



Attorney General Kamala D. Harris
State of California Department of Justice
1300 I Street
Sacramento, CA 95814-2919

October 18, 2016

Dear Attorney General Harris:

On your watch as California's top cop, law enforcement agencies up and down the state have been secretly using social media surveillance software that has been marketed to monitor protests and activists of color.¹ Highly invasive facial recognition that may have a disproportionate impact on Californians of color is also being quietly used in several of our largest cities² and counties.³ As the Attorney General, your leadership is urgently needed to address the lack of transparency, accountability, and oversight of law enforcement surveillance technology in order to fulfill your duty to safeguard the privacy, free speech, and civil rights of Californians.

It has been almost two years since the January 2015 California Attorney General forum on surveillance technology, "Protecting Our Communities, Respecting Our Liberties." At that time, organizations including the ACLU of California and the Electronic Frontier Foundation presented findings about the use of surveillance technology by local law enforcement in California. The ACLU of California alerted your office that the use of surveillance technology by local law enforcement was rapidly proliferating,⁴ while basic transparency, accountability,

¹ ACLU of California. Police use of social media surveillance software is escalating, and activists are in the digital crosshairs. https://medium.com/@ACLU_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48#lcj0fst13

² A nationwide facial recognition survey conducted by Georgetown Law include findings about facial recognition systems in San Francisco. <https://www.perpetuallineup.org/jurisdiction/san-francisco> Los Angeles. <https://www.perpetuallineup.org/jurisdiction/los-angeles> and San Diego <https://www.perpetuallineup.org/jurisdiction/san-diego-association-governments>. See *The Perpetual Line-up: Unregulated Police Face Recognition in America* for full report. <https://www.perpetuallineup.org/>

³ Public records documents released in July 2016 reveal an iris scanning technology being used in Riverside, Los Angeles, and San Bernardino counties. <http://www.theverge.com/2016/7/12/12148044/fbi-iris-pilot-program-ngi-biometric-database-aclu-privacy-act>

⁴ ACLU of California interactive map of surveillance findings. https://www.aclunc.org/article/map-state-surveillance-california#tab_SM

and safeguards to protect civil rights and civil liberties has been the exception, not the rule.⁵ The ACLU of California surveillance survey revealed that public debate about whether to use invasive surveillance technology was dismally rare - occurring less than 15% of the time.⁶ Additionally, fewer than 1 in 5 surveillance technologies even had a publicly available use policy, and none adequately protected civil liberties and civil rights.⁷ We recommended several concrete policy steps, such as issuing Attorney General Best Practices and supporting comprehensive state surveillance legislation, to rein in this out-of-control surveillance.⁸ Your office has failed to take any of these steps. We are writing now to urgently renew that request in light of new revelations showing the proliferation of surveillance technology.

1. Social media surveillance has gone unchecked

In the almost two years of inaction by your office, we have learned that California law enforcement have now been using social media surveillance marketed to monitor political and social movements, protests, and activists of color. While the ACLU of California public records act requests was quite limited in scope- just sixty-three total law enforcement agencies,⁹ it revealed very significant and concerning use of social media surveillance. Forty-percent of the agencies surveyed had used or acquired social media surveillance. These agencies included police departments, Sheriff departments, District Attorneys in the counties of Contra Costa, Sacramento, San Diego, San Mateo, and San Francisco, and your own E-crime unit of the California Attorney General.¹⁰

While we do not yet know all of the ways this highly sensitive technology has been used, we do know that the Fresno Police Department received guidance from its social media vendor, MediaSonar, to use its product to monitor “threats to public safety” by monitoring hashtags such as #BlackLivesMatter, #DontShoot, #ImUnarmed, #MikeBrown #PoliceBrutality, #dissent and

⁵ *State of Surveillance in California: Findings & Recommendations* – January 2015. ACLU of California available at

https://www.aclunc.org/sites/default/files/201501aclu_ca_surveillancetech_summary_and_recommendations.pdf

⁶ *Making Smart Decisions: A Guide to Community Transparency, Accountability & Oversight*. ACLU of California at 11. www.aclunc.org/smartaboutsurance

⁷ *Id* at 18

⁸ *Supra* note 5

⁹ ACLU of California submitted public records act requests in July 2016.

¹⁰ https://www.aclunc.org/sites/default/files/20160921_Social_Media_Surveillance_PRA_Summary.pdf

#ItsTimeforChange.¹¹ More than a dozen California law enforcement agencies have also acquired or used Geofeedia social media surveillance. This company's materials for law enforcement have characterized activist groups and unions as "overt threats" and suggest the product be used in ways to target activists of color.¹² A Geofeedia representative suggested to the San Jose Police Department that they should use the product to surveil the "Ferguson situation."¹³ San Jose Police did in fact use Geofeedia software to monitor South Asian, Muslim, and Sikh protesters only a few days after acquiring it.¹⁴ Geofeedia touted how useful its product was for monitoring protests to the San Diego District Attorney's Office – our records show that this agency used Geofeedia.¹⁵

No agencies, including your own office, have produced any documents providing evidence of any public debate about whether to use this very concerning surveillance technology, or any policies to safeguard rights.¹⁶

2. *Facial recognition and other biometric surveillance has been hiding in the shadows*

It has also become clear that sophisticated facial recognition or other biometric surveillance that may have a disproportionate impact on Californians of color¹⁷ is now being used in some of our state's largest cities and counties.

At least three major California cities – San Francisco, Los Angeles, and San Diego - have acquired sophisticated facial recognition surveillance technology.¹⁸ The Los Angeles Police Department can deploy mobile cameras capable of conducting real-time face recognition

¹¹ *Police use of social media surveillance software is escalating, and activists are in the digital crosshairs.* Nicole Ozer. ACLU of California. https://medium.com/@ACLU_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48#.ps45vy103

¹² See ACLU of California public records finding at https://www.aclunc.org/docs/20160921-pra_content_ferguson_r.pdf.pdf

¹³ See ACLU of California public records finding at http://www.aclunc.org/docs/20160921-pra_geofeedia_ferguson_situation_r.pdf.pdf

¹⁴ *Oakland Cops Quietly Acquired Social Media Surveillance Tool.* Ali Winston. East Bay Express. April 13, 2016. <http://www.eastbayexpress.com/oakland/oakland-cops-quietly-acquired-social-media-surveillance-tool/Content?oid=4747526>

¹⁵ See ACLU of California public records finding at http://www.aclunc.org/docs/20161011_geofeedia_das_monitoring_protests.pdf

¹⁶ https://medium.com/@ACLU_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48#.72mr03xah

¹⁷ See *Perpetual Line-up* discussion of racial bias and facial recognition at <https://www.perpetuallineup.org/findings/racial-bias>

¹⁸ See *Perpetual Line-up* at <https://www.perpetuallineup.org/>

against “hot lists” at distances of up to 600 feet.¹⁹ The number of facial recognition devices across San Diego increased 200% between 2013-2015, over 400,000 individuals are now in the facial recognition database. Local agencies have conducted more than 7,000 thousand facial recognitions,²⁰ And while San Francisco has had a multi-biometric system that includes face recognition capabilities since 2010, there is no evidence of any public debate or any policy governing how police can use the system, or safeguards in place to protect the rights of community members.²¹ Racial bias infects facial recognition systems.²²

Public records documents released in July 2016 also detail an iris scanning program coordinated by the California Department of Justice that is being used in three large California counties – Riverside, San Bernardino, and Los Angeles.²³ In San Bernardino alone, the county has used iris scanners to collect personal data from at least 200,000 people just in the past two and a half years. While described as a “pilot” project, the documents show that officials have quietly renewed the iris scan program for multiple years, and that the use of the invasive surveillance technology has continued to expand. There is no evidence of any local lawmaker oversight or democratic debate. Rather than a robust use policy, there is only an extremely vague privacy agreement between the FBI and the state of California.

3. *Attorney General should take concrete steps to stop secret and potentially discriminatory surveillance*

Social media surveillance and biometric surveillance are just two of the most recent examples of surveillance technology. It is essential for the Attorney General’s Office to take systemic action to stop secret and potentially discriminatory surveillance in California. At a minimum, law enforcement should not be seeking funds, obtaining or otherwise using surveillance technology without a transparent, public process, being accountable to their

¹⁹ See *Perpetual Line-up* findings for Los Angeles. <https://www.perpetuallineup.org/jurisdiction/los-angeles>

²⁰ <http://www.nbcsandiego.com/news/local/Facial-Recognition-Searches-Infogram-378296051.html>

²¹ See *Perpetual Line-up* findings for San Francisco available at <https://www.perpetuallineup.org/jurisdiction/san-francisco>

²² See *Perpetual Line-up* discussion of racial bias and facial recognition at <https://www.perpetuallineup.org/findings/racial-bias>

²³ *The FBI has collected 430,000 iris scans in a so-called pilot program.* Colin Lecher and Russell Brandom. The Verge. July 12, 2016. <http://www.theverge.com/2016/7/12/12148044/fbi-iris-pilot-program-ngi-biometric-database-aclu-privacy-act>

communities, and having robust oversight measures in place to make sure that civil rights and civil liberties are being safeguarded.

1. Support State Legislation to Create Consistent Transparency, Oversight, and Accountability Mechanisms for California Law Enforcement

The Attorney General should support state legislation that incorporates key principles to ensure proper and consistent transparency, oversight, and accountability when surveillance technology is being considered by any California law enforcement entity.

- **Informed Community Debate & Democratic Vote at Earliest Stage of Process:** Public notice, production and distribution of an easy-to-understand Surveillance Impact Report and opportunity for meaningful community debate prior to seeking funding or otherwise moving forward with surveillance technology
- **Surveillance & Civil Rights Impact Assessment:** In order to facilitate an informed public debate, conduct a surveillance impact assessment and expressly determine the real costs (both civil rights and fiscal) for any surveillance technology proposal.
- **Thorough Surveillance Use Policy:** Legally enforceable Surveillance Use Policy with robust civil liberties, civil rights, and security safeguards for any proposed surveillance technology.
- **Ongoing Oversight & Accountability:** Proper oversight of any surveillance technology use and accountability through annual reporting, review by policymakers and enforcement mechanisms.

2. Support Local Ordinances to Implement Transparency, Oversight, and Accountability Mechanisms for Local Law Enforcement

The Attorney General should also support local Surveillance Technology & Community Safety Ordinances and create mechanisms that facilitate consistent transparency, accountability, and oversight at the local level. Policymakers in Santa Clara County have already adopted such

an ordinance.²⁴ Oakland is currently drafting a similar law,²⁵ and several other large and small communities throughout California are also considering next steps.

3. Issue Attorney General Best Practices for Surveillance Technology

The Attorney General should issue clear guidance to law enforcement in the state about the basic mechanisms for public transparency, accountability, and oversight that should be in place at the earliest stage of the process – when surveillance technology is being considered and well before it is purchased or deployed. Best Practices issues by the Attorney General’s Office are needed for communities throughout California. The ACLU of California’s guide for communities, *Making Smart Decisions About Surveillance*, and resources also developed by The International Association of Chiefs of Police, Police Executive Research Forum, and the Department of Homeland Security Privacy Office would hopefully all be helpful to the development of Attorney General Best Practices.²⁶

4. Develop & Periodically Issue California State of Surveillance Report

Recent research on the state of surveillance in California has highlighted just how difficult it is to identify what is happening in the state. It would be very helpful for the Attorney General to streamline transparency about surveillance in California, both to increase public awareness and

²⁴ *Santa Clara County Passes Landmark Law to Shut Down Secret Surveillance*. Nicole A. Ozer. June 8, 2016. ACLU of Northern California. <https://www.aclunc.org/blog/santa-clara-county-passes-landmark-law-shut-down-secret-surveillance>

²⁵ City of Oakland Privacy Advisory Commission webpage <http://www2.oaklandnet.com/government/o/CityAdministration/d/PrivacyAdvisoryCommission/index.htm>

²⁶ https://www.aclunc.org/sites/default/files/20160325-making_smart_decisions_about_surveillance.pdf; Map: State of Surveillance in California, ACLU of Northern California, <https://www.aclunc.org/article/map-state-surveillance-california>; U.S. Dep’t of Homeland Security, *CCTV: Developing Best Practices (2007)*, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_rpt_cctv_2007.pdf; Police Executive Research Forum, *How Are Innovations in Technology Transforming Policing?* 26 (Jan. 2012), available at http://www.policeforum.org/assets/docs/Critical_Issues_Series/how%20are%20innovations%20in%20technology%20transforming%20policing%202012.pdf; International Association of Chiefs of Police, *Technology Policy Framework (2014)*, available at www.theiacp.org/Portals/0/documents/pdfs/IACP%20Technology%20Policy%20Framework%20January%202014%20Final.pdf.

facilitate oversight. As a recommendation in Best Practices or a provision in a potential state law, the Attorney General's Office should ensure that there are mechanisms to compile and release regularly-updated information about surveillance technology in the state, including what is being used and where, funding sources, and what processes are in place to provide for transparency, accountability, and oversight.

Conclusion

The California Constitution guarantees robust privacy and free expression rights to all people, with the Privacy Amendment specifically enacted to safeguard against the modern threat to personal privacy posed by data collection technology like social media surveillance and facial recognition. The rights of Californians are gravely threatened by the rapid proliferation of surveillance technology. The leadership of the Attorney General is urgently needed at this time address the lack of transparency, accountability, and oversight of law enforcement surveillance technology and safeguard the privacy, free speech, and civil rights of Californians. We look forward to learning what immediate actions the Office of the Attorney General will be taking to address these pressing issues.

Sincerely,

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