

May 27, 2016

Ms. Erika Brown Lee
U.S. Department of Justice
Privacy & Civil Liberties Office
Attn: Privacy Analyst
1331 Pennsylvania Ave. NW, Suite 1000
Washington, D.C. 20530-0001

Re: The Necessity of a 30-day Extension of Time to Submit Comments Regarding Proposal to Exempt the Next Generation Identification System from Key Provisions of the Privacy Act (CPCLO Order No. 003-2016) and the Next Generation Identification System of Records Notice (CPLCO Order No. 002-2016)

Dear Ms. Brown Lee:

We are a coalition of civil rights, human rights, immigrant rights, privacy, and transparency organizations and companies that are deeply concerned about the Federal Bureau of Investigation's Next Generation Identification (NGI) system – and the FBI's proposal to exempt that system from virtually every key provision of the Privacy Act. We urge the Department of Justice to grant the public 30 more days to comment on the FBI's request and the underlying system that it is designed to protect.

The NGI system uses some of the most advanced surveillance technologies known to humankind, including facial recognition, iris scans, and fingerprint recognition. It runs on a database holding records on millions of Americans, including millions who have never been accused of a crime. While the database is partially built using mugshots and arrest records submitted by state and local law enforcement agencies, it also includes the fingerprints and photos of people getting background checks – and people applying to become permanent residents or naturalized citizens.

As a result, the NGI system may not affect everyone equally. Instead, it likely includes a disproportionate number of African Americans, Latinos, and immigrants. This is a problem from a technical perspective, as a body of research – including research authored by FBI personnel – suggests that some of the biometrics at the core of NGI, like facial recognition, may *misidentify* African Americans, young people, and women at higher rates than whites, older people, and men, respectively.

The likely disparate impact of NGI is not limited to facial recognition. Arrest records in NGI often fail to indicate whether a person was convicted, acquitted, or if charges against them were dropped. According to a recent investigation, every year, thousands of people undergoing fingerprint-based background checks lose work due to FBI records that are inaccurate or out of date. Due to disproportionately high arrest rates, an undue number of those people are people of color.

For years, the American public has waited for the FBI to publish basic privacy notices about this database. Federal law requires that the FBI publish a System of Records Notice (SORN) and/or a Privacy Impact Assessment (PIA) when the agency starts to keep – or significantly changes – a database like NGI. For years, the FBI has not met these requirements.

In 2011, for example, the FBI began to allow state law enforcement to run facial recognition searches against photos in the NGI database. Despite pressure from Congress and civil society, the FBI didn't release a Privacy Impact Assessment about this program until September 2015. In fact, even though NGI itself was launched in 2008, the FBI didn't publish a System of Records Notice about NGI until May 5, 2016 – the same day it proposed to exempt the system from other, even more basic transparency requirements.

The FBI waited over half a decade to publish a basic privacy notice about NGI. Now, the American people have 21 business days to comment on that system – and the FBI's request to make most of it secret. This is far too little time.

The FBI asks to be exempt from Privacy Act rules that would let people find out whether they're in the NGI database, whether their profile has been shared with other parts of the government, and whether their profile is accurate or full of errors. In certain cases, some of these exemptions may be warranted. As a whole, they seem to go far beyond that. In fact, the FBI hasn't just asked to be exempt from specific provisions of the Privacy Act; it has asked to be exempt from the part of the law that lets citizens enforce *any* Privacy Act violation (5 U.S.C. § 552a(g)) – *even violations of requirements that the FBI isn't exempt from*. For example, the Privacy Act generally bars the government from creating databases about the political activities of its citizens (5 U.S.C. § 552a(e)(7)). Under the FBI's proposal, the FBI could violate that rule – and private citizens could never take them to court.

The Privacy Act was enacted to ensure that individuals had an enforceable right to know the records that the government keeps about their activities. While there may be legitimate reasons for exempting some law enforcement activities from some of the Act's provisions, exemptions must not render the Act meaningless.

This is an extraordinarily broad proposal, and the system it affects is extraordinarily sensitive – particularly for the communities it may affect the most. We urge the Department to allow the public the opportunity for a careful, step-by-step examination of both the NGI System of Records Notice and the FBI's proposal to render that system largely secret. An extension of no less than 30 days is warranted.

Sincerely,

18 Million Rising
Advocacy for Principled Action in Government
American-Arab Anti-Discrimination Committee
American Civil Liberties Union

American Library Association
Amnesty International USA
Arab American Institute
Bill of Rights Defense Committee / Defending Dissent Foundation
Center for Democracy & Technology
Center for Digital Democracy
Center for Media Justice
Center on Privacy & Technology at Georgetown Law
ColorofChange.org
Constitutional Alliance
The Constitution Project
Consumer Action
Consumer Watchdog
Council on American Islamic Relations
Data & Society
Demand Progress
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Free Press
Fight for the Future
Immigrant Defense Project
Immigrant Legal Resource Center
Lyft
Media Mobilizing Project
MPower Change
National Association of Criminal Defense Lawyers
National Council of La Raza
National Day Laborer Organizing Network
National Employment Law Project
National LGBTQ Task Force
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
New America's Open Technology Institute

OpenTheGovernment.org

Privacy Times

Raising Asian Immigrant Stories on the East Coast

R Street Institute

Sunlight Foundation

Uber

World Privacy Forum