

March 22, 2017

The Honorable Jason Chaffetz, Chairman  
The Honorable Elijah Cummings, Ranking Member  
House Committee on Oversight and Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

We write to you regarding the hearing on “Law Enforcement’s Use of Facial Recognition Technology.”<sup>1</sup> We appreciate your interest in the civil liberties implications of facial recognition technology. EPIC has litigated this issue and made specific recommendations regarding the protection of privacy.<sup>2</sup> We welcome your leadership on this critical issue and look forward to working with you and your staff. EPIC urges the Committee to consider also FBI’s Next Generation Identification program, which makes use of biometric identifiers and raises related issues.

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 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 (“NGI”) program.

In 2014, EPIC prevailed in a Freedom of Information Act (FOIA) case against the FBI concerning the 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> *Law Enforcement’s Policies On Facial Recognition Technology*, 115<sup>th</sup> Cong. (2017), H. Comm. on Oversight and Gov’t Reform, <https://oversight.house.gov/hearing/law-enforcements-use-facial-recognition-technology/> (March 22, 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 in this FOIA lawsuit showed 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 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.<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.<sup>7</sup> The NGI monthly stat sheets also showed that the NGI database is now predominantly used for non-criminal purposes.<sup>8</sup> 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.<sup>9</sup>

The increasing use and dissemination of biometric data by the FBI is particularly in need of oversight in light of the GAO's recent report on the FBI's use of facial recognition.<sup>10</sup> 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.<sup>11</sup>

The risks of NGI and the large-scale collection, use, retention, and sharing of biometrics, especially facial images, are well understood by the privacy and civil liberties community and EPIC led the way in calling for greater oversight on the FBI's NGI database. In 2011, 70 organizations urged the Inspector General of the Department of Justice to investigate the privacy and civil liberties implications of the FBI's NGI program.<sup>12</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

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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-1.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> *Id.*

<sup>9</sup> *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>).

<sup>10</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>11</sup> *Id.* at 33.

<sup>12</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).

robust review of the program.<sup>13</sup> EPIC sent a letter to Congress in January 2015 urging for greater oversight of NGI.<sup>14</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>15</sup>

The increasing use of biometrics, particularly facial recognition, by law enforcement raises serious privacy, civil liberties, and security risks. Improper collection, storage, and use of this information can result in identity theft, inaccurate identifications, and infringement on constitutional rights. An individual's ability to control access to his or her identity, including determining when to reveal it, is an essential aspect of personal security and privacy. The use of facial recognition technology erodes that ability. The collection of facial images into the FBI's NGI database raises privacy issues because of the surveillance potential of facial recognition, the collection of personally identifiable information into a centralized database, and the prospects of secondary uses of the data. Additionally, facial recognition technology can be done covertly, even remotely, and on a mass scale.

In the context of consumer protection, EPIC had urged the FTC to establish a moratorium on facial recognition techniques until adequate privacy safeguards were established.<sup>16</sup> We also objected to Facebook's use of facial recognition, which is prohibited by many countries outside of the United States.<sup>17</sup> And after 9-11, EPIC objected to Admiral John Poindexter's proposal for "Total Information Awareness," which relied in part on techniques such as facial recognition to capture identity.<sup>18</sup>

There are little to no reasonable precautions that individuals can take to prevent collection on one's image. Participation in society involves exposing one's face. Ubiquitous and near effortless identification eliminates individual's ability to control their identities and poses a special risk to the First Amendment rights of free association and free expression, particularly to those who engage in lawful protests. With the FBI's increasing database of biometrics on civilians, the NGI program could render anonymous free speech virtually impossible.

EPIC urges the Committee to ask the FBI to detail how the Bureau is currently using facial recognition, the agency's plans for its use in the future, and how the agency is mitigating the substantial privacy, civil liberties, and security risks that come with the collection, use, retention, and dissemination of facial images.

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<sup>13</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>.

<sup>14</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>15</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>.

<sup>16</sup> Comments of EPIC to FTC, *Face Facts: A Forum on Facial Recognition* (Jan. 31, 2012), <https://epic.org/privacy/facerecognition/EPIC-Face-Facts-Comments.pdf>.

<sup>17</sup> *In re Facebook and the Facial Identification of Users*, EPIC, [https://epic.org/privacy/facebook/facebook\\_and\\_facial\\_recognitio.html](https://epic.org/privacy/facebook/facebook_and_facial_recognitio.html) (EPIC's Complaint to the FTC in the matter of Facebook and the Facial Identification of Users is available at [https://epic.org/privacy/facebook/EPIC\\_FB\\_FR\\_FTC\\_Complaint\\_06\\_10\\_11.pdf](https://epic.org/privacy/facebook/EPIC_FB_FR_FTC_Complaint_06_10_11.pdf).)

<sup>18</sup> *Total Information Awareness*, EPIC, <https://www.epic.org/privacy/profiling/tia/>.

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