July 6, 2016

Ms. Erika Brown Lee
U.S. Department of Justice, Privacy and Civil Liberties Office
Attn: Privacy Analyst
National Place Building
1331 Pennsylvania Ave. NW, Suite 1000
Washington, DC 20530-0001

Re: Proposal to Exempt the Next Generation Identification System from Key Provisions of the Privacy Act of 1974 (CPCLO Order No. 003-2016), and the Next Generation Identification System of Records Notice (CPLCO No. 002-2016)

Dear Ms. Brown Lee,

On behalf of New America's Open Technology Institute (OTI), I write to express our concerns about the Federal Bureau of Investigation's (FBI) proposal to exempt its Next Generation Identification System (NGI) from the Privacy Act of 1974. As detailed in a letter that OTI co-signed last month, which requested an extension to this comment period, the NGI system is one of the most advanced biometric databases in the world, holding fingerprint, photo, and iris-scan records of millions of Americans.[1] Law enforcement agencies can search this database en masse for even minor crimes, and for years NGI has operated without adequate civilian or judicial oversight.

In addition to the general legal and privacy concerns raised by a technology that allows for sweeping, remote searches of individuals without their knowledge, we wish to highlight the fact that the use of biometric systems like NGI by law enforcement does not impact all Americans equally.

Law enforcement power has long been disproportionately used in communities of color. Although secretive surveillance practices threaten the privacy, security, and basic civil rights of all Americans, communities of color are the most vulnerable because of historical biases in

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[1] Letter to Erika Brown Lee, Dep't of Justice, from New America's Open Technology Institute, *et al*., May 27, 2016, *available at*
http://apps.washingtonpost.com/g/documents/national/letter-urges-justice-department-to-grant-public-more-time-to-comment-on-privacy-act-exclusion/2017/

policing.[2] For example, because African-Americans are disproportionately stopped by police and arrested compared to other demographic groups, they are more likely to be overrepresented in the NGI database.[3] Research also suggests that facial recognition technologies like the NGI are more likely to incorrectly identify faces that belong to women, youth, and people of color.[4] Therefore, not only are African-American faces more likely to turn up in NGI, they are also more likely to be misidentified during law enforcement searches.

The Privacy Act, from which the FBI seeks exemption, provides individuals with important protections against overreaching surveillance databases such as the NGI database. For example, the Privacy Act grants individuals the right to determine if they are enrolled in the NGI and fix any errors in their files. It also provides people with recourse in the case of a possible Privacy Act violation—a necessary check on the use of a powerful technology. The overall effect of exempting this database from these important provisions of the Privacy Act could be to promote high-tech racial profiling that runs contrary to the protections outlined in our laws and Constitution.

As an organization that works to promote ubiquitous, safe, and affordable access to technology and its benefits, we urge the FBI to avoid any practice that has a disproportionate and negative impact on communities of color. We urge the Department to reconsider this proposal, and instead promote policies that would ensure that this technology is deployed transparently—in a way that is accountable to the public and that respects fundamental civil rights.

Sincerely,

Kevin S. Bankston, Director
New America's Open Technology Institute
740 15th Street NW, Suite 900
Washington, DC 20001

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[2] Letter to Hon. Thomas Wheeler, Chairman, FCC and Erika Brown Lee, Dep't of Justice, from New America's Open Technology Institute, *et al*., May 16, 2016, *available at* https://s3.amazonaws.com/s3.colorofchange.org/images/FinalStingrayLetter_3-14-2016_45.pdf

[3] Matthew R. Durose, *et al*., U.S. Department of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (April 2014), *available at* http://1.usa.gov/1lvWsR7; *see also* Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA Today (Nov. 19, 2014), http://usat.ly/1u8ETXA; The Sentencing Project, Racial Disparity, http://bit.ly/1jERtxX.

[4] *See* GAO Report, *FBI Should Better Ensure Privacy and Accuracy*, http://www.gao.gov/assets/680/677098.pdf; *see also* Clare Garvie & Jonathan Frankle, *Facial-recognition software might have a racial bias problem*, Atlantic (Apr. 7, 2016) http://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/.