

August 2, 2018

Senator Jerry Hill
State Capitol, Room 5035
Sacramento, CA 95814

RE: SB 1186

Dear Senator Hill:

The undersigned are California-based law and information school faculty members and affiliates who work in the fields of privacy, information law, criminal law, and other related areas. We write to express our support for SB 1186, which would require local law enforcement agencies to obtain public approval from elected representatives for surveillance technology they wish to acquire. It would also require law enforcement agencies to write and obtain approval for a policy detailing how the surveillance technology, and the data it gathers, would be used. We support this bill because it would ensure that important legal and policy questions about law enforcement surveillance are properly addressed in a public forum by elected representatives, rather than by law enforcement agencies acting alone.

Today local law enforcement agencies can acquire and use powerful surveillance technology. Examples include automatic license plate readers, which scan the plate and collect the location of every passing car;¹ stingrays, which can force cell phones to reveal their locations even when they are indoors;² and unmanned surveillance drones, which substantially expand the capacity of local law enforcement agencies to conduct aerial surveillance.³

These and other surveillance technologies have the potential to improve public safety. But they also can gather substantial amounts of data on private individuals, with potentially negative impacts on privacy and free speech. And acquiring such technology in a non-transparent manner can also undermine trust in government. For example, automatic license plate readers can be deployed to identify stolen cars, but those devices have also been deployed to log cars at places of worship.⁴

¹ See Al Baker, *Camera Scans of Car Plates Are Reshaping Police Inquiries*, N.Y. Times (Apr. 11, 2011), <https://www.nytimes.com/2011/04/12/nyregion/12plates.html>.

² Monica Akhtar, *How Stingray Surveillance Devices Work*, Wash. Post (Apr. 11, 2018), https://www.washingtonpost.com/video/business/technology/how-stingray-cellphone-surveillance-devices-work/2018/04/11/62c5f1b4-3db4-11e8-955b-7d2e19b79966_video.html.

³ Dan Gettinger, Center for the Study of Drones, *Public Safety Drones: An Update* (May 2018), <https://dronecenter.bard.edu/public-safety-drones-update/>.

⁴ Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques>.

Additionally, federal immigration authorities have now obtained access to a nationwide license plate reader database.⁵

Whether local law enforcement agencies should deploy surveillance technology, and the conditions under which they deploy it, raise important legal and public policy questions. For this reason, local law enforcement agencies seeking to further community public safety goals should not unilaterally decide what surveillance technology they acquire and deploy. It is important that elected representatives—and through them, members of the public—have an opportunity to weigh in on whether and how surveillance technology is used, holistically considering its impact on civil rights and liberties and the overall safety needs of the community.

Unfortunately, all too often this does not happen. In Oakland, for example, the city was years into constructing a Domain Awareness Center to integrate surveillance data from around the city into one center for analysis and sharing before members of the city council realized what was being constructed.⁶ In San Jose, the police department acquired a drone for surveillance without consulting members of the community.⁷ And only in response to public records requests from advocacy organizations have elected representatives learned the full extent of other surveillance initiatives, such as San Diego's use of facial recognition technology.⁸

Surveillance technology can escape full public vetting for a variety of reasons, but chief among them is the ability of local law enforcement agencies to rely on federal funds to defray the costs of this technology. Since 9/11, the U.S. Department of Homeland Security has placed greater emphasis on helping local law enforcement agencies collect data, with the goal of facilitating greater sharing of data among agencies and with the federal government.⁹ The billions of dollars of federal grant funding have weakened the reliance of local law enforcement agencies on local elected representatives for funding. Pre-acquisition oversight requirements that may be applicable to technology purchases at the federal level, such as Privacy Impact Assessments designed to analyze the impact of new technologies on

⁵ Russell Brandom, *Exclusive: ICE Is About to Start Tracking License Plates Across the US*, The Verge (Jan. 26, 2018), <https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions>.

⁶ Catherine Crump, *Surveillance Policy Making by Procurement*, 90 Wash. L. Rev 1595, 1616-29 (2016).

⁷ David Louie, *SJPD to Lay out Plans for Use of Drone with Concerned Citizens*, ABC News (Nov. 13, 2014), <http://abc7news.com/technology/sjpd-to-lay-out-plans-for-use-of-drone-with-concerned-citizens-/394170/>.

⁸ Dave Maass & Jennifer Lynch, *San Diego Gets in Your Face With New Mobile Identification System*, Electronic Frontier Found. (Nov. 7, 2013), <https://www.eff.org/deeplinks/2013/11/san-diego-gets-your-face-new-mobile-identification-system>.

⁹ See generally Crump, *supra* note 6 (cataloging federal funding sources available to local law enforcement agencies seeking to acquire surveillance technology).

members of the public, are not applicable to city and county agencies considering surveillance technology acquisitions.

Local governing bodies, not law enforcement agencies acting on their own, should decide what surveillance technology is deployed in a community. Local elected representatives are the primary source of oversight for local law enforcement agencies. We rely on them to make sure that law enforcement agencies make decisions in step with local priorities. Yet federal funding has weakened these oversight mechanisms, displacing the control that local residents traditionally possessed over important public safety policy questions.

Fortunately, there are proven mechanisms for oversight of surveillance technology acquisition and deployment that some California cities use today. Santa Clara County and the cities of Davis, Berkeley, and Oakland have all passed ordinances requiring government entities to disclose what surveillance technology they intend to acquire, and to seek pre-acquisition approval for a policy to govern how the technology, and the data it gathers, is used.¹⁰

SB 1186 builds on these local reforms and proven processes, institutionalizing them across California. By requiring local law enforcement agencies to obtain local approval to use these powerful surveillance systems, SB 1186 enhances government transparency. While the details of how law enforcement uses a technology in a particular criminal case may need to be kept secret, basic information about the technology and its deployment in a locality raises important policy concerns the public should have the opportunity to consider.

In addition, SB 1186 makes clear that elected representatives and members of the public have important roles to play in deciding policy questions. The bill provides law enforcement agencies the opportunity to first formulate their own technology use policy. That is altogether appropriate given that law enforcement agencies have relevant expertise. But it gives elected representatives the final say on important questions such as whether a technology should be used at all and, if so, what data should be collected, stored, and shared with others.

Importantly, the requirements of SB 1186 apply equally to county as well as city law enforcement agencies. That is in part because county law enforcement agencies

¹⁰ See, e.g., Cyrus Farivar, *Oakland Passes “Strongest” Surveillance Oversight Law in US*, *Ars Technica* (May 3, 2018), <https://arstechnica.com/tech-policy/2018/05/oakland-passes-strongest-surveillance-oversight-law-in-us/>; Michael Maharrey, *Davis California Passes Ordinance Creating Oversight and Transparency for Surveillance Programs*, *OffNow* (Apr. 6, 2018), <https://offnow.org/davis-california-passes-ordinance-creating-oversight-and-transparency-for-surveillance-programs/>; Emilie Raguso, *Officials Approve New Rules on City Surveillance; May Be First in the Nation*, *Berkeleyside* (Mar. 15, 2018), <http://www.berkeleyside.com/2018/03/15/berkeley-officials-approve-new-rules-city-surveillance-may-first-nation>.

serve substantial populations living in unincorporated areas, and these Californians should also have the opportunity to have law enforcement surveillance policies vetted by elected representatives.¹¹ Finally, the Senate Judiciary Committee's analysis of SB 1186 emphasized that such oversight furthers the purpose of existing California law that generally requires the broad exercise of oversight of District Attorneys and Sheriffs.¹²

Three years ago, California led the way in protecting privacy by passing the California Electronic Communications Privacy Act, which updated the laws governing government access to electronic communications and devices to take account of new technology. Here, once again, California should be a leader in the regulation of law enforcement surveillance. By passing SB 1186, California could help ensure important legal and policy questions regarding local law enforcement deployment of surveillance technologies are resolved in a democratic and transparent manner.

Signed,¹³

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¹¹ California sheriffs frequently function as the primary policing presence in California communities. In Los Angeles County alone, the Sheriff's Department provides policing services to more than one million residents living in the county's unincorporated areas. In addition, forty of the county's eighty-eight cities contract with the Sheriff's Department to provide local police protection. *See* Los Angeles County Sheriff's Department, *Contract Law Enforcement Services* (rev. Jan. 2009), <https://www.sheriffs.org/sites/default/files/uploads/CLESDocument.pdf>.

¹² Senate Judiciary Comm., SB 1186 Analysis, at *16 (Apr. 16, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1186#.

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