



40 Rector Street, 9th Floor
New York, New York 10006
www.StopSpying.org | (646) 602-5600

**STATEMENT OF
ALBERT FOX CAHN, ESQ.
EXECUTIVE DIRECTOR
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT, INC.**

**BEFORE THE
COMMITTEE ON TECHNOLOGY
NEW YORK CITY COUNCIL**

**FOR A HEARING CONCERNING,
FOLLOW UP ON LOCAL LAW 49 OF 2018 IN RELATION TO AUTOMATED
DECISION SYSTEMS USED BY AGENCIES, INTRO 1447, AND INTRO 1806**

**PRESENTED
JANUARY 22, 2020**

Good morning, my name is Albert Fox Cahn, and I serve as the Executive Director for the Surveillance Technology Oversight Project (“S.T.O.P.”). S.T.O.P. advocates and litigates for New Yorkers’ privacy rights, fighting discriminatory surveillance. I am here today to support greater automated decision system (“ADS”) transparency and passage of Intro 1806.

The ADS Task Force was poised to make New York a leader in analysis and regulation of ADS. Sadly, unable to agree on fundamental questions and denied access to essential information, the Task Force’s work became impossible.

I. ADS Transparency Reduces Discrimination and Legal Challenges

There is no reason for agencies to resist ADS transparency the way they have, as transparency serves both the interest of the public and the agencies. Nationwide, we see the consequences of hasty and covert ADS adoption. Arkansas’s disastrous 2016 transition to algorithmic Medicare benefits haphazardly rolled-back attendants’ hours and left vulnerable patients without clean clothing or even food.¹ When the cuts were challenged, Arkansas failed to defend an algorithm it did not understand in court.

Idaho transitioned to opaque ADS in 2011 that severely cut Medicaid services for Idahoans with developmental disabilities. As in Arkansas, the cuts were challenged. And, as in Arkansas, the agency lost.² In the end, Idaho settled to scrap the ADS and develop a replacement system with the input and consent of affected Idahoans.

Michigan’s Unemployment Insurance Agency used ADS that wrongfully accused 40,000 residents of benefits fraud.³ Michiganders were wrongfully put into foreclosure or made homeless, and some even took their own lives.⁴ The system that was meant to save the agency money may end up costing millions in compensation.

ADS promise to increase efficiency and cut costs, but faulty systems will do neither. New York decisionmakers learned this lesson at the expense of large swaths of the Bronx.⁵ Transparency and community engagement throughout the ADS development cycle mitigates these harms and promotes ADS that best serve New Yorkers.

II. Best Practices in ADS Transparency

The Task Force failed to effectively learn from the research community’s recommendations and best practices. Agency transparency in ADS adoption and use, can protect New Yorkers from

¹ *Ledgerwood v. Ark. Dep’t of Human Services*, No. 60CV-17 (Pulaski Ct. (ark.) Cir. Ct. Jan. 26, 2017).

² See *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015).

³ Carol Thompson, *Michigan still looking for 500 people owed payback for unemployment agency error*, LANSING STATE JOURNAL (March 1, 2019) <https://www.lansingstatejournal.com/story/news/2019/03/01/michigan-unemployment-fraud-refund-marvin-miwam-midas/3026164002/>.

⁴ Robert Charette, *Michigan’s MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold*, IEEE SPECTRUM (January 24, 2018) <https://spectrum.ieee.org/riskfactor/computing/software/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold>.

⁵ Joe Flood, *Why the Bronx Burned*, N.Y. POST (May 16, 2010) <https://nypost.com/2010/05/16/why-the-bronx-burned/>.

discrimination, ensure the rights of the city's most vulnerable residents, and limit future agency liability.

ADS complexity often confounds disclosure efforts. Without adequate explainability tools and proper training, decisionmakers may not know a model's methodology or limits. And, decisionmakers may be unduly deferential to the model or unable to explain the ADS' role in a particular decision. "Model cards" that explain a model's methodology and limits should be considered to properly limit human deference to ADS.⁶ The Task Force should have considered human-training practices that teach decisionmakers how bias (conscious and unconscious) impacts ADS outputs and inform decisionmakers of the danger of "automation bias."⁷ If these best practices were adopted, they could safeguard against arbitrary, unexplainable, and therefore opaque applications of ADS.

I. The Task Force's Lack of Public Engagement

Having Task Force meetings that were open to public scrutiny was necessary but not sufficient to promote public discourse.⁸ A Task Force created, in large part, to increase transparency should have been transparent itself. The Task Force only held two public forums and a few community-based meetings with little publicity and community engagement.

The public should have had access to the Task Force's work. Instead, it worked at a lethargic pace, never published a draft of its recommendations, and ultimately was never able to decide on a definition of ADS. Task Force meetings were kept private over the protestations of the public and members of the Task Force itself. The lack of transparency surprised onlookers and the justification for it was unpersuasive.

II. Existing ADS in New York City

Nearly every New Yorker has encountered an ADS. And, nearly every New Yorker was and is unaware of those encounters. Yet, a comprehensive list of active ADS was never provided to the Task Force. The Task Force was not able to make meaningful recommendations without a list of active ADS.

This Task Force may have been first in the nation, but it was not first in the field. Legal scholars and data scientists have written at length about fairness, accountability, and transparency in automated systems, often with the understanding that overly generalized, academic recommendations have clear limits.⁹ A law review article or white paper to add to the towering stack was not the intended end

⁶ Model cards explain the training materials, methodology, limitations, known biases, and unknown or untested capacities that the models might harbor. Understanding how narrow the focus of a model is, or whether it includes racial features or racial proxy features like zip Code can impact the decision-making of a human agent involved in reading the output of the algorithm.

⁷ "Automation bias" is the phenomenon that people presented with an algorithmic prediction will confirm its truth rather than deny it. As we saw in the Boeing 737 case, poor training can result in catastrophic outcomes, especially when the machines and the humans disagree.

⁸ Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance* 71 ADMIN. L. REV. 1, 20-21 (2019) (discussing Fishbowl and Reasoned Transparency).

⁹ See, e.g., *Id.* at 29 (noting the limitations on the general analysis of transparency procedures for ADS because any process will "depend on how government actually uses machine learning—and even on what kind of machine-learning

product of this Task Force. Its recommendations should have effectuated the academic ideas of the growing interdisciplinary field in New York City.¹⁰ The 36 page final report only dedicated eight pages to recommendations. Those recommendations only amounted to generalizations and concerns about bias, funding, and regulatory burden. Without the transparency needed to make specific recommendations the Task Force's Final Report failed to provide the algorithmic accountability it was intended.

Intro 1806 would be a modest first step toward greater transparency about New York City's ADS. It would provide information the ADS Task Force was never granted, a current list of ADS, its purpose, and how it informs government decisions.¹¹ This information is increasingly vital as government ADS use expands. Growing agency dependence on ADS should not mean government systems are hidden from public oversight. Just the opposite. As government decisions and ADS become interwoven, transparency in one is synonymous with transparency in the other. If ADS continues to be hidden, intelligent regulation is near impossible. Intro 1806 would provide basic information necessary for the council to craft future needed regulations governing ADS. Intro 1806 is the initial step toward government ADS accountability, it can't respond to the full range of problems posed by ADS.

III. NYPD Use of ADS

Intro 1806 would provide greater transparency about the purpose and use of ADS in New York City, but it only partially addresses the unique threat posed by law enforcement use of ADS. Police ADS have the possibility to result in false arrest and even wrongful conviction. They can recreate the worst elements of human bias in policing communities of color. The lack of transparency about ADS in New York City is why for nearly three years I've fought for enactment of the only bill to comprehensively regulate The New York City Police Department ("NYPD") surveillance regime: The Public Oversight of Surveillance Technology ("POST") Act.¹² The NYPD has built up an arsenal of cutting edge, military-grade spy tools without any public notice or debate. These tools include items like facial recognition, x-ray vans, and automated license plate readers that can monitor a vehicle's location throughout the city. Facial recognition alone has led to the arrests of thousands of New Yorkers, many wrongly accused of crimes they didn't commit.

Let me be clear, the POST Act does not prohibit the NYPD from using new surveillance tools. Rather, it merely secures this Council's indispensable role in reviewing when and how such tools are deployed. Under the POST Act, the NYPD must issue an "impact and use policy" report when choosing to use a new surveillance tool.¹³ This report must describe the technology, rules, and

algorithm it uses"); Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City* 20 YALE J. L. & TECH 103, 136 (2018) (complaining that because there are "no means of knowing how many algorithms are currently in use, who has developed them, or which governments are using them" there is no way "to generalize from [the authors'] finding").

¹⁰ *Id.* at 29 (noting the limitations on the general analysis of transparency procedures for ADS because any process will "depend on how government actually uses machine learning—and even on what kind of machine-learning algorithm it uses").

¹¹ Reporting on Automated Decision Systems Used by City Agencies, Int 1806-2019.

¹² Public Oversight of Surveillance Technology (POST) Act, Int 0487-2018.

¹³ N.Y. CITY COUNCIL 1482 § 1 (N.Y. 2017), ch. 1, 14 ADMIN. CODE OF N.Y.C. § 14-167(b) (as proposed)

guidelines for the use of that technology, and safeguards for protecting any data collected.¹⁴ The City Council and the people of New York City would then be allowed to provide feedback on such an acquisition.¹⁵ Thus, the POST Act strikes a delicate balance, requiring sufficient information to ensure oversight, while protecting operational details, sources, and methods.

Civilian oversight of policing and intelligence gathering is not only a fundamental American value, it is essential for effective policing. As then-President Obama’s Task Force on 21st Century Policing found, “[l]aw enforcement agencies should establish a culture of transparency and accountability in order to build public trust and legitimacy.”¹⁶ The NYPD’s current procurement methods are not only undemocratic, but they harm the NYPD’s very mission of promoting public safety.

These spy tools pose a particularly potent threat to our immigrant communities. All too often, these systems create a risk of information sharing with federal agencies...even ICE. For example, the NYPD has contracted for years with the private firm Vigilant Solutions, which operates a nationwide database of over 2 billion license plate data points.¹⁷ Shockingly, last year we learned that that Vigilant Solutions was not just contracting with local police departments...it was also contracting with ICE.¹⁸ This one vendor is responsible for recording at least one million license plates per day.¹⁹

Perhaps most disturbingly, the NYPD relies on Vigilant Solution’s artificial intelligence to map out social networks, label New Yorkers as “criminal associates”, and create databases based on the company’s unproven algorithms.²⁰ This is just one example of countless surveillance tools that requires a systematic solution.

The POST Act is not just a comprehensive response, but also a modest one. The NYPD can continue using these tools—no matter how problematic—by complying with limited protections against waste, discrimination, and misuse. In fact, the POST Act would be one of the weakest surveillance reform bills in the country,²¹ especially when viewed in comparison to San Francisco’s²² and Oakland’s

¹⁴ *Id.* at 14-167(a) (as proposed)

¹⁵ *Id.* at 14-167(e-f) (as proposed)

¹⁶ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 12 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

¹⁷ See ROCCO PARASCONDOLA, *Exclusive: NYPD will be able to track fugitives who drive past license plate readers across the U.S.*, N.Y. DAILY NEWS, Mar. 02, 2015, <https://www.nydailynews.com/new-york/nypd-track-fugitives-drive-license-plate-readers-article-1.2133879>.

¹⁸ The Domain Awareness System collects the license plate data scanned by the approximately 500 license plate readers operated by the NYPD and combines it with footage from cameras and other surveillance devices around the city. The NYPD holds on to the license plate data for at least five years regardless of whether a car triggers any suspicion. See MARIKO HIROSE, *Documents Uncover NYPD’s Vast License Plate Reader Database*, ACLU, Jan. 25, 2016, <https://www.aclu.org/blog/privacy-technology/location-tracking/documents-uncover-nypds-vast-license-plate-reader-database?redirect=blog/speak-freely/documents-uncover-nypds-vast-license-plate-reader-database>.

¹⁹ *See id.*

²⁰ *See id.*

²¹ See ACLU, *Community Control Over Police Surveillance*, <https://www.aclu.org/issues/privacytechnology/surveillance-technologies/community-control-over-police-surveillance>

²² See CONGER, KATE, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES, May 14, 2019, <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html>.

outright bans on facial recognition technology²³ and Massachusetts's state-wide moratorium.²⁴ Additionally, many of the jurisdictions require legislators to approve each and every surveillance system their municipality buys, unlike the POST Act, which only requires public notice.

The evidence is clear: civilian oversight of surveillance enhances the public's trust in police departments and public safety.²⁵ Now, with thirty-two council members and the Public Advocate signed on as POST Act co-sponsors, the momentum is growing. Just last month the Committee on Public Safety heard the public's demands for NYPD accountability. Excitingly, members of this council reaffirmed their support to pass the bill despite NYPD stonewalling.²⁶

IV. Next Steps

ADS Task Force fell short of its mission to develop specific recommendations on how to regulate ADS. City government did not provide the necessary tools for the task force to succeed. This opaque veil that ADS are being hidden behind is a problem today, but even more alarmingly for our future. Government use of ADS continues to grow, with that growth transparency becomes more important by the day. ADS transparency is a vital component to our government's future.

I'm grateful that the committee is addressing New Yorkers' myriad privacy concerns. Our alarm grows by the day, as emerging technologies exacerbate the threats we are only now starting to address. Intro 1806 is a simple first step toward ADS transparency. Its passage is important not only today but for future ADS oversight.

Additionally, we urge this City Council to prioritize its response to police use of ADS and enact the POST Act. This legislation will provide vital transparency for the NYPD's acquisition of, and use of, surveillance technology, including many tools using ADS. I thank you for giving me the opportunity to address these urgent issues, and I look forward to working with the Council to safeguard the rights of all New Yorkers in the months and years to come.

²³ See EDITORIAL BOARD, San Francisco Banned Facial Recognition. New York Isn't Even Close. N.Y. TIMES, May 18, 2019, <https://www.nytimes.com/2019/05/18/opinion/nypd-post-act-surveillance.html>.

²⁴ See MASSACHUSETTS SENATE, Bill S.1385, <https://malegislature.gov/Bills/191/S1385>.

²⁵ Oakland, California and Seattle, Washington have enacted similar police oversight laws without deteriorating public safety. See *id.*

²⁶ Councilman Donovan Richards asked the NYPD representatives, "Gentlemen, you do realize that we are empowered to pass legislation with or without you?" Annie Mcdonough, NYPD Stands Firm Against Reporting Requirements in POST Act, CITY & STATE N.Y., December 19, 2019, <https://www.cityandstateny.com/articles/policy/policy/nypd-stands-firm-against-reporting-requirements-post-act.html>