

**Comments of**  
**THE ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)**

**to the**

**OPEN GOVERNMENT PARTNERSHIP'S INDEPENDENT REPORTING  
MECHANISM**

*Request for Civil Society Input on End-of-Term Report Assessing Progress toward National  
Action Plan on Open Government*

Oct. 30, 2017

**Comments on NAP Commitments to:** 1) Promote Evidence-based Policy for More Effective Service Delivery; 2) Improve Transparency of Privacy Programs and Practices; 3) Improve Transparency of Privacy Programs and Practices; and 4) Increase Transparency of the Intelligence Community

**1) Promote Evidence-based Policy for More Effective Service Delivery**

In implementing the National Action Plan (“NAP”) principle to “Promote Evidence-based Policy,” EPIC recommends incorporating findings on evidence-based policy established in the final report of the Commission on Evidence Based Policymaking. The Commission on Evidence Based Policymaking was established by Congress to study how data across the federal government could be combined to improve public policy while protecting privacy to make data in the federal government more widely available to ensure better policymaking. EPIC applauded the Commission's final report - “Recommendations of the Commission on Evidence Based Policymaking” – which backs evidence-based policy, recommends new privacy safeguards such as Privacy Enhancing Techniques, encourages broader use of statistical data, and recommends the creation of a National Secure Data Service.<sup>1</sup> The report incorporates recommendations made by EPIC in comments to the Commission.<sup>2</sup> EPIC testified before the Commission last year and called for the adoption of innovative privacy safeguards to protect personal data and make informed public policy decisions.<sup>3</sup> While the Commission’s work is a positive step, EPIC

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<sup>1</sup> *Recommendations of the Commission on Evidence-Based Policymaking: Hearing before the H. Comm. on Oversight & Government Reform*, 115th Cong. (2017), <https://oversight.house.gov/hearing/recommendations-commission-evidence-basedpolicymaking/>.

<sup>2</sup> EPIC, Comments to Commission on Evidence-Based Policymaking (Nov. 14, 2016), <https://epic.org/apa/comments/EPIC-CEP-RFC.pdf>.

<sup>3</sup> Marc Rotenberg, *Commission on Evidence-Based Policymaking: Privacy Perspectives, before the National Academies of Science* (2016), <https://epic.org/privacy/wiretap/RotenbergCEBP-9-16.pdf>.

emphasizes that where data maintained by the federal government implicates identifiable individuals, privacy risks must be addressed and reduced as much as possible.

EPIC endorsed several of the Commission's recommendations that should guide implementation of the NAP. Requiring comprehensive risk assessments for de-identified confidential data and supporting adoption of PETs are key recommendations of the Commission's report that will serve to protect personal information. Even where data has been de-identified it is still possible to combine certain data sets with others to determine extensive amounts of personal information.<sup>4</sup> For instance, EPIC president Marc Rotenberg participated in a National Academies of Sciences report on how federal data sources can be used for public policy research while protecting privacy, which explained:

Any consideration of expanding data must have privacy as a core value...As federal agencies seek to combine multiple datasets, they need to simultaneously address how to control risks from privacy breaches. Privacy-enhancing techniques and privacy-preserving statistical data analysis can be valuable in these efforts and enable the use of private-sector and other alternative data sources for federal statistics.<sup>5</sup>

Equally important is to recognize that under the Privacy Act statistical data is subject to fewer privacy constraints because it is understood that statistical does not identify specific individuals. If it is possible to re-identify aggregate data, complete privacy protections must necessarily apply. Agencies will carry the responsibility to ensure the adequacy of the privacy enhancing and privacy protecting techniques. It is necessary to note that there need not be any tradeoffs between evidence based policy and privacy protections. Many government data sets do not implicate privacy protections at all.<sup>6</sup> Meteorological data, for example, has become increasingly important as the severity of storms has increased. The government should make this information widely available to the public to improve emergency planning and promote public safety.

The Commission also proposes a National Secure Data Service ("NSDS") to facilitate data access for the purposes of evidence building. Establishing an entity that helps analyze data from multiple sources should help ensure that data sets can be combined and used securely in a defined set of circumstances. At the same time, there are real challenges to ensure that the creation of the NSDS does not create a centralized repository of data on Americans, like the proposed National Data Center which was broadly opposed by the public and led to the enactment of the Privacy Act.

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<sup>4</sup> Latanya Sweeney, *Simple Demographics Often Identify People Uniquely*, Carnegie Mellon University, *Data Privacy Working Paper* (2000), <https://dataprivacylab.org/projects/identifiability/paper1.pdf>.

<sup>5</sup> Nat'l Acads. of Science, *Innovations in Fed. Statistics, Combining Data Sources While Protecting Privacy* 3 (2017), <https://www.nap.edu/catalog/24652/innovations-in-federalstatistics-combining-data-sources-while-protecting-privacy>.

<sup>6</sup> See e.g., Nat'l Hurricane Ctr., *NHD Data Archive*, [nhc.noaa.gov](http://www.nhc.noaa.gov/), <http://www.nhc.noaa.gov/>.

## Modernize Implementation of the Freedom of Information Act

EPIC welcomed the passage of the FOIA Oversight and Implementation Act in January 2016. However, there is still significant progress needed to fulfill the NAP goal to “Modernize Implementation of the Freedom of Information Act.” EPIC has undertaken several recent initiatives highlighting ongoing deficiencies in access to federal information, including shortfalls in disclosure obligations, the removal of federal information online, and the weaknesses in the Office of Government Information Services (“OGIS”) dispute resolution rules.

In April 2017, EPIC and a coalition of civil society organizations urged Immigration and Customs Enforcement (“ICE”) to comply with the Freedom of Information Act obligations to disclose information and justify any asserted exemptions. The letter to DHS Secretary Kelly called upon the federal agency to “fully disclose information on immigration enforcement cooperation between federal and non-federal law enforcement agencies.”<sup>7</sup> The letter noted that while DHS components have an obligation to disclose this information within specific deadlines under the FOIA, “ICE has significantly reduced the amount of information it is releasing” concerning immigration detainees.<sup>8</sup> In FOIA determination letters, the component also often “failed to cite any lawful exemption or justification for withholding such information.”<sup>9</sup> The coalition called on DHS to “disclose the full record on immigration cooperation in response to public FOIA requests.”<sup>10</sup>

NAP implementation should also focus attention on increasing removal of federal information online. EPIC and a coalition of over sixty organizations also the Office of Management and Budget (“OMB”) to preserve access to government information online.<sup>11</sup> The coalition warned that agencies have begun removing information on topics “such as animal welfare, individuals with disabilities, climate change, and more from their websites,” and called on OMB to ensure agencies give the public notice required by law before removing information.<sup>12</sup>

Finally, in comments to the Office of Government Information Services (OGIS) EPIC and a group of open government organizations urged greater transparency for OGIS dispute

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<sup>7</sup> Letter from EPIC, Coalition to Sec’y Kelly, Dep’t of Homeland Sec. (April 24, 2017), [https://www.openthegovernment.org/sites/default/files/Letter%20to%20DHS\\_ICE%20FOIA%20odata.pdf](https://www.openthegovernment.org/sites/default/files/Letter%20to%20DHS_ICE%20FOIA%20odata.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Letter from EPIC, Coalition to Acting Adm’r Dominic Mancini, Office of Mgmt. and Budget (Feb. 13, 2017), <https://www.openthegovernment.org/sites/default/files/Letter%20to%20OMB%20PRA%20requirements%20final.pdf>.

<sup>12</sup> *Id.*

resolutions.<sup>13</sup> The groups urged OGIS not to place restrictive confidentiality requirements on requesters who use dispute resolution services that limit the reach of OGIS’s important work to support the FOIA. Specifically, group cautioned against a proposal to apply restrictions of Administrative Dispute Resolution Act where the statute may not be applicable, and keeping confidential final OGIS response letters. Such restrictions would weaken OGIS’s role, and “limit access to other requesters dealing with the same agency and take away the ability of the public and Congress to monitor agency FOIA practices,” the letter explained.<sup>14</sup>

## **Improve Transparency of Privacy Programs and Practices**

The NAP commitment to “Improve Transparency of Privacy Programs and Practice” includes strengthening and updating guidance on Federal agencies’ responsibilities for protecting personally identifiable information. Nonetheless, EPIC notes that federal agencies continue to fail to create and publish Privacy Impact Assessments (“PIA”) and other privacy and civil liberties assessments required by law. EPIC has revealed the agencies’ failure to complete these assessments in through both FOIA requests and FOIA litigation. EPIC is also currently suing Presidential Commission on Election Integrity for creating a database of personal voter data information before conducting a PIA.

As a result of FOIA lawsuit *EPIC v. DEA*, EPIC revealed that the Drug Enforcement Administration (“DEA”) never completed privacy impact assessments for the agency's massive license plate reader program, a telecommunications records database, and other systems of public surveillance.<sup>15</sup> EPIC filed suit against the DEA in February 2015, seeking all PIAs that were not currently publicly available, as well as all the Initial Privacy Assessment (“IPA”) and Privacy Threshold Analysis (“PTA”) documents since January 2007. However, despite a D.C. District Court September 2016 order against the agency to search for records in response to the FOIA lawsuit in, the DEA failed to produce privacy assessments required by law. *EPIC v. DEA*, 208 F.Supp.3d 108, 110 (D.D.C. 2016).

Through a FOIA request to the Federal Aviation Administration, EPIC obtained documents revealing that the FAA never finished a report ordered by Congress on the privacy implications of “unmanned aircraft systems,” or drones.<sup>16</sup> As stated in the accompanying explanatory statement indicating Congressional intent for appropriations, the Appropriations Act of 2014 required the FAA to inform Congress on “how the FAA can address the impact of widespread use of [drones] on individual privacy.”<sup>17</sup> Mindful that the FAA plays a “unique role”

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<sup>13</sup> EPIC, Coalition to Dir. Alina Semo, Office of Gov’t Info. Servs. (Feb. 24, 2017), [https://www.openthegovernment.org/sites/default/files/OGIS%20regulations\\_comment%20\(w%20endorsements\).pdf](https://www.openthegovernment.org/sites/default/files/OGIS%20regulations_comment%20(w%20endorsements).pdf).

<sup>14</sup> *Id.*

<sup>15</sup> EPIC, *EPIC v. DEA – Privacy Impact Assessments*, EPIC.org, <https://epic.org/foia/dea/pia/>.

<sup>16</sup> EPIC, *FAA FOIA Request July 20, 2017*, EPIC.org (July 20, 2016), <https://epic.org/privacy/litigation/apa/EPIC-16-07-20-FAA-FOIA-20160720-Request.pdf>.

<sup>17</sup> Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5. (Jan. 17 2014); Explanatory Statement Submitted By Mr. Rogers of Kentucky, Chairman of the House

in civil aviation, Congress required the agency to conduct a study on the implications of UAS integration into the national airspace on individual privacy.”<sup>18</sup> Congress ordered the FAA to submit the Study to the House and Senate Committees on Appropriations “well in advance of the FAA’s schedule for developing final regulations on the integration of UAS into the national airspace,” by July 15, 2015.<sup>19</sup> Internal emails obtained by EPIC show that the agency never finished the study.<sup>20</sup>

Finally, in July 2017 EPIC filed suit against the Presidential Advisory Commission on Election Integrity (the "Commission") for failing to conduct a Privacy Impact Assessment prior to establishing a database of personal voter data.<sup>21</sup> The Commission, chaired by the Vice President, was established on May 11, 2017.<sup>22</sup> It has a stated purpose to "study the registration and voting processes used in Federal Elections" and issue a report to the President.<sup>23</sup> On June 28, 2017, the Commission's Vice Chair Kris Kobach sent a letter to election officials for all 50 states and the District of Columbia seeking detailed state voter data protected from disclosure by law.<sup>24</sup> The Commission failed to conduct a PIA before this collection attempt. While the Commission suspended the collection following EPIC lawsuit on July 26, 2017 Mr. Kobach renewed the Commission’s attempt to collect state voter data.<sup>25</sup> EPIC, joined by 50 voting experts and 20 privacy organizations, has also urged state election officials to oppose the Commission's

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Committee on Appropriations Regarding the House Amendment to the Senate Amendment on H.R. 3547, Consolidated Appropriations Act, 2014, 160 CONG. REC. H475, H1186–87 (daily ed. Jan. 14, 2014), 160 Cong Rec H 475, at \*H1186–87 (LEXIS), <https://www.congress.gov/congressional-record/2014/01/15/house-section/article/H475-2>.

<sup>18</sup> Explanatory Statement Submitted By Mr. Rogers of Kentucky, Chairman of the House Committee on Appropriations Regarding the House Amendment to the Senate Amendment on H.R. 3547 at \*H1186.

<sup>19</sup> *Id.*

<sup>20</sup> EPIC, *Sept. 20, 2016 Production Re: FAA FOIA Request July 20, 2017*, EPIC.org (Sept. 20, 2016), <https://epic.org/privacy/litigation/apa/faa/drones/EPIC-16-07-20-FAA-FOIA-20160921-Production.pdf>.

<sup>21</sup> *EPIC v. Commission*, No. 17-1320 (D.D.C. filed July 3, 2017).

<sup>22</sup> Exec. Order No. 13,799, 82 Fed. Reg. 22,389 ¶ 7 (May 11, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-10003.pdf>.

<sup>23</sup> Charter, Presidential Advisory Commission on Election Integrity ¶ 6 (June 23, 2017), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf>.

<sup>24</sup> *See, e.g.*, Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm’n on Election Integrity, to Hon. Elaine Marshall, Sec’y of State, N.C. (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-NorthCarolina.html>.

<sup>25</sup> Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm’n on Election Integrity, to John Merrill, Sec’y of State, Ala. (July 26, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf>.

demand,<sup>26</sup> and EPIC has also called on Congress and the incoming Administrator of the GSA to block the data collection.<sup>27</sup>

The case is *EPIC v. Commission*, No. 17-1320. EPIC has a related appeal of the D.C. District Court's preliminary decision concluding that neither the Commission nor the other government actors involved in collecting state voter data were subject to judicial review under the Administrative Procedure Act. That appeal with the U.S. Court of Appeals for the District of Columbia Circuit is captioned *EPIC v. Commission*, No. 17-5171. The argument before the D.C. Circuit Court of Appeals is scheduled for November 21, 2017.

## **Increase Transparency of the Intelligence Community**

EPIC cites two specific concerns that must be resolved by to ensure meaningful progress toward the NAP commitment to “Transparency of the Intelligence Community.” The Privacy and Civil Liberties Oversight Board (“PCLOB”), which today has only a single board member and has not published reports on U.S. intelligence authorities promised for release long ago, must be restored to full strength. Additionally, the U.S. Intelligence Community (“IC”) should uphold its promise to release the number of Americans swept up in Section 702 surveillance.

First, the PCLOB, a key transparency and oversight mechanism for theUSIC, must be restored to full strength. PCLOB, established by the Implementing Recommendations of the 9/11 Commission Act,<sup>28</sup> currently has no Chair and only one out of its four Board members. A full strength PCLOB is essential to oversight of government surveillance and publication of reports that provide independent public analyses of key surveillance authorities. PCLOB has important unfinished work that cannot be completed until the Board is restored to quorum status. In 2014, PCLOB announced that that it would issue a public report examining surveillance conducted under Executive Order 12333 and the implications for privacy and civil liberties.<sup>29</sup> After further delay, the board announced an anticipated publication date of the report scheduled for the end of 2016. Today, nearly to 2018, the long-promised report still has yet to be released to the public. In her remarks at the annual EPIC dinner in June 2017, Judge Wald noted that before she left PCLOB in January 2017 there had been “dozens of drafts of a proposed 12333 report circulated to the Board.”<sup>30</sup>

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<sup>26</sup> Letter from EPIC, *et. al*, to Nat’l Assn. of State Sec’ys (July 3, 2017), <https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf>.

<sup>27</sup> Letter from EPIC, to Chairman Ron Johnson and Ranking Member Claire McCaskill, Senate Comm. on Homeland Sec. and Gov’t Affairs (Oct. 19, 2017), <https://epic.org/testimony/congress/EPIC-GSA-Commission-Supervision-Oct2017.pdf>.

<sup>28</sup> See *The FISA Amendments Act of 2008: Hearing before the H. Comm. on the Judiciary*, 112<sup>th</sup> Cong. (2012) <https://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf> (testimony of EPIC President Marc Rotenberg,)

<sup>29</sup> Privacy and Civil Liberties Oversight Bd., *PCLOB Announces Its Short Term Agenda*, [pclov.gov](http://pclov.gov) (July 23, 2014), <https://www.pclob.gov/newsroom/20140807.html>.

<sup>30</sup> Privacy and Civil Liberties Oversight Bd., *Semi-Annual Report: October 2015-March 2016* (2016), [https://www.pclob.gov/library/Semi\\_Annual\\_Report\\_August\\_2016.pdf](https://www.pclob.gov/library/Semi_Annual_Report_August_2016.pdf).

EPIC and a coalition of over 30 organizations have also urged the Director of National Intelligence Dan Coates to uphold a promise to provide a public estimate of how many Americans are caught up in NSA surveillance of foreign targets under Section 702 of the Foreign Intelligence Surveillance Act.<sup>31</sup> Director Coates has rescinded the commitment former DNI James Clapper made to civil society organizations and members of Congress to provide this information.<sup>32</sup> However, the Director has since failed to explain why the IC concluded that “providing such information would be infeasible,” despite months of briefings to civil society and Congressional staff on methodologies that suggest that just the opposite is true,” the letter explained.<sup>33</sup> The Privacy and Civil Liberties Oversight Board had also suggested the NSA count and disclose the “number of telephone communications acquired in which one caller is located in the United States,” “the number of Internet communications acquired through upstream collection that originate or terminate in the United States,” and other U.S. person statistics.<sup>34</sup> As sunset for Section 702 approaches at the end of 2017 and the public debates over renewal and amending legislation intensifies, this estimate should be provided to the public. 50 U.S.C. §1881 note.

Sincerely

/s/ Marc Rotenberg  
Marc Rotenberg  
EPIC President

/s/ Eleni Kyriakides  
Eleni Kyriakides  
EPIC Fellow

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<sup>31</sup> Letter from EPIC, Coalition, to Dan Coates, Dir. of Nat’l Intelligence (June 12, 2017), [https://na-production.s3.amazonaws.com/documents/CoatsResponseLetter\\_6\\_12.pdf](https://na-production.s3.amazonaws.com/documents/CoatsResponseLetter_6_12.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 13 (2014), <https://www.pclob.gov/library/702-report.pdf>.