

June 20, 2017

The Honorable John Culberson, Chairman  
The Honorable José Serrano, Ranking Member  
U.S. House Committee on Appropriations  
Subcommittee on Commerce, Justice, Science, and Related Agencies  
H-305, The Capitol  
Washington, DC 20515

Dear Chairman Culberson and Ranking Member Serrano:

The Electronic Privacy Information Center (“EPIC”) is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. We participate in a wide range of activities, including policy research and education, litigation, and advocacy. We write to you regarding the hearing on the FBI FY2018 budget.<sup>1</sup> EPIC is currently pursuing Freedom of Information Act matters related to the FBI’s use of facial recognition and has made specific recommendations regarding the protections of privacy.<sup>2</sup> We encourage your Committee to look more closely at this program as it raises substantial concerns for the civil liberties of Americans.

In 2014, EPIC prevailed in a Freedom of Information Act (FOIA) case against the FBI concerning the Next Generation Identification (“NGI”) program.<sup>3</sup> In finding for EPIC’s public interest claim, U.S. District Judge Tanya Chutkan stated:

There can be little dispute that the general public has a genuine, tangible interest in a system designed to store and manipulate significant quantities of its own biometric data, particularly given the great numbers of people from whom such data will be gathered.<sup>4</sup>

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<sup>1</sup> *Federal Bureau of Investigation – Budget Hearing*, 115<sup>th</sup> Cong. (2017), H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science, and Related Agencies, <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394903> (June 21, 2017).

<sup>2</sup> See *EPIC v. FBI*, No. 2013 -cv- 00442 (D.D.C. Nov. 5, 2014), <http://epic.org/foia/fbi/ngi/>; Comments of EPIC to Federal Bureau of Investigation, *Privacy Act of 1974; Systems of Record Notice of a Modified System of Records Notice* (July 6, 2016), <https://epic.org/apa/comments/EPIC-CPCLO-FBI-NGI-Comments.pdf>.

<sup>3</sup> *EPIC v. FBI*, No. 2013 -cv- 00442 (D.D.C. Nov. 5, 2014).

<sup>4</sup> *Id.* at 10.

The documents EPIC obtained revealed that the FBI accepted a twenty percent error rate for the facial recognition technology used with NGI.<sup>5</sup> Through a previous FOIA request, EPIC obtained agreements between the FBI and state DMVs that allowed the FBI to use facial recognition to compare subjects of FBI investigations with the millions of license and identification photos retained by participating state DMVs. Those are images of licensed drivers who are suspected of no crime.<sup>6</sup>

More recently, EPIC obtained nearly two years of monthly stat sheets for NGI. These documents revealed that the FBI's use of facial recognition searches is increasing and that the NGI database is now predominantly used for non-criminal purposes.<sup>7</sup> The FBI has stated it does not run facial recognition searches using the civilian data, but there is currently no legal safeguard preventing the FBI from reversing this position. EPIC is currently litigating a FOIA lawsuit for the Bureau's biometric agreements with the DoD. Earlier EPIC obtained agreements between the FBI and DoD, and one that included the State Department, that detailed the dissemination of biometric data of Americans between the agencies.<sup>8</sup>

Congress should look more closely at the use of biometric data by the FBI. According to the recent GAO report on the FBI's use of facial recognition,<sup>9</sup> the FBI failed to conduct a privacy audit of the agency facial recognition program or adequately test the accuracy of the technology.<sup>10</sup>

Concerns about the growth of the FBI's biometric program, especially facial recognition, are widely shared by the privacy and civil liberties community. In 2011, EPIC and more than 70 organizations urged the DOJ Inspector General to investigate the privacy and civil liberties implications of the FBI's NGI program.<sup>11</sup> In 2014, as NGI neared full operational capacity, a coalition of civil liberties groups urged Attorney General Eric Holder to review the NGI program and release an updated Privacy Impact Assessment as a first step to robust review of the program.<sup>12</sup> EPIC sent a letter to the Senate Judiciary Committee in January 2015 calling for

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<sup>5</sup> DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION (NGI) SYSTEM REQUIREMENTS DOCUMENT VERSION 4.4 at 244 (Oct. 1, 2010), <https://epic.org/foia/fbi/ngi/NGI-System-Requirements.pdf>.

<sup>6</sup> *FBI Performs Massive Virtual Line-up by Searching DMV Photos*, EPIC (June 17, 2013), <https://epic.org/2013/06/fbi-performs-massive-virtual-l.html>.

<sup>7</sup> FEDERAL BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION MONTHLY FACT SHEETS (Nov. 2014 – Aug. 2016), available at <http://epic.org/foia/fbi/EPIC-16-09-08-FBI-FOIA-20161219-NGI-Monthly-Fact-Sheets.pdf>.

<sup>8</sup> *EPIC v. FBI (Biometric Data Transfer Agreements)*, EPIC, <https://epic.org/foia/fbi/biometric-mou/>.

<sup>9</sup> U.S. Gov't Accountability Office, GAO-16-267, FACE RECOGNITION TECHNOLOGY: FBI SHOULD BETTER ENSURE PRIVACY AND ACCURACY (2016), <http://www.gao.gov/assets/680/677098.pdf>.

<sup>10</sup> *Id.* at 33.

<sup>11</sup> Letter from Coalition of Civil Liberties groups to Cynthia A. Schnedar, DOJ Acting Inspector General (Sept. 11, 2011), [https://epic.org/privacy/secure\\_communities/DOJ-S-Comm-Letter.pdf](https://epic.org/privacy/secure_communities/DOJ-S-Comm-Letter.pdf).

<sup>12</sup> Letter from Coalition of Civil Liberties groups to Eric Holder, U.S. Attorney General (June 24, 2014), <https://www.privacycoalition.org/Ltr-to-Review-FBI-NGI-Program.pdf>.

greater oversight of NGI.<sup>13</sup> Most recently, a coalition of 46 groups sent a letter to Congress in June 2016 demanding oversight of the FBI's vast biometric database—NGI.<sup>14</sup>

The FBI's NGI program raises far-reaching privacy issues that implicate the rights of Americans all across the country. Ubiquitous identification technologies pose a special risk to the rights free association and free expression, particularly to those who engage in lawful protests. With the FBI's growing and largely unaccountable national database of biometrics on civilians, the NGI program pose a direct threat to American values and freedoms.

EPIC urges the Committee to ask Acting Director McCabe the following questions:

**Director McCabe – What steps has the Bureau taken to ensure compliance with federal privacy law for the Next Generation Identification program?**

**Director McCabe – How will the Bureau ensure accuracy and reliability for biometric identifiers?**

**Director McCabe – Should the Next Generation biometric database be used for non-law enforcement purposes?**

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Jeramie Scott

Jeramie Scott  
EPIC National Security Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Policy Director

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<sup>13</sup> Letter from EPIC to Sen. Chuck Grassley and Sen. Patrick Leahy, S. Comm. on the Judiciary (Jan. 9, 2015), <https://epic.org/foia/fbi/ngi/EPIC-to-SJC-re-NGI.pdf>.

<sup>14</sup> Letter from EPIC, Coalition of civil rights, privacy, and transparency groups to S. Comm. on the Judiciary (June 23, 2016), <https://epic.org/privacy/fbi/NGI-Congressional-Oversight-Letter.pdf>.