁷

Has the ODLS received a waiver of the cookie policy? We respectfully request that, consistent with federal policy, ODLS not collect user technical information such as Internet domain, IP addresses, or cookies.

IV. We request clarification of how ODLS will be used to allow “family members and other individuals to deposit money in detainee accounts.”

The notice indicates that one of the goals of the ODLS will be to facilitate monetary deposits into detainee accounts. Specifically the notice says that use of the ODLS “would also support the sharing of information about ICE detainees for the purpose of allowing family members and other individuals to deposit money in detainee accounts for telephone and commissary services within a detention facility.” However the notice does not explain how ODLS will facilitate depositing funds into detainee accounts. The notice explanation simply states that:

some detention facilities have on-site kiosks and website and telephone services that allow members of the public to deposit money in detainees’ telephone and/or commissary accounts for that detention facility. This proposed routine use would support the operation of these kiosks, websites, and telephone systems that allow the public to search for a detainee at a particular facility and make a deposit into the detainee’s account.

This description is unclear as to what role ODLS will play in facilitating deposits. Will ODLS accept deposits for detainee accounts, or will it simply allow members of the public to locate detainees so that they can make deposits using status quo procedures for a given detention facility? Is the “support” provided for the kiosks, websites, and telephone systems, simply identifying the location of the detainee, or is the support a monetary transfer system? If it is the latter, we request a detailed clarification of the proposed interface and system.

V. We suggest providing for the protection of vulnerable groups by allowing individuals to opt out of the ODLS.

We are concerned about the safety and privacy implications of making available to the public location information for vulnerable detainees including asylum seekers, human trafficking survivors, and victims of domestic abuse, sexual assault, and other crimes. Currently juveniles are automatically excluded from the search results on ODLS. However, no provision is made for other vulnerable groups such as asylum seekers, women who have been victims of gender-based violence, or detainees applying for U visas. These vulnerable groups face particular dangers that require confidentiality of their location, if the detainees so choose. For example, reports have recently surfaced of sexual assault by a CCA contractor involving multiple detainees at the Hutto

¹⁷ Office of Management and Budget, M-00-13, *available at* http://www.whitehouse.gov/omb/memoranda_m00-13/.

women's detention facility in Taylor, Texas. One woman has formally filed a complaint and is seeking a U visa. Other detainees may as well. Their location, whether at Hutto or another ICE facility, is very sensitive, as there are legitimate concerns that other CCA employees or ICE employees could retaliate against the complainants.

Therefore, we suggest that ODLS require an exact A-number search for these vulnerable populations as a default, AND that the search results for these individuals not include a specific detention location but rather refer the searcher to a phone number for further information. Bona fide searchers will then be able to get relevant public information over the phone. Individuals in these vulnerable groups, or their counsel, should additionally be given the opportunity to opt out of the ODLS database altogether. Finally, it is particularly crucial that ICE make it easier for detainees in these vulnerable groups to communicate things like A-numbers and locations with friends and family.

Providing a more stringent standard for searchability and an opt-out provision for vulnerable groups prior to allowing easy, full public access to their location on the internet is consistent with federal law. For example, Congress created the Violence Against Women Act (VAWA) confidentiality provisions to, among other things, prevent abusers and other crime perpetrators from using the immigration system as a tool of power and control over their victims.¹⁸ DHS must develop protocols that screen immigrants for crime victimization or crime vulnerability and empowers them, or their lawyers to opt out of the public internet/ODLS listing.

Thank you for your consideration of these important matters. If you have any questions, please contact Joanne Lin, ACLU Legislative Counsel, at 202/675-2317 or jlin@aclu.org.

Sincerely,

American Civil Liberties Union
American Immigration Lawyers Association
Lutheran Immigration and Refugee Service
National Immigrant Justice Center

cc: Phyllis Coven, ICE Office of Detention Policy and Planning

¹⁸ See "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 122 (2005).

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