

July 12, 2017

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the upcoming hearing on the nomination of Christopher Wray to be the Director of the Federal Bureau of Investigation.¹ EPIC respectfully requests that you to ask the Nominee about the Next Generation Identification (“NGI”) systems and his commitment to preserving privacy protections for FBI programs and databases. EPIC has pursued FOIA litigation to promote accountability for the NGI system and we have made specific recommendations regarding the protection of privacy for biometric identification systems.² EPIC believes that the NGI system raises profound questions of privacy, civil liberties, and security for all Americans.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC participates in a wide range of activities, including research and education, litigation, and advocacy. EPIC is currently pursuing Freedom of Information Act matters related to the FBI’s use of facial recognition and other biometric identifiers as part of the FBI’s Next Generation Identification program. EPIC has also prepared amicus briefs for the US Supreme Court in cases concerning the civil liberties implications of new investigative techniques.³

¹ *Nominations*, 115th Cong. (2017), S. Comm. on the Judiciary, <https://www.judiciary.senate.gov/meetings/07/12/2017/nominations> (Jul. 11, 2017).

² 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>.

³ Brief of *Amicus Curiae* EPIC, *Riley v. California*, 573 U.S. ____ (2014), <https://epic.org/amicus/cell-phone/riley/>; Brief of *Amicus Curiae* EPIC, *Maryland v. King*, 569 U. S. ____ (2013), <https://epic.org/amicus/dna-act/maryland/EPIC-Amicus-Brief.pdf>; Brief of *Amicus Curiae* EPIC, *Florida v. Harris*, 568 U. S. ____ (2013), <https://epic.org/amicus/harris/EPIC-Amicus-Brief.pdf>; Brief of *Amicus Curiae* EPIC, *U.S. v. Jones*, 565 U. S. ____ (2012), https://epic.org/amicus/jones/EPIC_Jones_amicus_final.pdf.

In 2014, EPIC prevailed in a Freedom of Information Act (FOIA) case against the FBI concerning the NGI program.⁴ EPIC had sought information about the reliability and accuracy of the database system maintained by the FBI and obtained documents showing that the FBI accepted a twenty percent error rate for the facial recognition technology used with NGI.⁵ Through a previous FOIA request, EPIC obtained numerous 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.⁶

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.⁷ The NGI monthly stat sheets also showed that the NGI database is now predominantly used for non-criminal purposes.⁸ The FBI has stated in the past that the Bureau does not run facial recognition searches using the civilian data in NGI, but there is currently no legal requirement preventing the FBI from reversing this position—and doing so without informing the public. EPIC is currently litigating a FOIA lawsuit for the Bureau's biometric agreements with the Department of Defense. Through that FOIA lawsuit, EPIC obtained several agreements between the FBI and DoD and one that included that State Department that detailed the dissemination of biometric data between the agencies.⁹

The GAO's recent report on the FBI's use of facial recognition underscores the need for NGI oversight.¹⁰ The GAO report detailed the FBI's failure to conduct a privacy audit of the agency's use of facial recognition or adequately test the accuracy of the technology.¹¹

EPIC also urges this Committee to ask the nominee about his view of completing timely Privacy Impact Assessments ("PIA's"). In 2014, EPIC filed a FOIA request seeking PIA's that had not yet been released to the public, one of which was for the FBI's license plate reader program.¹² In the documents obtained by EPIC, an e-mail from 2012 indicated that the FBI was required to produce a PIA for this program, however, two years later the PIA had not yet been released to the public. The E-Government Act of 2002 requires agencies to perform PIA's for

⁴ *EPIC v. FBI*, No. 2013 -cv- 00442 (D.D.C. Nov. 5, 2014).

⁵ 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>.

⁶ *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>.

⁷ 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>.

⁸ *Id.*

⁹ *EPIC v. FBI (Biometric Data Transfer Agreements)*, EPIC, <https://epic.org/foia/fbi/biometric-mou/>. (The Memorandum of Understanding obtained by EPIC via FOIA request is available at <https://epic.org/foia/fbi/biometric-mou/16-cv-02237-FBI-Biometric-MOUs-FBI-and-DOD.pdf>).

¹⁰ 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>.

¹¹ *Id.* at 33.

¹² *EPIC v. FBI – Privacy Assessments*, EPIC, <https://epic.org/foia/fbi/pia/>.

new information technology that collects personally identifiable information.¹³ Additionally, the Department of Justice notes in its guidance that PIA's "help[] promote trust between the public and the Department increasing transparency of the Department's systems and missions."¹⁴

EPIC also urges this Committee to question the nominee on his views of the FBI's domestic surveillance and data storage activities. EPIC remains concerned about the Bureau's domestic surveillance activities, particularly those related to the drone program. EPIC recently obtained some documents on FBI drone operations, however the FBI has failed to release documents on drone policies and procedures related to privacy, civil liberties, and civil rights.¹⁵ EPIC has also criticized the proposed "Insider Threat" database that will be used to collect vast amounts of personal information on Department of Justice employees, contractors, interns, and visitors.¹⁶

EPIC again urges the Committee to ask the Nominee about the NGI system, completing and releasing Privacy Impact Assessments, and his views on the FBI's domestic surveillance programs.

- Are the privacy and security safeguards for NGI and other FBI programs and databases adequate?
- Has the specific threat of remote hacking of FBI databases been assessed and, if not, will the nominee ensure that such an assessment takes place?
- Have all the necessary Privacy Impact Assessments been completed for FBI programs and databases?
- Will the nominee make the prompt completion and release of future Privacy Impact Assessments a priority?
- Will individuals be able to access their personally identifiable and biometric information that the FBI readily makes available to more than one million people across federal, state, and local governments?
- What limitations exist on FBI domestic surveillance programs, such as drones and social media monitoring, for non-law enforcement purposes, and specifically for Constitutionally protected activity, such as political rallies?

¹³ E-Government Act of 2002, 107 P.L. 247 §208 (2002).

¹⁴ *Privacy Impact Assessments: Official Guidance*, Department of Justice, Mar. 2012, <https://www.justice.gov/opcl/docs/2012-doj-pia-manual.pdf>.

¹⁵ *EPIC Obtains Documents About FBI Drone Program*, EPIC, Apr. 6, 2017, <https://epic.org/2017/04/epic-obtains-documents-about-f-1.html>.

¹⁶ *EPIC Backs Privacy Act Protections for "Insider Threat" Database*, EPIC, Jul. 5, 2017, <https://epic.org/2017/07/epic-backs-privacy-act-protect.html>; Comments of EPIC, *Department of Justice Insider Threat Database*, Jun. 30, 2017, <https://epic.org/apa/comments/EPIC-DOJ-Insider-Threat-Database.pdf>.

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

/s/ Kim Miller
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