M E M O R A N D U M

DATE: November 14, 2023

TO: The Honorable Council President Elo-Rivera and Members of the San Diego City Council

FROM: Ike Anyanetu, Chair - City of San Diego Privacy Advisory Board
Pegah Parsi, Vice Chair - City of San Diego Privacy Advisory Board

SUBJECT: Amendments to the Transparent and Responsible Use of Surveillance Technology Ordinance

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Dear President Elo-Rivera and Honorable Council Members:

We write in response to the November 15, 2023 Public Safety Committee Agenda Item-1's proposed amendments to the TRUST Ordinance. We appreciate the intent to improve the clarity and workings of this transparency and oversight framework, and to better align with your existing procurement practices. Furthermore, the Privacy Advisory Board has a shared interest in amendments to the ordinance that allow the board to better conduct its business efficiently, and we support amendments that reduce the administrative burden so long as they do not subvert the ordinance's overall goals.

Background

It is well known that the original ACLU model ordinance is elegant at addressing concerns and crafting guardrails for the use of municipal surveillance technology, and also possible that none of the ACLU's attorney's had procurement experience when crafting it. However, it is a starting point, and we should understand at times drafting mistakes and disagreements are likely to be made, in part due to the lack of experience of San Diego with this model.

We still believe that amendment has not solved the obvious volume problems, nor does it allow for thoughtful analysis and review and public scrutiny, as staff rushes to comply. A real-time example of this harm has just occurred. Several days ago, SDPD overwhelmed the PAB with a submission of 24 impact statements and proposed use policies to review en masse, which must now be performed within 90 days per the ordinance[1]. This will likely lead to bad policies slipping through the cracks, and due to other structural problems in the existing ordinance discussed further below, will ensure that the status quo of blindly evaluating proposals (e.g. Smart Street Lights, ALPR) that has already occurred, will continue. If the city of San Diego truly desires to craft good policies, engage the public, and be more transparent, imposing an

[1] This mass submission does raise some questions - if the existing ordinance is so burdensome, how was SDPD able to create 24 impact statements and corresponding proposed use policies in a relatively short time? Furthermore, it is certain that some of these documents were ready to be reviewed before the remainder were completed, and thus they could have been submitted to the PAB at an earlier time, relieving the burden on SDPD itself to attend and answer questions, and providing the PAB and general public with more time to review the materials. .

arbitrary deadline to meet in a jurisdiction with a large amount of technology to review is the wrong way to go. It is noteworthy that of all such ordinances in California, San Diego's is the sole version that does not contain a provision authorizing continued use of its pre-existing technology, until and unless the City Council rejects its corresponding proposed use policy.

We further recommend that you quickly fill the vacancy on the PAB. As there is only one attorney on the board, and she is also the only policy writer and analyst by trade, an additional attorney with similar experience should be appointed as the ninth member. Although the current PAB is unfamiliar with this model and did not craft it which hinders their own understanding, each member is well educated, offers a unique and diverse perspective, and can learn to do their job with repetition, similar to the staff's own burden, which will ease as they go through the process and gain more experience and understanding of where the goal posts are. It is a learning process for everyone. We are happy to discuss any of the sticking points and our experience in other jurisdictions, to share with you some options to choose from that can solve your concerns and are tailored to San Diego specifically.

Specific Proposed Amendments (per October 31, 2023 staff report)

1. We have no comment on the proposed amendment.

2. We have no comment on the proposed amendment.

3. Anyone paying attention understands that the present and future of policing is data mining. Data sharing agreements are necessary to review and potentially modify based on new best practices, even in the consumer context via CPRA regulations. These could likewise fall under this definition.

   The city should consider why the term "continuing argument" was included and why it is important. Of the many federal task forces that San Diego participates in, the vast majority resulted in exemptions, a tough blow to transparency, reporting, and public engagement in this area. If clarification is needed, amend the definition but do not eliminate it.

4. We object to the expansion in this proposed amendment, as "exigent circumstances" is a legal term of art and reserved for your police department. If the amendment were restricted to the police department rather than "city staff" which have presumably never been trained on exigent circumstances in practice and the legal lay of the land pertinent to the same, we have no objection. It is statistically improbable in a city as large and as well resourced as San Diego, that non-police departments do not already have any desired technology in their possession necessary for an emergency, and that also meets the definition of surveillance technology. Police are generally part of any first responder situation and there is no legal reason they couldn't borrow the equipment on another department's behalf if by some chance San Diego's 300+ technologies do not address the imminent threat. The need to expand this definition

should be a non-starter, as its existing definition already provides for a generous amount of authority and flexibility to act without oversight or transparency.

5. We have no comment on the proposed amendment.

6. We have no substantive comment on the proposed amendment. We do continue to disagree with the administration's current inventory list as all covered by the definition of surveillance technology. We have observed and been informed that certain stakeholders in San Diego cut back the scope of the ordinance and PAB, and part of that strategy is to say everything under the sun is subject to the ordinance, thereby creating an absurd administrative burden that cannot be met without gutting the vetting process. However, we saw dozens of clearly exempt technologies on the previous Mayor's list, along with many duplicates that can be addressed via a one-size-fits all policy. San Francisco recently created a single social media policy for 24 departments, dramatically reducing their administrative burden. San Diego has similar social media software from multiple departments on its current list. The burden that is claimed to exist is not there.

7. These are already exempt under your existing ordinance, at Section 210.0101(m)(1)(F).

8. While we generally have no objection to this proposed amendment, and have supported most of it in other jurisdictions, we do object to the bad precedent established by Berkeley's ordinance as to exempting fixed cameras on city property. A primary reason for creating the PAB is due to the rapid pace of technological advancements, which no elected official has capacity to keep up with due to the very many other important tasks you take on.. Yesterday's camera is not tomorrow's. Berkeley was successfully sued by Secure Justice when they falsely claimed its cameras were exempt due to this provision, yet in fact they contained facial recognition analytics which are banned by their ordinance, in addition to other features that removed the cameras from the exempted category.

9. We have no substantive comment on the proposed amendment, except to inquire as to what is meant by "federal, state, and local databases for summary criminal history." If this refers to Records Management Systems (RMS), or jail custody databases, we have no objection. However, if this again gets at the future of policing regarding data mining via fusion centers (e.g. SANDAG), CalGang, or other known problematic databases with a history of significant data hygiene and unlawfully obtained data concerns, this will be adverse to your stated goal of defending the intent of the ordinance, which is intended to mitigate harm and defend civil liberties by careful rule crafting. It should also be clarified as to whether the quoted phrase means public and/or private database, as to "local." Many vendors and data brokers provide subscription-based services to their databases and could fall under "local." These databases are rife with errors and worthy of oversight.

10. We have no comment on the proposed amendment.

11. Without knowing what is being proposed, we cannot evaluate as to whether it will harm or support the intent of the oversight framework.

12. We object to the reduction of time for the PAB to do its job, and for community input. This amendment would also be adverse to your stated goal of defending the intent of the ordinance, which requires adequate time for thoughtful analysis and careful rule crafting, in addition to allowing the public a meaningful bite at the apple participating in the rule making. If our strong suggestion to strike the "prior to soliciting a proposal" is adopted, the PAB won't have to struggle as hard to do its job like it does at present. When the relevant information is provided upfront, rather than piecemeal or not at all, and based on our significant and consistent participation in other jurisdictions like BART, San Francisco, and Oakland, we find that the average technology proposal requires 2-3 meetings of the reviewing body at most. This includes regular meetings, ad hoc subcommittee meetings, and special meetings.

    It is noteworthy that of all the existing ordinances in California like San Diego's, ours is the sole version without an express provision authorizing ongoing use of its existing technology, unless and until the City Council expressly rejects its corresponding proposed use policy. An amendment to add this was part of Mayor Gloria's withdrawn September '23 amendment package. This is likely the cause of the above referenced recent 24 policy en masse submission, and ongoing tension between administrative staff, the city attorney, and community advocates. **The PAB is caught in the crosshairs, unable to effectively perform.**

    When reviewing a complicated technology, the PAB would ideally invite vendors to participate in both ad hoc and regular meetings, with the idea that they would agree to attend as they want our contract. The city should emphasize to the PAB that they can invite vendors in to discuss the technical specifications of the technology they are selling to your city. Of course San Diego can't legally obligate them to participate, but it would be strange if vendors consistently declined to participate. Vendors are grateful to dispel rumors and conspiracy theories, and demonstrate that they have nothing to hide from the public.

    Rather than amending the time to review provision, San Diego might consider just emphasizing the chair's authority to call special meetings. In other jurisdictions, when there is an expiring contract or grant funding deadline, or knowledge that an item will likely not require more than one meeting, advisory boards and commissions have called special meetings to get the review done quickly and forwarded to the Council so they can take action. SDPD has some very powerful technology like Graykey, but the process can still be collegial. The process can be easy and collegial even on the controversial technologies, if participants work together in good faith **and** have the necessary information (by striking the "soliciting a proposal" provision). You can view an

example of Oakland's commission discussing controversial technology with their police department here[2]:
https://www.oaklandca.gov/meeting/privacy-advisory-commission-14

13. We strongly object to this proposed amendment, per our above arguments. The PAB will not care about 90% of the contract, nor will we desire to negotiate prices as that's not within the board's purview. At most, with two to three paragraphs pertaining to data ownership and usage of said data are reviewed with city staff, it should not take more than one meeting to review the contract.

    The only reason the PAB has no present authority to review contracts is because our recommendation to include it was not adopted. Such authority can be easily granted, by writing it into the PAB review process, likely by adding a subpart to Section 210.0101(n)(8), *Fiscal Cost*. San Diego needs to consider what a billion dollar corporation might do when their contract conflicts with a Council approved use policy. They may litigate, and you there is a fiduciary responsibility to ensure that does not occur. Including contract review isn't a heavy lift, nor an increase in the administrative burden when creation of a contract is already required by existing procurement practices. San Diego should include adding "proposed or operative contract" as a defined term, and then if you want to narrow the scope of work to ensure a timely review occurs, defining it to cover only the definitions of data (all types, including raw, and processed), and data rights (e.g. sharing, selling, repurposing) that the PAB needs to evaluate to do its job, and the operational provisions in each contract that pertain to the same. In addition, the existing ordinance at Section 210.0107 prohibits San Diego from entering into contracts that conflict with the provisions of the ordinance. PAB review will help ensure this provision is not violated.

14. We suggest one clarifying amendment in the existing proposal, to state "...that consolidates all technology *for which there is a corresponding approved use policy*." One would not expect a report on a technology with no data to provide and without this clarification confusion and unnecessary work may occur. We also recommend that the city weigh the pros and cons of amending to include a date certain, rather than "one year after approval" of the use policy which at volume will be problematic to track.

    The city must consider the number of covered technologies as the largest jurisdiction to date to attempt this. In California, Santa Clara and San Francisco are the next two largest jurisdictions, with both having around 180 technologies in play. They both have a date certain beginning in the second year after adoption of the policy. The first report is one year after adoption of the policy. Much smaller Oakland is a hybrid, allowing for a report to be submitted on a date certain, or one year after policy adoption, and staff has the discretion to determine which date they prefer. It is never the PAC's decision. This

[2] This particular video also addresses several of the points in this letter: contract review, special meetings, procurement and ACLU model not in alignment, cooperation in moving the item in a timely manner to Council, and exigent circumstances.

hybrid allows for departments with larger volume, like police and transportation, to have some necessary flexibility and spread the submissions out, while smaller volume departments can easily hit the date certain. Although it isn't a problem today, a date certain in San Diego for all technologies would prohibit public engagement and meaningful PAB review, due to the large amount of information to review a few years down the road.

However, as there is thankfully no proposed amendment to reduce the review period at this stage from 90 to 60 days, perhaps the PAB could get it all done in three months. The PAB could also call special meetings to accomplish its task, and although your existing ordinance allows for the requesting and granting of a 60 day extension to comply as to the annual report submissions, another amendment the city might consider here is to simply increase the length of the extension from the present 60 days to 90 days.

15. Regarding the right to cure with San Diego stakeholders pre-enactment of the ordinance, our concern with the current proposal is that 90 days is simply far too lengthy a period to continue to do harm. The proponents of this amendment are likely looking at Santa Clara County (the first in the nation to adopt this model, and for which no "lessons learned" were available) and Berkeley, which has one of the weakest ordinances in the country (and which has still been sued twice despite the overly-generous right to cure period). We recommend San Francisco's 30-day right to cure period, if such a right to cure is included.

    Of the 3 lawsuits in California under this ordinance model:

    1) Berkeley - a dispute over whether a technology was categorically exempt and therefore no duty to submit it for City Council approval existed. It was not exempt. Secure Justice successfully settled its claim, resulting in performance and payment of attorney fees and costs.
    2) Oakland - failure to submit policies for pre-existing technology, and failure to follow approved use policies. Secure Justice successfully settled its claim, resulting in performance and payment of attorney fees and costs.
    3) San Francisco - a dispute over whether police used a pre-existing technology which the ordinance allowed (like all such ordinances in CA except San Diego as stated above in #12), unless and until the proposed use policy is subsequently rejected by the governing body), or whether it was a new-technology. The two proponents of this lawsuit lost at the trial court and appeal levels.

We appreciate the thoughtfulness that went into the staff report and proposed amendments. The inflammatory rhetoric we had seen in the media and at PAB meetings led us to believe that far worse amendments would be proposed. We appreciate that you are truly trying to improve the system, and we support amendments that reduce the administrative burden so long as they do not subvert the ordinance's overall goals.

We are happy to answer any questions, and if requested, provide language from multiple jurisdictions that have addressed the particular topic, so that you have options to consider. These ordinances must be tailored to each jurisdiction, and we can help you get there if desired.

Respectfully,

Ike Anyanetu, Chair - City of San Diego Privacy Advisory Board
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