

March 23, 2017

The Honorable Jason Chaffetz, Chairman
The Honorable Elijah Cummings, Ranking Member
U.S. 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 today's hearing on "Legislative Proposals for Fostering Transparency." EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues and manages one of the most extensive open government litigation programs in the United States.¹ EPIC routinely pursues Freedom of Information Act ("FOIA") cases as part of our mission to inform the public about the activities of government. Many of EPIC's FOIA cases have been featured in national news reports.²

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern. The need for public oversight increases as government agencies propose new surveillance methods that routinely disregard the need for public accountability. EPIC has used the FOIA to enable public oversight of invasive surveillance initiatives.³

Public awareness of our government's activity through the FOIA not only allows for a more informed public debate over new surveillance proposals, but also ensures accountability for government officials. Public debate leads to solutions that better respect the nation's democratic values. EPIC's FOIA litigation has specifically enabled more effective Congressional oversight of federal agencies.⁴ As the *Huffington Post* reported a few years ago:

WASHINGTON — Lawmakers looking into homeland security officials' practice of monitoring social media sites seized on a report Thursday by a civil liberties

¹ See *About EPIC*, EPIC, <https://epic.org/epic/about.html>; *EPIC FOIA Cases*, EPIC, <https://epic.org/foia/>; Marc Rotenberg et al, *The Open Government Clinic: Teaching the Basics of Lawyering*, 48 IND.L.REV. 149 (2014); EPIC, *Litigation Under the Federal Open Government Laws 2010* (2010).

² See, e.g., Matthew L. Wald & John Schwartz, *Screening Plans Went Beyond Terrorism*, N.Y. Times, Sept. 19, 2004, at A25 ("the documents were released under the Freedom of Information Act to the Electronic Privacy Information Center, one of the groups that had raised concerns about plans to use commercial databases and datamining technology to scan the records of all travelers, whether they were suspect or not."); Spencer S. Hsu and Cecilia Kang, *Obama Web-Tracking Proposal Raises Privacy Concerns*, Washington Post, Aug. 11, 2009 ("The terms of the contract, negotiated through the General Services Administration, 'expressly waives those rules or guidelines as they may apply to Google.' The contract was obtained by EPIC through a Freedom of Information Act request."), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/10/AR2009081002743.html>

³ See *EPIC Open Government*, EPIC, https://www.epic.org/open_gov/.

⁴ Statement of Marc Rotenberg, hearing on *TSA Oversight Part 1: Whole Body Imaging* before the House Committee on Oversight and Government Reform, Mar. 16, 2011, https://oversight.house.gov/wp-content/uploads/2012/01/Rotenberg_Testimony_3-16-11.pdf

group that said taxpayers have shelled out more than \$11 million to a private contractor to analyze online comments that “reflect adversely” on the federal government.

In a rare show of bipartisan agreement, members of the House Homeland Security Subcommittee on Counterterrorism and Intelligence held up a report by the [Electronic Privacy Information Center](#) (EPIC) as they questioned the chief privacy officer of the Department of Homeland Security. The [hearing](#), titled “DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy,” relied heavily on talking points from a recent EPIC report on nearly 3,000 pages of documents it obtained under a Freedom of Information Act lawsuit. The records detail DHS’ online monitoring activities and include instructions to General Dynamics, the private company tasked with trolling the Internet for the agency to analyze comments on DHS or other parts of the federal government.⁵

Most recently, in celebration of Sunshine Week, EPIC published the “2017 FOIA Gallery.”⁶ This gallery showcases EPIC’s 2016 work to further government transparency. For example, we recently obtained two years of statistics detailing the Federal Bureau of Investigation biometric identification program, Next Generation Identification (“NGI”).⁷ These statistics show the substantial non-criminal uses of the database. 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.⁸

Last year, EPIC also obtained hundreds of documents from Customs and Border Protection about a controversial data mining program used to build profiles on travelers.⁹ “Analytical Framework for Intelligence” is a CBP program used to create “risk assessment” scores to travelers using personally identifiable information from a variety of sources, including government databases, commercial data brokers, and other Internet sources. The documents also revealed the substantial role Palantir served in the CBP project.¹⁰

⁵ Andrea Stone, DHS Monitoring of Social Media Under Scrutiny by Lawmakers, The Huffington Post, Feb. 16, 2012, http://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html.

⁶ EPIC FOIA Gallery 2017, EPIC, https://epic.org/foia_gallery_2017.html.

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

⁸ EPIC v. FBI, 72 F.Supp. 3d 338, 346 (D.D.C 2014).

⁹ EPIC v. CBP (Analytical Framework for Intelligence), EPIC, <https://epic.org/foia/dhs/cbp/afi/>.

¹⁰ Spencer Woodman, Documents suggest Palantir could help power Trump’s ‘extreme vetting’ of immigrants (Dec. 21, 2016), <http://www.theverge.com/2016/12/21/14012534/palantir-peter-thiel-trump-immigrant-extreme-vetting>.

The FOIA continues to be an integral part of EPIC’s work. EPIC is also currently engaged in litigation¹¹ with the Federal Aviation Administration as the result of a FOIA request that showed that the agency failed to complete a report that had been ordered by Congress on the privacy implications of commercial drones.¹² Not only did the documents EPIC received indicate that the FAA had failed to comply with a Congressional directive, they suggest the FAA had no intention of doing so.¹³

EPIC recently filed suit to obtain the unclassified version of the Office of the Director of National Intelligence seeking the Complete ODNI Assessment of Russian interference in the 2016 election.¹⁴ Full, robust, and informed public debate over the Russian interference serves foundational American interests: national security, election integrity, and the protection of democratic institutions domestically and globally. Through *EPIC v. ODNI*, EPIC seeks public release Complete ODNI Assessment to support this public debate and help prevent future attacks on democratic institutions.

Finally, EPIC is currently pursuing a FOIA lawsuit against the Department of Justice seeking information on criminal justice “risk assessment” tools.¹⁵ These techniques attempt to predict an individual’s chance of recidivism using statistical probabilities such as age, employment history, and prior criminal records. Yet, despite widespread use, the techniques are controversial: the reliability, fairness, and constitutional legitimacy of such tools have been rigorously contested. EPIC is pursuing the release of DOJ policies, guidelines, source codes, and validation studies to facilitate public assessment. This issue warrants Congressional oversight

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/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Eleni Kyriakides
Eleni Kyriakides
EPIC Open Government Fellow

/s/ Kim Miller
Kim Miller
EPIC Policy Fellow

¹¹ *EPIC v. FAA*, No. 16-1297 (D.C. Cir. Filed Mar. 2, 2017), (EPIC’s brief is available at <https://epic.org/privacy/litigation/apa/faa/drones/1664208-EPIC-Amended-Brief.pdf>)

¹² FAA Modernization and Reform Act of 2012, Pub. L. 112-95 § 332, 126 Stat. 73-75.

¹³ <https://epic.org/privacy/litigation/apa/faa/drones/EPIC-16-07-20-FAA-FOIA-20160921-Production.pdf>

¹⁴ *EPIC v. ODNI*, No. 17-163 (D.C. Cir. Filed Jan. 25, 2017) (EPIC’s Complaint is available at <https://epic.org/foia/odni/russian-hacking/EPIC-v-ODNI-Complaint.pdf>.)

¹⁵ *EPIC v. DOJ*, No. 17-410 (D.C. Cir. filed Mar. 7, 2017) (EPIC’s Complaint is available at <https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-v-DOJ-criminal-justice-algorithms-complaint.pdf>.)