

THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD



TRAVIS LEBLANC
BOARD MEMBER

June 1, 2020

The Honorable Chad F. Wolf
U.S. Department of Homeland Security
Nebraska Ave. Center, NW
Washington, DC 20528

Dear Acting Secretary Wolf:

Protecting the privacy and civil liberties of Americans is the duty of every federal official. While there is no question that the 2019 Novel Coronavirus necessitates enhanced public health measures to detect and mitigate spread of the virus, the ongoing pandemic is not a hall pass to disregard the privacy and civil liberties of the traveling public. It is my understanding, based on reporting in the press, that the Department of Homeland Security is planning to require all air travelers to submit to mandatory DHS-administered temperature checks or thermal imaging prior to boarding a commercial airplane.¹ Needless to say, the privacy and civil liberties intrusions such a policy would create elicit my concern as a Member of The Privacy and Civil Liberties Oversight Board. I thus have several questions regarding the purpose, legal authorities, operations, and privacy and civil liberties protections related to this initiative. It is my hope that your responses will demonstrate that any such endeavor will be taken with the well-being and safety of the traveling public in mind, and that the Department will immediately put in place policies to limit the collection, sharing, and retention of sensitive biometric health information.

Like many Americans, I am unconvinced that the Transportation Security Administration (TSA) would have the authority and training to administer a mass surveillance program to collect sensitive biometric health data from airport passengers across the country. TSA's fundamental mission is, as its name suggests, ensuring the *security* of airport travel. As far as I know, TSA officers typically have no medical training, nor are they otherwise trained in protecting public health. While I can appreciate the difficult economic circumstances currently facing the aviation industry, I would like to understand better the purpose of the proposed temperature checks

¹ See, e.g. <https://www.wsj.com/articles/tsa-preparing-to-check-passenger-temperatures-11589579570>.

and/or thermal imaging screening by TSA and the options and consequences for any passenger whom TSA determines to have a fever.

Several studies and government agencies, including the Centers for Disease Control and Prevention (CDC), have questioned the utility of thermal screening in airports. Air travelers may experience elevated temperatures from numerous non-COVID-19 related sources such as exercise, stress, heightened emotional state, alcohol consumption, heart conditions, pregnancy, urinary-tract infections, cancer, and a host of other unrelated conditions. It is thus not surprising that several scientific studies examining the efficacy of thermal screening to detect COVID-19 have concluded that it is ineffective. For example, recent CDC guidance reports that 35% of COVID-19 patients are asymptomatic and it estimates that 40% of COVID-19 transmission occurs before individuals feel sick.² Similarly, a recent study from the United Kingdom found that thermal passenger screening at airport entry and exit is slightly better than a coin toss at detecting COVID-19 infections in airport travelers.³ That study concluded, “[a]irport screening is unlikely to detect a sufficient proportion of [COVID-19] infected travellers to avoid entry of infected travellers.” *Id.* While it is possible that better data could undercut these results in the future, the results themselves are not surprising given that: many carriers of COVID-19 are asymptomatic or experience extended incubation periods; many passengers have elevated temperatures for reasons other than COVID-19; passengers may depress their temperatures by taking antipyretic medication such as aspirin and ibuprofen; and thermal cameras and monitors are often inaccurate. In sum, the preponderance of medical data strongly suggests that thermal screening for COVID-19 is ineffective, inefficient, and expensive.

As you know, The Privacy and Civil Liberties Oversight Board has an ongoing oversight investigation into DHS’s use of facial recognition and other biometric technologies in aviation security. As there is a liberty interest in air travel, I trust you can appreciate the extent to which the proposed temperature checks and/or thermal imaging screening by DHS could unduly burden the traveling public. I have significant concerns regarding the privacy and civil liberties issues raised by the large-scale collection of sensitive biometric data by DHS for use in making what would normally be medically-informed travel determinations. Accordingly, I would like answers to the following questions by June 15, 2020:

1. Under what legal authority would TSA conduct temperature checks and potentially deny travel to air passengers?

2. While the operational implementation of the Do Not Board list rests on TSA’s authority under 49 U.S.C. §114 (f) & (h), it is CDC, not TSA, who has the authority to make public health determinations and impose liberty restrictions.⁴ Into what agreements, if any, have DHS and CDC entered that substitute the existing Do Not Board process requiring multiple levels of internal review by CDC health officials with a temperature check or thermal imaging screening conducted by a Transportation Security Officer (TSO)? If CDC and DHS have not entered into any such

² <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7014668/>.

⁴42 USC § 264

agreements, under what authority would TSA seek to conduct medical examinations and make determinations that an individual poses a serious public health risk and, therefore, should not be allowed to travel by air?

3. According to media reports, the nation's public health experts at the CDC have already concluded temperature checks are not a reliable tool for screening passengers for COVID-19.⁵ Has DHS determined that thermal scanning improves the safety of air travel for some other reason, and, if not, has DHS considered whether the performance of such a procedure might engender a false sense of security among airline passengers?

4. How will you ensure that the safety of TSOs will not be compromised in administering thermal screening tests?

5. There is great variability in the accuracy of thermal cameras and monitors. What specific scanners or thermometers have been or will be approved by the Department for use to perform temperature checks on air travelers?

6. What standard will the Department use to determine whether a particular test subject has a "fever"? Will medical personnel or public health experts be available at all TSA checkpoints where temperature checks are administered to confirm the presence of a fever and determine whether or not such fever is a result of COVID-19?

7. In which airports do you plan to conduct thermal screening and how much money do you anticipate allocating for this effort, including equipment acquisition, training, personnel expenses, and any other costs associated with the program? Will airlines pay a portion of these costs?

8. Will thermal screening be compulsory for all passengers or only select ones? Will passengers have the right to decline thermal testing? If a passenger is denied entry pursuant to screening, what redress and right of appeal will be available to them? Does TSA anticipate creating a new watchlist within its Secure Flight system to prohibit these passengers from flying? If so, how can a passenger secure his or her removal from the list? Are there any other adverse actions that could potentially be taken against any passenger who is determined to have a fever?

9. As you know, CDC has found that COVID-19 severely impacts racial and ethnic minorities.⁶ What measures will you take to ensure that people of color will not be disproportionately precluded from air travel as a result of thermal screening? Will you commit to reporting aggregate statistics, including demographics, regarding the number of travelers tested, those who test positive for a fever, and those who are consequently denied access to the secure area of the airport as a result of such tests?

10. It is critical that the Department be transparent about its biometric information practices. What information will TSA collect in performing temperature checks on passengers and will there

⁵ <https://www.usatoday.com/story/news/investigations/2020/05/09/white-house-push-airport-fever-screenings-overrules-cdc-scientists/3097158001/>.

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

be any restrictions on the sharing of this information with other government or private entities? What information do you plan to provide to passengers in advance of and after a thermal screening examination?

11. My understanding is that DHS has already piloted thermal screening at Dulles International Airport and possibly others. Has DHS conducted and published a Privacy Impact Assessment (PIA) pertaining to its thermal screening activities, as required by the E-Government Act? If not, when do you plan to do so?

12. To better understand the potential impact the Department's thermal screening proposal might have on travelers, please identify the office that is leading and coordinating the thermal screening effort and any other components of DHS that may be assisting with the initiative, such as the Countering Weapons of Mass Destruction Office. Please also identify any other agencies that may be working with DHS on this effort and provide any policies, processes, procedures, and/or Concept of Operations that DHS has developed to conduct this activity.

Thank you in advance for your attention to these requests. I look forward to hearing from you on these important matters.

Sincerely,

TRAVIS LEBLANC

cc: Ms. Dena Kozanas, Chief Privacy Officer
U.S. Department of Homeland Security

Ms. Cameron Quinn, Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security

Mr. Peter Pietra, Privacy Officer
Transportation Security Administration