

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

White House Office of Science and Technology Policy and National Science Foundation

Regarding the

Implementation of the Interim Report of the National AI Research Resource

87 FR 31914

June 30, 2022

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.¹ EPIC has a long history of promoting transparency and accountability for information technology.²

EPIC recommends the White House Office of Science and Technology Policy (“OSTP”) and the National Science Foundation (“NSF”)³ center human rights, civil rights, and thoughtful procurement and reduce reliance on and federal funding of private sector AI systems in their implementation of the National AI Research Resource Task Force Interim Report (“NAIRR Report”)⁴ In October 2021, EPIC urged the NAIRR to (1) devote significant resources to the robust assessment and preservation of privacy, civil rights, and civil liberties in the face of growing AI use; (2) provide regulators at the federal, state, and local levels with resources to ensure that civil rights and consumer protection laws are enforced against entities that deploy AI or automated decision-making systems; and (3) to limit partnerships with the private sector.

¹ EPIC, *About EPIC* (2022), <https://epic.org/epic/about.html>.

² EPIC, *Algorithmic Transparency* (2022), <https://www.epic.org/algorithmic-transparency/>; EPIC, *Algorithms in the Criminal Justice System* (2022), <https://www.epic.org/algorithmic-transparency/crim-justice/>; Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Federal Trade Commission (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf>; Comments of EPIC, *Developing UNESCO’s Internet Universality Indicators: Help UNESCO Assess and Improve the Internet*, United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Mar. 15, 2018), 5-6, [https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20\(3\).pdf](https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20(3).pdf).

³ Hereinafter to referred to as “agencies”

⁴ National Science Foundation, Science and Technology Policy Office, *Request for Information on Implementing Initial Findings and Recommendations of the National Artificial Intelligence Research Resource Task Force*, Federal Register, 87 FR 31914 (June 30, 2022) <https://www.federalregister.gov/documents/2022/05/25/2022-11223/request-for-information-rfi-on-implementing-initial-findings-and-recommendations-of-the-national>

EPIC renews these points to the agencies as they work to implement NAIRR’s interim report. EPIC recommends that the agencies set defined minimum standards for algorithmic transparency and accountability and set strict limits on the use of NAIRR to develop certain harmful applications like emotion recognition.

EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the adoption of the Universal Guidelines for AI (“UGAI”) to promote trustworthy and careful adoption of algorithms.⁵ EPIC has advocated for transparency and accountability internationally, litigating 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 to assess the probability that an individual commits 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 adequate regulation to protect individuals.¹⁰

⁵ See e.g. EPIC v. DOJ (D.C. Cir.) (18-5307), <https://epic.org/foia/doj/criminal-justice-algorithms/>; Comments of EPIC, *Intellectual Property Protection for Artificial Intelligence Innovation*, U.S. Patent and Trademark Office (Jan. 10, 2020), <https://epic.org/apa/comments/EPIC-USPTO-Jan2020.pdf>; Comments of EPIC, *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, Department of Housing and Urban Development (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>; Comments of EPIC, *Request for Information: Big Data and the Future of Privacy*, Office of Science and Technology Policy (Apr. 4, 2014), <https://epic.org/privacy/big-data/EPIC-OSTP-Big-Data.pdf>.

⁶ EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)*, <https://epic.org/foia/doj/criminal-justice-algorithms/>.

⁷ See *Id.* and EPIC, *EPIC v. DHS (FAST Program)* <https://epic.org/foia/dhs/fast/>.

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, National Science Foundation, 83 FR 48655 (Oct. 26, 2018) <https://epic.org/apa/comments/EPIC-Comments-NSF-AI-Strategic-Plan-2018.pdf>.

¹⁰ Comments of EPIC, *Solicitation of Written Comments by the National Security Commission on Artificial Intelligence*, 85 Fed. Reg. 32,055, National Security Commission on Artificial Intelligence (Sep. 30, 2020) <https://epic.org/apa/comments/EPIC-comments-to-NSCAI-093020.pdf>; Comments of EPIC, *Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications,”* 85 Fed. Reg. 1825, Office of Management and Budget (Mar. 13, 2020) <https://epic.org/apa/comments/EPIC-OMB-AI-MAR2020.pdf>; Comments of EPIC, *Request for Feedback in Parallel with the White Paper on Fundamental Rights*, European Commission Fundamental Rights Policy Unit (May 29, 2020) <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Comments-May2020.pdf>; Comments of EPIC, *Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence*, European Commission (Sep. 10, 2020) <https://epic.org/apa/comments/EPIC-EU-Commission-AI-Sep2020.pdf>.

To establish necessary consumer safeguards, EPIC has filed FTC complaints against HireVue,¹¹ an employment screening company, and Airbnb,¹² the rental service that claims to assess risk in potential renters based on an opaque algorithm. EPIC has also filed a petition with the FTC for a rulemaking for AI in Commerce.¹³

Agencies Implementing NAIRR’s Interim Plan Must Strengthen Oversight to Ensure That Protections for Individual Rights Aren’t Overtaken by Commercial Interests

EPIC urges the agencies to focus on building capacity for oversight and strictly purposeful procurement and away from aiding development for purpose of international competition. Throughout the report, the focus is on increased capacity to create new AI systems¹⁴, but without parallel focus to control harmful AI and with insufficient recognition about the lack of accuracy or control. Several of the recommendations from the NAIRR report could help strengthen protections for people subject to AI, but the devil is in the details, and EPIC provides specific ways in which the recommendations with protective potential must be implemented to be meaningful.

The agencies must prioritize building oversight capacity for an infrastructure to perform independent and thorough audits and impact assessments for both commercial and governmental AI, as well as effective ways to communicate the findings of those oversight mechanisms, and triggers that take unacceptably risky AI off the market.

The strongly worded set of suggestions found in Recommendation 3-4¹⁵, that the operations of the NAIRR should live outside of the government to not be stymied by burdensome procurement regulations is troubling. This necessarily sets up incentives away from the protection of fundamental rights and toward further regulatory capture. Again, the government should build capacity for oversight and careful development, not defer it, and the interest should be strictly in the hands of a party without independent profit motives.

Recommendation 3-6¹⁶ and 3-7¹⁷ are illustrative of the report’s insufficient focus on meaningful protection. EPIC believes that increased flexibility in contracting with private

¹¹ Complaint and Request for Investigation, Injunction, and Other Relief, *In re HireVue* (Nov. 6, 2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf.

¹² Complaint and Request for Investigation, Injunction, and Other Relief, *In re Airbnb* (Feb. 27, 2019), https://epic.org/privacy/ftc/airbnb/EPIC_FTC_Airbnb_Complaint_Feb2020.pdf.

¹³ *In re: Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce*, EPIC (Feb. 3, 2020) <https://epic.org/privacy/ftc/ai/EPIC-FTC-AI-Petition.pdf>.

¹⁴ NAIRR Interim Report, *supra* note 10 2-2.

¹⁵ NAIRR Recommendation 3-4: The day-to-day operations of the NAIRR should be managed by an independent, non-governmental entity with dedicated, expert staff.

¹⁶ NAIRR Recommendation 3-6: The NAIRR management entity should have flexibility in contracting, partnering, or entering other agreements with the private sector, with appropriate government oversight.

¹⁷ NAIRR Recommendation 3-7: The NAIRR management entity should be explicitly charged with addressing diversity, equity, inclusion, and accessibility (DEIA) issues related to NAIRR-supported AI R&D.

companies beyond what the government already does would be harmful to the quality of AI that comes out of NAIRR. EPIC supports the centering and concretizing of DEIA principles in all AI R&D, but a vague charge of addressing is not enough. There need to be meaningful controls as well as prohibitions on what types of AI is developed, and the oversight and accountability capacity to limit AI harm of those communities.¹⁸

Recommendations 3-7 and 3-8¹⁹ must include specific prohibitions and limitations on what tools can be developed. Without this, Recommendation 3-9²⁰ calling for governing charters and policies amounts to administrative theater.

The agencies should be extremely cautious in their implementations of NAIRR's Recommendations that incentivize data collection, including sensitive data collection, and include strong data minimization requirements to all projects.

EPIC commends and supports a broad implementation of Recommendation 3-10.²¹ Access to NAIRR resources should be contingent on review, clear use policies must include prohibitions, and shared information must be made transparent to those subjected. Recommendations 3-7 – 3-9 must be read into the use policies of 3-10.

¹⁸ Algorithmic harm is rampant and felt hardest by marginalized communities. See e.g., Larry Hardesty, *Study finds gender and skin-type bias in commercial artificial-intelligence systems*, MIT News (Feb. 11, 2018), <http://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>; Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 Am. Crim L. Rev. 1553 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251763; Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 Wash. U.L. Rev. 681 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225350; See, e.g., Muhammad Ali, Piotr Sapiezynski, Miranda OgenOgen, Aleksandra Korolova, Alan Mislove, Aaron Rieke, *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, arXiv:1904.02095 (Apr 3, 2019); GAO summary of Z. Obermeyer, B. Powers, C. Vogeli, and S. Mullainathan. "Dissecting racial bias in an algorithm used to manage the health of populations," *Science*, vol. 366, no. 6464 (2019), pp. 447-453 | GAO-21-519SP; Tom Simonite, *How an Algorithm Blocked Kidney Transplants to Black Patients*, (Oct. 26, 2020) <https://www.wired.com/story/how-algorithm-blocked-kidney-transplants-black-patients/>; Amit Datta, Anupam Datta, Michael Carl Tschantz, *Automated Experiments and Privacy Settings A Tale of Opacity, Choice, and Discrimination*, arXiv:1408.6491v2 [cs.CR] 17 (Mar. 18 2015), available at <https://arxiv.org/pdf/1408.6491.pdf>; Sheridan Wall and Hilke Schellmann *LinkedIn's job-matching AI was biased. The company's solution? More AI*, MIT Technology Review (Jun 23, 2021) <https://www.technologyreview.com/2021/06/23/1026825/linkedin-ai-bias-ziprecruiter-monster-artificial-intelligence/>; Daan Koklman, "F**k the algorithm?" *What the world can learn from the UK's A-level grading fiasco*, LSE Impact Blog (Aug. 2020).

¹⁹ NAIRR Recommendation 3-8: NAIRR management and administration should be governed by a formal charter and associated policies, with an executive leadership team managing day-to-day operations.

²⁰ NAIRR Recommendation 3-9: The governance policies and performance of the NAIRR should be overseen by a board of governors and complemented with mechanisms for external advice, oversight, and evaluation

²¹ NAIRR Recommendation 3-10: Access to NAIRR resources should be contingent on research project proposal review, be governed by clear use policies and user agreements, and be in compliance with relevant requirements for open sharing of research outputs.

For Recommendation 3-15²², the agencies must require definition of metrics and indicators of success grounded in established best practices to be made public, and established as part of a open and public process not controlled by industry preference. Metrics must be created to evaluate how the AI that comes out of NAIRR supported projects are protective of rights, transparent, and in line with a defined set of principles of AI. EPIC recommends the use of UGAI which has been endorsed by more than 250 experts and 60 organizations in 40 countries, as well as the Organisation for Cooperation and Economic Development AI Principles to guide R&D.²³ The UGAI comprise twelve principles:

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 Obligation.²⁴

The OECD AI Principles²⁵ were adopted in 2019 and endorsed by 42 countries—including the United States and the G20 nations.²⁶ 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.
5. Accountability.²⁷

EPIC strongly agrees with Recommendation 3-19,²⁸ and urges the agencies to include tracking evaluations in line with the above principles, as well as accuracy rates and bias reporting

²² NAIRR Recommendation 3-15: NAIRR evaluation methods, including definition of metrics and indicators of success for the NAIRR, should be grounded in established best practices.

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

²⁴ *Id.*

²⁵ *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019) [hereinafter *OECD AI Principles*], <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>;

²⁶ *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>.

²⁷ *OECD AI Principles*, *supra* note 15.

²⁸ NAIRR Recommendation 3-19: The NAIRR management entity should establish a publicly accessible platform that tracks the usage and outputs of NAIRR-supported research and the results of external evaluations.

in the publicly accessible outputs. These requirements will help legitimate each system and increase trust.

Conclusion

EPIC urge the agencies to implement the findings of the NAIRR Interim Report with strict prohibitions, reporting requirements, transparency, and keeping control for government actors. The NAIRR should not primarily be an accelerator for AI development for AI development's sake. EPIC will be happy to provide further comment in later stages of implementation.

Respectfully Submitted,

s/ Ben Winters
Ben Winters
EPIC Counsel