



# Privacy Impact Assessment

for

# CBP and ICE DNA Collection

**DHS Reference No. DHS/ALL/PIA-080**

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**Homeland  
Security**



## Abstract

The U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE), as federal law enforcement agencies, are statutorily mandated to collect deoxyribonucleic acid (DNA) from certain individuals who come into their custody. CBP and ICE began to collect DNA from persons who are detained under the authority of the United States consistent with the DNA Fingerprint Act of 2005.<sup>1</sup> To support this effort, the Federal Bureau of Investigations (FBI) Laboratory (“FBI Laboratory”) provides Buccal Collection Kits to both CBP and ICE. CBP and ICE use these kits collect the DNA via buccal cheek swab and send the DNA samples to the FBI, which in turn process them and store the resulting DNA profile in the FBI’s Combined DNA Index System (CODIS) National DNA Index System (NDIS) (CODIS/NDIS). NDIS contains DNA profiles contributed by federal and state agencies and participating forensic laboratories. CBP and ICE are conducting this joint Privacy Impact Assessment (PIA) to provide notice to the public of this biometric collection and to analyze the associated privacy risks. DHS is reissuing this PIA, originally published January 3, 2020, to note that CBP Office of Field Operations is expanding the minimum age for DNA collection from 18 to 14.

## Overview

Under 34 U.S.C. § 40702(a)(1)(A), *Collection and Use of DNA Identification Information from Certain Federal Offenders* (hereafter “the statute”), the United States Attorney General has the authority to “collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.” Failure by an individual subject to provide a DNA sample, as required, is considered a class A misdemeanor and punished in accordance with Title 18 of the U.S. Code.<sup>2</sup>

In 2008, the U.S. Department of Justice (DOJ) published in the Federal Register a Final Rule implementing the collection of DNA samples under the statute.<sup>3</sup> That rule modified 28 C.F.R. Part, specifically 28 C.F.R. § 28.12(b)(4), which permitted the DHS Secretary (in consultation with the Attorney General) to determine categories of aliens from whom collection is not feasible because of operational exigencies or resource limitations. By way of an exchange of letters between DHS and DOJ in 2010,<sup>4</sup> DHS was exempted from the mandatory DNA sample collection

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<sup>1</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title X, §§ 1001-1005, 119 Stat 2960, 3084 (2006) (current version in sections of 42 U.S.C.).

<sup>2</sup> See 34 U.S.C. § 40702(a)(5). See also 18 U.S.C. § 3559(a)(6).

<sup>3</sup> DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932 (Dec. 10, 2008).

<sup>4</sup> Letter from Janet A. Napolitano, Secretary, U.S. Department of Homeland Security, to Eric H. Holder, Jr.,



from certain non-U.S. Persons in administrative proceedings and administrative removals who did not have a criminal record.

In October 2019, the DOJ published a Notice of Proposed Rulemaking (NPRM)<sup>5</sup> proposing to remove 28 C.F.R. § 28.12(b)(4), as discussed above. Upon publication of the Final Rule,<sup>6</sup> the Attorney General (AG) restored the AG's plenary authority under the DNA Fingerprint Act to authorize and direct DNA sample collection by federal agencies, including DHS (subject to permitted limitations and exceptions). As 28 C.F.R. § 28.12(b) is implemented moving forward, this Final Rule will not preclude limitations and exceptions to the regulation's requirement to collect DNA samples by DHS because of operational exigencies, resource limitations, or other grounds. However, all exceptions beyond those expressly stated in the regulation's remaining provisions will require the explicit approval of the Attorney General.

The DOJ is assisting DHS in developing and implementing a plan to phase in DNA-sample collection from non-U.S. Persons who are detained under the authority of the United States, as well as certain U.S. citizens and Lawful Permanent Residents (U.S. Persons) who are being arrested or facing criminal charges.<sup>7</sup> The non-U.S. Persons (including those detained for criminal or administrative purposes) have their DNA collected by ICE or CBP designated officers, who follow the collection and submission procedures described in the respective implementation sections below. CBP and ICE send all DNA samples to the FBI Laboratory, which processes the samples and stores the resulting DNA profile in CODIS. NDIS contains the DNA profiles contributed by federal and state agencies and participating forensic laboratories. NDIS is part of the FBI's Combined DNA Index System (CODIS), which is a generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases.<sup>8</sup>

## **Rationale**

In the October 2019 NPRM, the DOJ included a comprehensive rationale for revocation of the DHS Secretary's authority to exempt certain categories of aliens from mandatory DNA sample collection under 28 C.F.R. § 28.12(b)(4).<sup>9</sup> Among those reasons, per DOJ, "prompt DNA-sample collection could be essential to the detection and solution of crimes [aliens] may have committed or may commit in the United States. Regardless of whether individuals are deemed criminal

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Attorney General, U.S. Department of Justice (Mar. 22, 2010) (on file with U.S. Department of Homeland Security).

<sup>5</sup> DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. 56397 (Oct. 22, 2019).

<sup>6</sup> DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. 56399 (Mar. 9, 2020).

<sup>7</sup> 34 U.S.C. § 40702(a)(1)(A).

<sup>8</sup> See U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, PRIVACY IMPACT ASSESSMENT NATIONAL DNA INDEX SYSTEM (2004), available at <https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/ndis>.

<sup>9</sup> See *supra* note 5.



arrestees or immigration detainees, the use of collected DNA samples follows a similar process and has similar value.”<sup>10</sup> The DNA profiles the government derives from arrestee or detainee samples amount to sanitized “genetic fingerprints” that can be used to identify an individual uniquely but do not disclose the individual’s traits, disorders, or dispositions.<sup>11</sup> The FBI Laboratory compares profiles from ICE and CBP submissions against existing profiles in NDIS, which includes DNA profiles derived from DNA information submitted by other agencies. A match to CODIS identifies the arrestee or detainee as a potential lead for further investigation by other law enforcement agencies.

The time it may take for the FBI Laboratory to process a DNA sample submitted by CBP or ICE may result in any potential match to CODIS occurring after the subject is no longer in CBP or ICE custody. Therefore, it is unlikely that CBP or ICE would be able to use a DNA profile match for public safety or investigative purposes prior to either an individual’s removal to his or her home country, release into the interior of the United States, or transfer to another federal agency. Nevertheless, CBP’s and ICE’s DNA sample collection enables DHS to comply with the DNA Fingerprint Act, which authorizes federal law enforcement agencies to collect DNA samples from individuals who are arrested, facing charges, or non-U.S. Persons detained under the authority of the United States and to send the collected DNA sample to the FBI.<sup>12</sup> The collected DNA samples may be used by other federal law enforcement agencies to support law enforcement investigations and to generate further investigative leads. Thus, DHS’s collection of DNA samples from certain U.S. Persons and non-U.S. Person detainees furthers the Government’s interests of justice and public safety, while being mindful of the privacy risks inherent in individual genetic privacy.<sup>13</sup>

## **Implementation**

The FBI provides the necessary number of Buccal Collection Kits to CBP and ICE. Each collection kit includes a Request for National DNA Database Entry Form (FD-936) and a buccal swab. The form FD-936 and the device each contain a matching unique barcode, which the FBI Laboratory uses to ensure availability of both biographic and biometric data for each subject, as well as for tracking purposes at the FBI Laboratory and profile entries in NDIS.

Each Buccal Collection Kit (“E” Barcode Kit”) contains the following:

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<sup>10</sup> “The advent of DNA technology is one of the most significant scientific advancements of our era,” having an “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” *Maryland v. King*, 569 U.S. 435, 442 (2013) (quotation marks omitted). DNA analysis “provides a powerful tool for human identification,” which “help[s] to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused.” See *supra* note 3, 73 Fed. Reg. 74933. “[T]hrough DNA matching,” it enables “a vast class of crimes [to] be solved.” *Id.* at 74934.

<sup>11</sup> See *supra* note 5.

<sup>12</sup> See *supra* note 1, § 1004.

<sup>13</sup> See *King*, 569 U.S. at 442-46, 461-65. See also *supra* note 3, 73 Fed. Reg. 74933, 74937-38.



- 1 Buccal swab collection device with unique barcode;
- 1 instruction on how to use the DNA Collection device (i.e., swab);
- 1 FD-936 submission form;
- 1 pair nitrile (latex-free) gloves;
- 1 single-use ink pad;
- 2 fingerprint ink remover towelettes;
- 1 buccal swab collection device envelope containing 1 PillowPak desiccant;
- 1 Agency Code Information Sheet; and
- 1 pre-paid return United States Postal Service (USPS) envelope.

### *CBP Implementation*

Effective January 2020, CBP began collecting DNA from any person in CBP custody who is subject to fingerprinting.<sup>14</sup> This includes aliens as well as U.S. citizens and Lawful Permanent Residents (U.S. Persons). As with all other DNA samples that federal law enforcement agencies collect under the authority of the DNA Fingerprint Act, CBP sends DNA samples from its DNA population<sup>15</sup> to the FBI, which enters results into CODIS.

The authorized method of DNA sample collection from non-convicts in federal custody, such as those detained for some administrative immigration violations, is by buccal (cheek) swab. Using DNA sample kits provided by the FBI, CBP agents and officers collect a DNA sample by taking a cheek swab from every individual within scope of the new regulation and submit the DNA samples to the FBI for processing and entry in the CODIS system. CBP began implementation using a phased approach, as described in full below. The initial phase requires DNA sample collection from arrested persons presented for prosecution and individuals held at a port of entry during consideration of admissibility and subject to further detention or proceedings but does not include DNA samples from anyone under the age of 14. CBP may also collect DNA samples from other aliens detained under the authority of the United States. Cooperation by those detained and subject to DNA sample collection is a mandatory condition of pretrial release<sup>16</sup> and refusal to

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<sup>14</sup> The United States Border Patrol collects DNA from any individual over the age of 14, while the CBP Office of Field Operations collects DNA from individuals who are between the ages of 14 and 79 years old. Currently, CBP does not categorically fingerprint individuals under the age of 14 but has the discretion to do so in potentially criminal situations.

<sup>15</sup> The DNA population is the population of people CBP and ICE encounter who are eligible by policy and law to have their DNA taken by DHS and submitted to FBI.

<sup>16</sup> 18 U.S.C. §§ 3142(b), (c)(1)(A).



cooperate in DNA sample collection is a Class A misdemeanor.<sup>17</sup>

CBP is implementing the collection of DNA for inclusion in CODIS in a five-phased pilot approach over the course of the next three (3) years. During and after the pilot, the FBI provides CBP with all Buccal Collection Kits. Each collection kit includes a Request for National DNA Database Entry Form, FD-936, and a DNA collection device. The form FD-936 and the device contain a matching unique barcode and must remain together throughout the entire process. These unique barcodes are used for, among other things, tracking purposes at the FBI Laboratory and the profile entries into the CODIS.

To assist CBP and ICE, the FBI Laboratory provides CBP with a training DVD that explains the DNA collection process as well as how to fill out form FD-936. Once an automated workflow has been developed by CBP, the FBI Laboratory works with CBP in updating the training material to address the new automated workflow. At CBP's request, the FBI Laboratory may participate in a 'train the trainer' event at multiple CBP locations. United States Border Patrol (USBP) and the Office of Field Operations provides all CBP agents and officers with written implementation plans.

### DNA Collection Process

CBP collects DNA samples from its DNA population using the following collection process:

- CBP agents and officers identify subjects who qualify for DNA sample collection.
- The CBP agent or officer determines whether the subject has previously had a DNA sample successfully processed and stored in CODIS (based on whether the FBI Identity History Summary record has a DNA indicator).
- If there is an existing CODIS DNA profile, the CBP agent or officer does not collect a DNA sample.
- If a CODIS DNA profile does not exist, the CBP agent or officer proceeds with the following steps in collecting a DNA sample:
  - Open the CBP system of record for intake processing (e.g., e3<sup>18</sup> used by U.S. Border Patrol agents or Secure Integrated Government Mainframe Access (SIGMA)<sup>19</sup> used by CBP Officers at Ports of Entry) and update/biographical data;

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<sup>17</sup> 34 U.S.C. § 40702(a)(5)(A).

<sup>18</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND BORDER PROTECTION, PRIVACY IMPACT ASSESSMENT FOR THE CBP PORTAL (E3) TO ENFORCE, DHS/CBP/PIA-012 (2017 and subsequent updates), available at <https://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

<sup>19</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND BORDER PROTECTION, PRIVACY IMPACT



- Open the FBI-provided Buccal Collection Kit and put on the provided latex gloves;
- Open the buccal swab collection device, scan or manually enter the unique barcode in the CBP system of record and verify that the barcode has been captured;
- Collect the DNA sample (instruct subject on how to hold, place, drag, and close device);
- The CBP agent or officer verifies that the unique barcode on the form FD-936 matches the barcode on the buccal swab collection device before placing the completed FD-936 and DNA sample in the pre-paid return envelope; and
- The CBP agent or officer seals the pre-paid return envelope and places the sealed DNA sample kit in out-going USPS mail before discarding the trash associated with the Buccal Collection Kit.

CBP enters the fact that a DNA sample was collected into the respective CBP system of record. During Phase I, and until the system of record can be enhanced, CBP officers at a Port of Entry (POE) annotate all articulable facts, observations, and the name of the authorizing official(s) for the DNA collection in the subject's Form I-213 in SIGMA. Beginning with Phase 1, CBP agents use e3 to auto-populate form FD-936, thus reducing the likelihood of error when completing the form and reducing processing time. CBP officers at POEs collecting the DNA sample manually complete the form FD-936.

### Project Phases

Phase I of the implementation pilot process involves trained CBP agents and officers<sup>20</sup> at one (1) USBP Sector (Detroit) and one (1) POE (Eagle Pass Port of Entry within the Laredo Field Office area of responsibility). CBP agents and officers collect DNA samples from criminal aliens as well as aliens and U.S. Persons referred to prosecution, with the exception of anyone under the age of 14. During Phase II, CBP will expand its training and collection to include training bargaining unit CBP agents and officers at specified USBP Sectors and POEs responsible for DNA collection. For this phase, CBP may also collect DNA samples from other aliens with a criminal background. Phase III begins with training the remaining non-bargaining unit CBP agents and officers at all remaining USBP Sectors and POEs to collect DNA samples. Phase IV begins with training all bargaining unit CBP agents and officers to collect DNA samples from criminal

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ASSESSMENT FOR THE AUTOMATED TARGETING SYSTEM, DHS/CBP/PIA-006 (2007 and subsequent updates), available at <https://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

<sup>20</sup> During Phase I, only trained CBP non-bargaining unit supervisory officers collect DNA samples at the POE while both bargaining and non-bargaining unit USBP agents are trained to collect DNA samples at the Sector. During Phase II, both bargaining and non-bargaining unit CBP agents and officers will be trained to collect DNA samples.



population at all USBP Sectors and POEs. The DNA population will remain the same throughout the pilot.

Phase V will be considered full implementation and will include the training of all bargaining and non-bargaining unit CBP agents and officers in the collection of DNA samples. When fully implemented, and if agreed upon between DHS and DOJ, the CBP DNA collection population may be expanded beyond criminal aliens and aliens referred to prosecution to include: all criminal arrestees, including U.S. Persons; all detained non-U.S. Persons detained for processing under administrative proceedings and released on their own recognizance; all detained non-U.S. Persons detained for processing under administrative proceedings and voluntary withdraw application; all aliens subject to expedited removal, reinstatement of removal, or administrative removal; and all voluntary returns.

CBP's DNA collection will not including the following populations:

- Individuals lawfully in or being processed for lawful admission into the United States;
- Individuals held at a POE during consideration of admissibility but not subject to further detention or proceedings;
- Individuals who withdraw their application for admission who are not subject to further enforcement action;
- Individuals who are Visa Waiver Program refusals who are not subject to further enforcement action;
- Individuals held in connection with maritime interdiction, and applicants for admission denied landing rights at berth;
- Pursuant to memorandums of understanding, any individual transferred from CBP custody to the custody of another federal agency (with the exception of ICE);
- When CODIS already contains a DNA profile for the individual; or
- Individuals suffering from a severe physical or cognitive handicap including:
  - Mental impairment;
  - Subjects being immediately transported for medical treatment; or
  - Subjects appearing to be under the influence of narcotics in a manner that poses a risk to officer safety.



## *ICE Implementation*

In order to implement the requirements of the amended regulations, ICE conducts a DNA sample collection pilot at one ICE Enforcement and Removal Operations (ERO) facility to determine operational and resource needs for full scale implementation at all ICE locations. Participation in the pilot program is limited to ERO. ICE's Homeland Security Investigation (HSI) will not participate, as the new rule has limited impact on HSI operations because it is already ICE practice to collect DNA samples from individuals, including U.S. Persons, arrested and detained by ICE for criminal prosecution. Under this pilot, ERO is not collecting DNA from U.S. Persons who only commit administrative immigration violations. ERO may collect DNA from U.S. Persons who are being arrested for or charged with a criminal violation. The impact of the change proposed by DOJ's NPRM is limited to ICE's DNA collection from non-U.S. Persons it detains for administrative purposes.

ERO non-bargaining unit employees at the pilot site collect DNA samples from individuals as they are processed into ICE custody (i.e., when employees collect biographical information and fingerprints). ICE limits the scope of the pilot to simulate real-life operating conditions at a detention facility when DNA sample collection is fully expanded and implemented. Full implementation will occur in stages after completion of the pilot, assessment of the pilot results, completion of union bargaining, and development and deployment of necessary policy documents and training.

### DNA Collection Process

Subjects are processed in accordance with existing procedure, including collection of fingerprints, with the following additional steps:

- Determine if any exceptions to DNA sample collection apply. If so, check the relevant exception box in the EID Arrest GUI for Law Enforcement (EAGLE);<sup>21</sup>
- If no exceptions apply, open Buccal Collection Kit and scan barcode;
- Put on provided gloves;
- Open buccal swab collection device, scan unique barcode, and verify barcode capture;
- Collect DNA sample;
- Place swab in collection device envelop, seal, and place in return envelope;

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<sup>21</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (EID), DHS/ICE/PIA-015 (2010 and subsequent updates), available at <https://www.dhs.gov/privacy-documents-ice>.



- Remove gloves, per anti-contamination methodology;
- Complete necessary data fields in EAGLE;
- When all data is available (pending receipt of Identity History Summary response to Booking transaction), print completed FD-936;
- Verify data and place FD-936 in envelope; and
- Seal pre-paid return envelope, place in out-going mail, and discard trash from collection kit.

ICE has developed the pilot implementation plan for the collection of DNA samples for inclusion in CODIS. The results of the pilot will be assessed prior to expansion to additional locations. Additional technical, policy, and process changes may be necessary, including changes to EAGLE booking application and the Enforcement Integrated Database (EID) to support ICE’s implementation plan. The table below lists all data points required to complete the FD-936, specifying which data fields already exist in EID and which ICE needs to add.

<b>Required Fields</b>	
<b>Existing EID Fields</b>	<b>New EID Fields</b>
Collecting Agency (No Field Needed)	Master Name (i.e., the original name connected to an FBI Identity History Summary)
Originating Agency Identifier (ORI)	Next Generation Identification (NGI) <sup>22</sup> Transaction Control Number (TCN)
Last Name	Collection Device Identifier (i.e., barcode)
First Name	Collection Date/Time (YYYY/MM/DD/HH:MM:SS)
FBI UCN	DNA Collection Exemption Reasons
Date of Birth (YYYYMMDD)	
Gender	
Arrest/Conviction Code (No Field Needed)	
Collector’s Last Name	
Collector’s First Name	

<sup>22</sup> See U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, PRIVACY IMPACT ASSESSMENTS FOR VARIOUS USES OF FBI’S NEXT GENERATION IDENTIFIER SYSTEM, available at <https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments>.



## Project Phases

For Phase I, ICE collects DNA samples from all aliens who are booked in the designated Area of Responsibility (AOR), provided the individual does not meet one of the exceptions identified in this document. ICE HQ maintains consistent communication with the Field Office to ensure feedback is provided promptly. Expansion of the pilot to additional sites and to bargaining unit employees is contingent on successful implementation in Phase I. ICE will have the opportunity to course correct as necessary during this phase.

In Phase II, ICE will monitor the progress of the pilot (from Phase I) and begin implementation at other locations as appropriate. After a period of successful collections, ICE anticipates collecting DNA samples at an additional two sites, increasing daily collections. ICE will develop policies relating to use of reasonable force and other issues identified during the pilot.

In Phase III, ICE will complete the implementation plan and initiate bargaining with the appropriate ICE union. While this new process is being bargained, ICE will expand the pilot collection program to each of ERO's remaining and designated sites, with non-bargaining unit employees collecting DNA samples from a selected number of individuals each day. The total number of sites and collections is subject to staff availability and best practices from other pilot sites. Once bargaining is completed on the new protocols and procedures for collecting DNA samples, ICE will begin implementation with bargaining unit employees.

In Phase IV, bargaining unit employees will start to collect DNA samples from aliens who are booked through their processing facilities and do not fall within one of the exceptions described above. This collection will likely start in 1 – 2 sites to determine that all processes and procedures are clear and implementable, before expanding to other sites.

## ERO Responsibilities and Requirements

ERO non-bargaining unit employees will collect DNA samples from non-U.S. persons booked into the facility and from whom they currently collect fingerprints. Under full implementation, CBP will be responsible for collecting DNA samples from all aliens who CBP arrests and processes before turning the aliens over to ICE. For this reason, ICE will not collect DNA samples from non-U.S. Persons who have been arrested and processed by CBP prior to being turned over to ICE. ERO's non-bargaining unit employees will use manual DNA-sample collection kits and record all necessary information in EID EAGLE.<sup>23</sup> When ERO does not collect a DNA sample, ERO will indicate such in EAGLE, selecting from the following reasons:

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<sup>23</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (EID), DHS/ICE/PIA-015 (2010 and subsequent updates), available at <https://www.dhs.gov/privacy-documents-ice>.



- Alien is below 14 years of age;<sup>24</sup>
- Alien has been transferred from DHS (either CBP or HSI) or DOJ custody;
- Alien's DNA has been collected previously, as indicated on their FBI Identity History Summary; or
- For purposes of the pilot, alien is non-compliant.

After the samples are collected, the sealed Buccal Collection Kits will be assembled from the pilot site as soon as practicable, brought to the mail room, and then mailed via U.S. Postal Service (USPS) to the FBI Laboratory on the next business day. The kits will be processed by FBI Laboratory for inclusion in CODIS.

ERO will work on automating the completion of the FD-936 form ("Request for National DNA Database Entry") that must accompany the return of each sample, in an effort to improve the efficiency of ICE bulk DNA sample collection. Until this automation is complete, ERO personnel will manually enter relevant information from the FD-936 form into EAGLE and will send the accompanying paper form to the FBI Laboratory.

#### Homeland Security Investigations Responsibilities and Requirements

As is their current practice, HSI agents ensure DNA samples are collected from individuals, including U.S. Persons, who are arrested for criminal prosecution under HSI's authorities prior to booking the aliens with ERO. HSI's responsibilities do not change under the terms of the pilot. Therefore, agents shall not rely on ERO to collect DNA from non-U.S. Persons.

#### ICE Office of Policy and Planning Responsibilities and Requirements

Following the conclusion of the pilot, ICE will prepare a report on the outcomes of the pilot, including best practices, demographic information, and other relevant information, to be shared with CBP and DHS leadership to inform future planning. When enough information has been gathered to inform broader implementation, ICE will complete its full implementation plan and begin the collective bargaining process to include bargaining unit employees as DNA sample collectors, and the development and creation of necessary policies related to DNA-sample collection.

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<sup>24</sup> 34 U.S.C. § 40702 does not specifically mention minor aliens. However, 28 C.F.R. § 28.12(b) states, "[u]nless otherwise directed by the Attorney General, the collection of DNA samples under this paragraph may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General." DHS's submission of DNA to the FBI Laboratory is predicated on the submission of fingerprints to FBI's Criminal Justice Information Services (FBI CJIS) Division. As DHS does not currently collect fingerprints from anyone under the age of 14, DHS will similarly also not collect DNA samples from this group of alien detainees under the age of 14. *See* 28 C.F.R. 28.12(b).



The full implementation plan will include training requirements for bargaining and non-bargaining unit employees, both on the DNA-sample collection process itself, as well as ICE-specific policies and procedures.

## ICE Office of Information Governance and Privacy Responsibilities and Requirements

The Office of Information Governance and Privacy (IGP) assists in providing oversight and guidance involving records/data retention and disposition, as well as providing guidance involving the protection of individual privacy. Any biographical data collected by ICE in furtherance of this effort is retained in compliance with National Archives and Records Administration (NARA) requirements DAA-0563-2013-0001 Biometric with Limited Biographical Data.<sup>25</sup>

## **Fair Information Practice Principles (FIPPs)**

The Privacy Act of 1974<sup>26</sup> articulates concepts of how the federal government should treat individuals and their information and imposes duties upon federal agencies regarding the collection, use, dissemination, and maintenance of personally identifiable information. Section 222(2) of the Homeland Security Act of 2002, as amended, states that the Chief Privacy Officer shall assure that information is handled in full compliance with the fair information practices as set out in the Privacy Act of 1974.<sup>27</sup>

In response to this obligation, the DHS Privacy Office developed a set of Fair Information Practice Principles (FIPPs) from the underlying concepts of the Privacy Act to encompass the full breadth and diversity of the information and interactions of DHS.<sup>28</sup> The FIPPs account for the nature and purpose of the information being collected in relation to DHS's mission to preserve, protect, and secure.

DHS conducts Privacy Impact Assessments on both programs and information technology systems, pursuant to the E-Government Act of 2002, Section 208<sup>29</sup> and the Homeland Security

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<sup>25</sup> NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, REQUEST FOR RECORDS DISPOSITION AUTHORITY, RECORDS SCHEDULE NUMBER DAA-0563-2013-0001, U.S. DEPARTMENT OF HOMELAND SECURITY, BIOMETRIC WITH LIMITED BIOGRAPHICAL DATA (2013), available at [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0563/daa-0563-2013-0001\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0563/daa-0563-2013-0001_sf115.pdf).

<sup>26</sup> 5 U.S.C. § 552a.

<sup>27</sup> 6 U.S.C. § 142(a)(2).

<sup>28</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, PRIVACY POLICY GUIDANCE MEMORANDUM 2008-01/PRIVACY POLICY DIRECTIVE 140-06, THE FAIR INFORMATION PRACTICE PRINCIPLES: FRAMEWORK FOR PRIVACY POLICY AT THE DEPARTMENT OF HOMELAND SECURITY (2008), available at <https://www.dhs.gov/privacy-policy-guidance>.

<sup>29</sup> 44 U.S.C. § 3501 note.



Act of 2002, Section 222.<sup>30</sup> This PIA examines the privacy impact of CBP and ICE detainee DNA sample collection as it relates to the Fair Information Practice Principles.

## 1. Principle of Transparency

*Principle: DHS should be transparent and provide notice to the individual regarding its collection, use, dissemination, and maintenance of Personally Identifiable Information (PII). Technologies or systems using PII must be described in a System of Record Notice (SORN) and PIA, as appropriate.*

In October 2019, DOJ published a Notice of Proposed Rulemaking (NPRM) titled *DNA-Sample Collection from Immigration Detainees*.<sup>31</sup> DOJ published the NPRM for public review in the Federal Register and solicited public comment and feedback. The DNA Fingerprint Act of 2005<sup>32</sup> also provides clear notice to the public about this information collection.

DHS has conducted this PIA to provide additional notice regarding how DHS intends to implement this specific collection. DOJ also has a published PIA on the NDIS system for reference.<sup>33</sup>

**Privacy Risk:** There is a risk that individuals in federal custody will not be aware they must provide a DNA sample to law enforcement officers.

**Mitigation:** This risk is partially mitigated. A privacy notice is publicly posted at ICE facilities where DNA is collected pursuant to the processes outlined in this PIA.<sup>34</sup> CBP provides individual verbal notice to individuals subject to DNA collection. Additionally, individuals subject to DNA sample collection and the general public were issued notice pursuant to DOJ's NPRM, and the various statutory provisions that require DNA sample collection from certain individuals in federal custody. The DOJ has also published several regulations implementing these statutes, all of which subject to public notice and comment.

Further, DHS provides notice through the publication of this PIA and the relevant System of Records Notices (SORNs).<sup>35</sup>

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<sup>30</sup> 6 U.S.C. § 142.

<sup>31</sup> See *supra* note 5.

<sup>32</sup> See *supra* note 1.

<sup>33</sup> See *supra* note 8.

<sup>34</sup> The privacy notice will be communicated to detainees with limited English proficiency in a manner and language they can understand. See Exec. Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50123 (Aug. 16, 2000).

<sup>35</sup> See DHS/CBP-023 Border Patrol Enforcement Records (BPER), 81 Fed. Reg. 72601 (Oct. 20, 2016); DHS/CBP-011 U.S. Customs and Border Protection TECS, 73 Fed. Reg. 77778 (Dec. 19, 2008); DHS/ICE-011 Criminal Arrest Records and Immigration Enforcement Records (CARIER) System of Records, 81 Fed. Reg. 72080 (Oct. 19, 2016), available at <https://www.dhs.gov/system-records-notices-sorns>.



**DHS Privacy Office Recommendation:** Where feasible, the DHS Privacy Office recommends that CBP also post a privacy notice.

**Privacy Risk:** There is a risk that CBP provides inadequate notice that it collects DNA and sends it to the FBI.

**Mitigation:** This risk is partially mitigated. While CBP's SORNs do not provide explicit mention of the collection and sharing of DNA, the broad nature of DHS/CBP-011 U.S. Customs and Border Protection TECS and the specific inclusion of biometric information in the DHS/CBP-023 Border Patrol Enforcement Records (BPER) generally cover this collection. In an effort to be more transparent, CBP is in the process of updating DHS/CBP-023 Border Patrol Enforcement Records (BPER) and DHS/CBP-011 U.S. Customs and Border Protection TECS to provide more explicit notice to the public.

**Privacy Risk:** There is a risk that individuals whose DNA sample is collected while the individuals are children will not be aware that their DNA profile will remain on file with FBI in perpetuity.

**Mitigation:** This risk is partially mitigated. Presently, CBP does not categorically fingerprint individuals under the age of 14, and therefore will not be collecting DNA samples, but has the discretion to do so in potentially criminal situations. If DOJ changes the regulation and requires CBP to fingerprint all individuals under the age 14, CBP would comply and collect DNA samples as well. The publication of this PIA, appropriate SORNs, and the privacy notice that are posted at relevant ICE detention facilities helps provide notice to the public of this DNA sample collection. Additionally, the FBI has considerable information about their DNA profile database publicly available.<sup>36</sup>

## 2. Principle of Individual Participation

*Principle: DHS should involve the individual in the process of using PII. DHS should, to the extent practical, seek individual consent for the collection, use, dissemination, and maintenance of PII and should provide mechanisms for appropriate access, correction, and redress regarding DHS's use of PII.*

When fully implemented, CBP and ICE will collect DNA samples (buccal cheek swabs) from the following groups of individuals in custody: criminal arrestees including U.S. citizens, lawful permanent residents, and aliens; all non-U.S. Persons detained for processing under administrative proceedings and released on their own recognizance; all non-U.S. Persons who are

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<sup>36</sup> See U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/laboratory/biometric-analysis/federal-dna-database> (last visited July 22, 2020).



detained for processing under administrative proceedings and voluntary withdraw application; all non-U.S. Persons subject to expedited removal, reinstatement of removal, or administrative removal; and all voluntary returns.

**Privacy Risk:** There is a risk that DNA collection requires no consent and is not voluntary.

**Mitigation:** This risk cannot be mitigated. If individuals refuse to provide a DNA sample (i.e., are not compliant), then DHS may pursue criminal prosecution. The statute mandating DNA sample collection specifically states that an individual subject to DNA-sample collection who fails to cooperate in the collection of that sample may be guilty of a class A misdemeanor.<sup>37</sup>

### 3. Principle of Purpose Specification

*Principle: DHS should specifically articulate the authority which permits the collection of PII and specifically articulate the purpose or purposes for which the PII is intended to be used.*

CBP and ICE are statutorily compelled to collect DNA from “individuals who are arrested, facing charges, convicted, or from non-United States persons who are detained under the authority of the United States.”<sup>38</sup> This helps assure that the DNA is collected for law enforcement purposes, such as the generation of future investigative leads.<sup>39</sup>

### 4. Principle of Data Minimization

*Principle: DHS should only collect PII that is directly relevant and necessary to accomplish the specified purpose(s) and only retain PII for as long as is necessary to fulfill the specified purpose(s). PII should be disposed of in accordance with DHS records disposition schedules as approved by the National Archives and Records Administration (NARA).*

The DNA collection enables DHS to comply with 34 U.S.C. § 40702, which requires federal law enforcement agencies to collect DNA samples from individuals who are arrested, facing charges, or convicted, or from non-U.S. Persons who are detained under the authority of the United States and to send the collected samples to the FBI. The resulting DNA profile may be used by other federal law enforcement agencies to support law enforcement investigations and to generate investigative leads.

Using FBI Laboratory-provided buccal collection kits, CBP and ICE agents and officers collect DNA samples and mail the collected DNA samples to the FBI Laboratory for processing

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<sup>37</sup> See *supra* note 17.

<sup>38</sup> See *supra* note 12.

<sup>39</sup> See *supra* note 5, in supporting the decision to revoke the DHS Secretary’s prior discretionary waiver under 28 C.F.R. § 28.12(b)(4).



and entry in NDIS. CBP annotates the unique barcode associated DNA sample and associated Form FD-936 in the CBP information technology system (e.g., e3 or SIGMA), indicating that a DNA sample was collected from the detainee by CBP. ICE collects and retains this information in EAGLE (for storage in EID). All DNA samples are mailed to the FBI Laboratory no later than the next business day in the prepaid envelopes via U.S. Postal Service, as prescribed by the FBI Laboratory.

CBP and ICE do not store the physical DNA samples beyond the time that the samples are held before being put into the mail.

**Privacy Risk:** There is a risk of overcollection of information, particularly from young children, who could not have committed any crimes for which to match against.

**Mitigation:** This risk is partially mitigated. As indicated, ICE does not collect DNA samples from individuals under 14 years of age. ICE will adhere to the same protocol and policy that it currently follows with respect to fingerprints. The October 2019 DOJ NPRM provides several other rationales indicating the usefulness of DNA sample collection.<sup>40</sup> Presently, CBP does not categorically fingerprint individuals under the age of 14, and therefore will not be collecting DNA samples, but has the discretion to do so in potentially criminal situations. If DOJ changes the regulation and requires CBP to fingerprint all individuals under the age 14, CBP would comply and collect DNA samples for that population of individuals as well.

## 5. Principle of Use Limitation

*Principle: DHS should use PII solely for the purpose(s) specified in the notice. Sharing PII outside the Department should be for a purpose compatible with the purpose for which the PII was collected.*

CBP and ICE submit the DNA samples directly to the FBI Laboratory. CBP and ICE will not use the DNA sample for any purpose beyond submission to the FBI. Once the sample is submitted, the FBI Laboratory produces a DNA profile for each submission and uploads it to NDIS. These DNA profiles are then available to be searched against unknown forensic profiles from crime scenes across the country. If a match is identified, the casework laboratory (i.e., the lab that submitted DNA from a crime scene) can request FBI Laboratory to confirm the offender sample DNA profile. Once the profile is confirmed, the FBI Laboratory then releases the subject's personal identifying information to back to the casework laboratory. This information can then be passed on to investigators as case leads.

**Privacy Risk:** There is a risk that DNA samples submitted by CBP and ICE to the FBI

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<sup>40</sup> See *supra* note 5, 84 Fed. Reg. 56399-400.



will be used beyond law enforcement and criminal justice purposes.

**Mitigation:** This risk is mitigated. The FBI uses DNA samples to generate DNA profiles for identification and to determine any nexus to existing or future law enforcement cases. DNA samples generated by the FBI Laboratory may not be used to discriminate in the provision of health benefits or other services. DNA samples are not used by the FBI Laboratory to reveal any physical traits, race, ethnicity, disease susceptibility, or other sensitive information about an individual.

## 6. Principle of Data Quality and Integrity

*Principle: DHS should, to the extent practical, ensure that PII is accurate, relevant, timely, and complete, within the context of each use of the PII.*

All DNA samples collected by CBP and ICE are sent to the FBI Laboratory for processing and entry in NDIS. CBP and ICE are not involved in the processing, entry, or reconciliation of any DNA sample. As prescribed by the FBI Laboratory, DNA samples are mailed to the FBI Laboratory via USPS.

**Privacy Risk:** There is a risk that the samples will be contaminated or unusable.

**Mitigation:** This risk is mitigated. The FBI provides in-person and video-based training to CBP and ICE to ensure that samples are properly collected. If CBP or ICE submit an unusable sample to the FBI, the FBI will send CBP and ICE a “Rejection Notification.” CBP and ICE may attempt to retake the sample as appropriate, if the individual remains in custody. If the individual was released from custody, there will be no attempt to apprehend the subject to collect a new sample.

**Privacy Risk:** There is a risk a percentage of the DNA samples could be lost, destroyed, or separated from the corresponding form before reaching the FBI Laboratory.

**Mitigation:** ICE and CBP have developed pilot implementation plans for the collection of DNA samples for inclusion in CODIS, including the proper handling of the DNA samples. ICE and CBP use pre-printed postage paid tear-resistant envelopes in order to lessen risk of loss. However, the risk posed to samples in the U.S. Mail, if any, is not one within the agency’s control. It is the responsibility of USPS to ensure that all samples (and corresponding forms) arrive at the FBI Laboratory.



## 7. Principle of Security

*Principle: DHS should protect PII (in all forms) through appropriate security safeguards against risks such as loss, unauthorized access or use, destruction, modification, or unintended or inappropriate disclosure.*

Only authorized and trained CBP and ICE employees use the Buccal Collection Kits. Each DNA sample submitted to the FBI Laboratory is linked via the unique barcode number to the individual's record in agency systems. Collected DNA samples are secured on-site at the respective DHS facility and mailed to the FBI Laboratory (via U.S. mail). No DNA samples are retained by DHS.

## 8. Principle of Accountability and Auditing

*Principle: DHS should be accountable for complying with these principles, providing training to all employees and contractors who use PII, and should audit the actual use of PII to demonstrate compliance with these principles and all applicable privacy protection requirements.*

Each Buccal Collection Kit has a unique barcode that associates the DNA sample to the corresponding form FD-936. This barcode is scanned or manually entered in to the relevant CBP or ICE system of record (e.g., e3, SIGMA, EAGLE). Beginning with Phase I, USBP agents and ICE officers and agents use their respective systems to auto-populate the FD-936 and manually print and send it to the FBI. CBP officers at POEs manually complete (i.e., hand write) the form FD-936 while CBP works to automate this process in SIGMA. The DNA samples will always have to be mailed to the FBI.

**Privacy Risk:** There is a risk that DHS personnel will use PII for purposes beyond what is described in this PIA.

**Mitigation:** All DHS personnel (whether CBP or ICE) are trained on the DNA collection procedures and the appropriate handling of PII (including Sensitive PII). Further, only personnel with a verified need to know are granted access to the appropriate DHS systems, such as e3 or EAGLE. These systems employ robust audit controls to ensure appropriate usage and access controls. If DHS determines that personnel are using the system for unauthorized purposes, it may revoke that person's access, and/or take additional measures as appropriate.

## Conclusion

Pursuant to the requirements of the statute, CBP and ICE must collect DNA from certain individuals in their custody. CBP and ICE began to collect DNA samples from individuals



arrested, facing charges, or non-U.S. Persons who are detained under the authority of the United States consistent with the DNA Fingerprint Act of 2005. CBP and ICE collect the DNA samples by a buccal cheek swab and send the physical DNA specimens to the FBI Laboratory, which processes the samples and maintains the resulting DNA profile in the CODIS. DHS will implement the collection of DNA samples in a multi-phased pilot approach, as described in full above. DHS has identified privacy risks inherent to the collection of DNA samples and has described mitigations – when available – above.

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## Approval Signature

Original, signed copy on file with the DHS Privacy Office.

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