

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

Office of Science and Technology Policy

Regarding the

Request for Information to the Update of the National Artificial Intelligence Research and Development Strategic Plan

87 Fed. Reg. 5,876

March 3, 2022

The Electronic Privacy Information Center (EPIC) submits the following feedback to the request for information by the Office of Science and Technology Policy (OSTP) on behalf of the National Science and Technology Council's (NSTC) Select Committee on Artificial Intelligence (Select Committee), the NSTC Machine Learning and AI Subcommittee (MLAI-SC), the National AI Initiative Office (NAIIO), and the Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), hereinafter referred to as “agencies,” concerning the Update of the National Artificial Intelligence Research and Development Strategic Plan.¹

Interest of EPIC

EPIC is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging privacy and related human rights issues and to protect privacy, the First Amendment, and constitutional values.² EPIC has a long history of promoting transparency and accountability for information technology.³

¹ Science and Technology Policy Office, Request for Information to the Update of the National Artificial Intelligence Research and Development Strategic Plan, 87 Fed. Reg. 5,876, <https://www.federalregister.gov/documents/2022/02/02/2022-02161/request-for-information-to-the-update-of-the-national-artificial-intelligence-research-and>.

² EPIC, *About EPIC* (2021), <https://epic.org/epic/about.html>

³ EPIC, *AI & Human Rights* (2021), <https://epic.org/issues/ai/>; EPIC, *Algorithms in the Criminal Justice System* (2021), <https://epic.org/issues/ai/ai-in-the-criminal-justice-system/>; EPIC, *AI Policy* (2021) <https://epic.org/issues/ai/ai-policy/>; EPIC, *Government AI Use* (2021) <https://epic.org/issues/ai/government-use-of-ai/>; EPIC, *Commercial AI Use* (2021) <https://epic.org/issues/ai/commercial-ai-use/>; EPIC, *Scoring and Screening* (2021) <https://epic.org/issues/ai/screening-scoring/>.

EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the adoption of the Universal Guidelines for AI (“UGAI”) to advance trustworthy use of algorithms and justice for individuals harmed by AI systems.⁴ EPIC has advocated for transparency and accountability internationally in connection with the use of AI systems.⁵ EPIC has litigated cases against the U.S. Department of Justice to compel production of documents regarding “evidence-based risk assessment tools”⁶ and against the U.S. Department of Homeland Security to produce documents about a program purported to assess the probability of whether an individual committed a crime.⁷ In 2018, EPIC and leading scientific societies petitioned the U.S. Office of Science and Technology Policy to solicit public input on U.S. artificial intelligence policy.⁸ EPIC submitted comments urging the National Science Foundation to adopt the UGAI and to promote and enforce the UGAI across funding, research, and deployment of U.S. AI systems.⁹ EPIC has also submitted comments to the National Security Commission on Artificial Intelligence, the U.S. Office of Science and Technology Policy, the European Commission, and the U.S. Office of Management and Budget urging the adoption of AI system regulation that meaningfully protects individuals.¹⁰

⁴ See, e.g., EPIC, *EPIC Comments to NIST in re Artificial Intelligence Risk Management Framework*, National Institute of Standards and Technology (Aug. 18, 2021), <https://epic.org/documents/regarding-the-artificial-intelligence-risk-management-framework/>; EPIC, *EPIC Comments to Comptroller of the Currency et al. in re Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning* (July 1, 2021), <https://archive.epic.org/apa/comments/EPIC-Financial-Agencies-AI-July2021.pdf>; EPIC, *EPIC Comments to the Federal Communications Commission Technological Advisory Council*, Federal Communications Commission (Sept. 18, 2020) <https://epic.org/documents/comments-to-the-federal-communications-commission-technological-advisory-council/>; EPIC, *EPIC v. DOJ* (2020), <https://epic.org/foia/doj/criminal-justice-algorithms/>; EPIC, *EPIC Comments to the U.S. Patent and Trademark Office in re Intellectual Property Protection for Artificial Intelligence Innovation* (Jan. 10, 2020), <https://epic.org/apa/comments/EPIC-USPTO-Jan2020.pdf>; EPIC, *EPIC Comments to the Department of Housing and Urban Development in re Implementation of the Fair Housing Act's Disparate Impact Standard* (Oct. 18, 2019), <https://epic.org/apa/comments/EPIC-HUD-Oct2019.pdf>; Testimony of EPIC, Massachusetts Joint Committee on the Judiciary (Oct. 22, 2019), <https://epic.org/testimony/congress/EPIC-FacialRecognitionMoratorium-MA-Oct2019.pdf>; Statement of EPIC, *Industries of the Future*, U.S. Senate Committee on Commerce, Science & Transportation (Jan. 15, 2020), <https://epic.org/testimony/congress/EPIC-SCOM-AI-Jan2020.pdf>; EPIC, *EPIC Comments to the Office of Science and Technology Policy in re Request for Information: Big Data and the Future of Privacy* (Apr. 4, 2014), <https://epic.org/privacy/big-data/EPIC-OSTP-Big-Data.pdf>.

⁵ EPIC, *AI & Human Rights*, *supra* note 3.

⁶ EPIC, *EPIC v. DOJ*, *supra* note 4

⁷ *Id.*; see also EPIC, *EPIC v. AI Commission* (2021), <https://epic.org/documents/epic-v-ai-commission/>; EPIC *v. DHS (FAST Program)* (2015), <https://epic.org/documents/epic-v-dhs-fast-program/>.

⁸ EPIC, *Petition to OSTP for Request for Information on Artificial Intelligence Policy* (July 4, 2018), <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf>.

⁹ EPIC, *Request for Information on Update to the 2016 National Artificial Intelligence Research and Development Strategic Plan*, 83 Fed. Reg. 48,655 (Oct. 26, 2018), <https://epic.org/apa/comments/EPIC-Comments-NSF-AI-Strategic-Plan-2018.pdf>.

¹⁰ EPIC, *EPIC Comments to OSTP in re Public and Private Sector Uses of Biometric Technologies* (Jan. 15, 2022); EPIC, *EPIC Comments to OSTP in re Request for Information (RFI) on an Implementation Plan for a National Artificial Intelligence Research Resource* (Oct. 1, 2021); EPIC, *EPIC Comments in re Solicitation of Written Comments by the National Security Commission on Artificial Intelligence* (Sept. 30, 2020), <https://epic.org/apa/comments/EPIC-comments-to-NSCAI-093020.pdf>; EPIC, *EPIC Comments to OMB in re Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies* (Mar.

The Agencies Should Rely on the Universal Guidelines for AI and the OECD AI Principles to Guide Updates to the Research and Development Plan

EPIC recommends that the agencies use the Universal Guidelines for Artificial Intelligence to guide updates to the Research and Development Plan. The UGAI, based on the protection of human rights, were set out at the 2018 Public Voice meeting in Brussels, Belgium.¹¹ The UGAI have been endorsed by more than 250 experts and 60 organizations in 40 countries.¹² The twelve guidelines are:

1. Right to Transparency
2. Right to Human Determination
3. Identification Obligation
4. Fairness Obligation
5. Assessment and Accountability Obligation
6. Accuracy, Reliability, and Validity Obligations
7. Data Quality Obligation
8. Public Safety Obligation
9. Cybersecurity Obligation
10. Prohibition on Secret Profiling
11. Prohibition on Unitary Scoring
12. Termination Obligation¹³

The agencies should also incorporate the AI principles adopted by the Organization of Economic Cooperation and Development (“OECD AI Principles”).¹⁴ The OECD AI Principles were adopted in 2019 and endorsed by 42 countries—including several European Countries, the United States, and the G20 nations.¹⁵ While largely aligning with the principles of the UGAI, the OECD AI Principles provide additional considerations that may be beneficial to the register. The OECD AI Principles establish international standards for AI use:

1. Inclusive growth, sustainable development and well-being
2. Human-centered values and fairness
3. Transparency and explainability
4. Robustness, security, and safety

13, 2020), <https://epic.org/apa/comments/EPIC-OMB-AI-MAR2020.pdf>; EPIC, *EPIC Comments to the European Commission Fundamental Rights Policy Unit in re Request for Feedback in Parallel with the White Paper on Fundamental Rights* (May 29, 2020), <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Comments-May2020.pdf>; EPIC, *EPIC Comments to the European Commission in re Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence* (Sept. 10, 2020), <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Sep2020.pdf>.

¹¹ *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018) [hereinafter *Universal Guidelines*], <https://thepublicvoice.org/ai-universal-guidelines/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019) [hereinafter *OECD AI Principles*], <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

¹⁵ *U.S. Joins with OECD in Adopting Global AI Principles*, NTIA (May 22, 2019), <https://www.ntia.doc.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles>.

5. Accountability¹⁶

Agencies Should Expand and Substantiate Goals of Ethics and Accountability and Focus Development Strategies to an Appropriate Scope

The agencies should update the eight strategies currently comprising the National Artificial Intelligence Research and Development Strategic Plan with specific, actionable measures to “understand and address the ethical, legal, and societal implications of AI” and to “ensure the safety and security of AI systems.”¹⁷

Five of the eight current strategies explicitly promote the development of AI. For example, making datasets publicly available and expanding public-private partnerships to accelerate advances in AI will support AI developers and increase the introduction and use of AI systems. Yet there are no specific parallel strategies to address “implications of AI” or “ensure . . . safety and security.” If the Strategic Plan fails to establish concrete steps and benchmarks for safeguarding the public against AI, it is likely these goals will go unrealized or become watered down in the interests of rapid AI development.

EPIC provides feedback on the specific strategies below, recommending several new strategies and limiting ones that irresponsibly accelerate development and deployment of technologies without the requisite oversight and protections in place.

Strategies 3 and 4 Should Include Action Items to Protect the Public From Harmful AI Systems

Building AI oversight and regulatory capacity must be a top priority of federal agencies. To achieve this, EPIC recommends that Strategy 3 be expanded into specific action items, including:

- Prohibiting the use of AI systems that pose unjustifiable risks or which are otherwise ineffective, improper, inaccurate, or biased;
- Establishing prohibitions on AI systems that, alone or in combination with other technologies, are manipulative or facilitate mass profiling;
- Requiring agencies that use automated decision-making systems to publish vital information about those systems in a user-friendly inventory, expanding on requirements created by Executive Order 13,960;
- Developing impact assessment and reporting standards that users of a commercially developed AI tool must comply with when the tool is used in sensitive contexts such as hiring, credit determinations, and criminal justice;
- Imposing purpose specification and use limitation requirements on AI systems to mitigate mission creep;
- Providing an opportunity for individuals unfairly harmed by AI systems to obtain redress; and

¹⁶ *Recommendation of the Council on Artificial Intelligence*, Organisation for Economic Cooperation and Development (May 21, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

¹⁷ National AI Research and Development Plan Strategies 3 & 4.

- Limiting the collection of personal information by AI systems without express, informed consent.

Similarly, the agencies should update Strategy 4 to include the following action items:

- Prohibiting the use of inherently unsafe AI applications;
- Establishing and enforcing minimum data governance and minimization requirements;
- Ensuring that agencies adequately evaluate and publish information about the AI systems they procure and develop; and
- Determining best practices for identifying which AI tools are discriminatory, inaccurate, or otherwise fundamentally incompatible with the protection of human and civil rights.

Strategy 8 Should be Narrowed to Prevent Surveillance, Bias, Corporate Capture, and Other Harms

Without adequate limits, the focus on AI public-private partnerships called for in the Strategic Plan will pose an unacceptable threat to civil and human rights. Under the current Plan, the agencies are complicating problems associated with AI that they are not yet putting adequate resources toward addressing. As EPIC warned the National Security Commission on Artificial Intelligence in September 2020, “incentivizing the adoption of commercial software tools and ‘moderniz[ing]’ solely to gain a competitive edge will undermine the U.S.’s principled leadership on AI.”¹⁶

EPIC recommends that the agencies adjust Strategy 8 to limit public-private partnerships to circumstances where (1) there is a demonstrated need for a particular type of AI development or research, and such development or research can be accomplished consistent with the preservation of human and civil rights; or (2) where public-private partnerships are needed to improve AI oversight.”

This shift in focus would allow the agencies to achieve their parallel goals of expanding public-private partnerships and protecting civil rights and civil liberties without hindering either. The agencies can identify appropriate and beneficial uses of AI while avoiding the facilitation of new AI systems purely for the sake of competition.

Conclusion

For the reasons above, EPIC recommends that the agencies prioritize the protection of the public in updating the National Artificial Intelligence Research and Development Strategic Plan.

Respectfully Submitted,

/s/ Ben Winters

Ben Winters
EPIC Counsel