

May 9, 2024

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Re: Comments on the NYPD March 28, 2024 Draft Impact and Use Policy for
Electromagnetic Weapons Detection System

Dear Commissioners Caban and Barrett,

On March 28, 2024, the NYPD and Mayor Eric Adams announced their intention to move forward with weapon scanning technology in the New York City subway system.¹ On the same day, in compliance with the Public Oversight of Technology (POST) Act, the NYPD posted a draft Impact and Use Policy for Electromagnetic Weapons Detection System for comment. But the NYPD's compliance with the Post Act ends there.

As discussed in previous comments by The Legal Aid Society,² and bolstered by the Office of the Inspector General's own report, the NYPD's Impact and Use Policies (IUPs) fail to satisfy the

¹ Marcia Kramer, *NYC subway testing out weapons detection technology, Mayor Adams says*, CBS News, March 29, 2024 available at <https://www.cbsnews.com/newyork/news/nyc-subway-crime-weapons-detection-technology-mayor-eric-adams/> [last accessed May 3, 2024]

² The Legal Aid Society, *Comments on the NYPD Jan. 11, 2021 Draft Impact & Use Policies, pursuant to the Public Oversight of Surveillance Technology (POST) Act*, February 25, 2021, available at <https://www.brennancenter.org/sites/default/files/2021->

requirements of the POST Act. The OIG previously found that “the vast majority of the IUPS produced by the NYPD were general and generic” and provided specific recommendations for the NYPD to improve the policies to conform with the Post Act’s requirements.³ In spite of significant public comments, and the OIG’s report, the NYPD has made no substantive changes to the existing IUPS in line with the recommendations and continues to issue new IUPS, as this one, that are wholly inadequate.

Pursuant to the POST Act, each IUP must address 10 specific issues. The Electromagnetic Weapons Detection System IUP fails to address the basic requirements of the law. From failing to provide any information about a potential vendor, claiming inapplicable constitutional exceptions, to obfuscating the capability and functioning of the proposed technology, the IUP fails in every regard.

Lack of Vendor Information and Detailed Information about the Technology’s Capabilities

The draft policy is completely silent as to who will provide the technology the NYPD intends to use and provides only the most barebones overview of how an electromagnetic weapons detection system *may* operate. The NYPD remains in the process of identifying companies “with expertise in weapons-detection” technology.⁴ Without naming a specific vendor or device, it is impossible to know if the scanner ultimately selected functions the way the IUP describes. There is also no verifiable information from any manufacturer about how their products actually operate.

The IUP is also inconsistent with the limited information provided by the manufacturers about their technology. The technology is described as emitting “ultra-low frequency, electromagnetic pulses,” yet none of the manufacturer’s websites even use the phrase “electromagnetic” when describing their products. Absent from the IUP entirely is any mention of artificial intelligence, though each company providing the electromagnetic weapons scanners advertises its technology as using artificial intelligence. Evolv, the scanner demonstrated by the NYPD, explicitly describes its own technology as using “advanced sensor technology and artificial intelligence.”⁵ Zero Eyes, another company providing this technology, describes its product as an “AI image

[03/Legal%20Aid%20Society%20Comments%20on%20the%20Jan.%2011%2C%202021%20NYPD%20POST%20Act%20Draft%20Policies.pdf](#) [last accessed May 3, 2024]

³ Office of the Inspector General for the NYPD (NYPD-OIG), *An Assessment of NYPD’s Response to the POST Act*, November 2, 2022, available at https://www.nyc.gov/assets/doi/reports/pdf/2022/20PostActRelease_Rpt_11032022.pdf [last accessed May 3, 2024]

⁴ Associated Press, *New York City to test AI-enabled gun scanners in subway system*, March 29, 2024, available at <https://www.theguardian.com/technology/2024/mar/29/new-york-city-subway-ai-gun-scanners> [last accessed May 3, 2024]

⁵ Evolv, *Concealed Weapons Detection*, available at <https://www.evolvtechnology.com/products/evolv-express> [last accessed May 3, 2024]

classification system.”⁶ Omnilert gun detection advertises employing a “data-centric AI methodology.”⁷

Though the NYPD insists they have not identified a vendor, at the press conference held on March 28, 2024, Mayor Adams and NYPD Commissioner Caban demonstrated the use of a scanner made by Evolv.⁸ Not only have the Evolv scanners already proven themselves inaccurate and ineffective, but they have come under attack from their own investors for deception and fraud about the technology’s efficacy.

The potential NYPD pilot would not be the first mass rollout of Evolv scanners, but it would be the first in a subway system. This, despite Evolv CEO’s statement that “subways in particular are not a place that we think is a good use-case for us, both for the concept of operations, and being below ground and interference with the railways.”⁹ Even more concerning is the Mayor and NYPD’s insistence on forging forward with this technology though every pilot program has been a spectacular failure.

The scanners have been piloted in schools¹⁰ and hospitals,¹¹ and in almost every instance proven completely unreliable. School administrators reported that the scanners caused “chaos” and failed to detect common handguns.¹² On one occasion, a principal reported that safety officers searched “almost every child” based on consistent false alarms.¹³ The most commonly used sensitivity setting failed to detect one of the most common handguns in the country, while simultaneously triggering false alarms for three-ring binders and laptops.¹⁴ In one case, the scanner failed to detect a law enforcement officer’s service weapon, though it triggered an alarm for a 7-

⁶ ZeroEyes, *ZeroEyes Gun Detection Technology*, available at <https://zeroeyes.com/technology/> [last accessed May 3, 2024]

⁷ Omnilert, *Solutions: Active Shooter Solution*, available at <https://www.omnilert.com/solutions/gun-detection-system> [last accessed May 3, 2024]

⁸ Meredith Deliso, *NYC Plans To Test Gun Scanners In Subway System, Mayor Announces*, ABC News, March 28, 2024 available at <https://abcnews.go.com/US/nyc-gun-scanners-subway-system-pilot/story?id=108610973> [last accessed May 3, 2024]

⁹ Michael Gartland, *CEO Of Weapon Scanner Company Showcased By NYC Mayor Adams: Subways Not A “Good Use-Case”*, The Daily News, March 29, 2024 available at <https://www.nydailynews.com/2024/03/29/weapon-scanner-company-showcased-by-nyc-mayor-adams-subways-not-a-good-use-case-underground/> [last accessed May 3, 2024]

¹⁰ Aaron Gordon, *‘The Least Safe Day’: Rollout of Gun-Detecting AI Scanners in Schools Has Been a ‘Cluster,’ Emails Show*, Vice, August 25, 2022, available at <https://www.vice.com/en/article/5d3dw5/the-least-safe-day-rollout-of-gun-detecting-ai-scanners-in-schools-has-been-a-cluster-emails-show> [last accessed May 3, 2024]

¹¹ Felipe De La Hoz, *NYC Has Tried AI Weapons Scanners Before. The Result: Tons of False Positives*, Hell Gate, April 2, 2024, available at <https://hellgatencyc.com/nyc-ai-weapons-scanners-pilot-false-positives> [last accessed May 3, 2024]

¹² Aaron Gordon, *‘The Least Safe Day’: Rollout of Gun-Detecting AI Scanners in Schools Has Been a ‘Cluster,’ Emails Show*, Vice, August 25, 2022, available at <https://www.vice.com/en/article/5d3dw5/the-least-safe-day-rollout-of-gun-detecting-ai-scanners-in-schools-has-been-a-cluster-emails-show> [last accessed May 3, 2024]

¹³ *Id.*

¹⁴ *Id.*

year-old's lunch box.¹⁵ In the 7-month pilot at Jacobi Medical Center in the Bronx, around 43,800 of 50,000 alarms – nearly 85% – were false positives.¹⁶ During the course of the pilot, the scanners' accuracy did not improve, and in the last month of their use, yielded a 95% false positive rate.¹⁷

Evolv itself is alleged to have doctored reports, refused to release information, and lied to investors. The National Center for Spectator Sports Safety and Security (NCS⁴) published the results of an “operational exercise” regarding the advertised capabilities of the Evolv technology. Evolv publicized the report as a review from a fully independent third party, with the negative findings redacted and without disclosing that they had in fact paid for the research.¹⁸ Evolv removed results that found, among others, that “knives are not consistently detected” and that the scanners had only a 92% detection rate for weapons of the type a traditional metal detector would alert on 100% of the time.¹⁹

Evolv is also currently the subject of multiple lawsuits and federal investigations. Investors have filed suit against Evolv for false and misleading statements about the capabilities of the technology.²⁰ The company is also being sued by a student in New York who was stabbed after an Evolv scanner failed to detect another student carrying a knife.²¹ In February, the U.S. Securities and Exchange Commission (SEC) began a fact-finding inquiry into Evolv, while the Federal Trade Commission (FTC) reached out to investors in October for information about aspects of Evolv's marketing practices.²²

The omission of any named vendor or specific contract simply results in another generic, vague, boilerplate impact and use policy. But it is particularly concerning in this case, where the product unveiled at the public press conference is one with a history of documented failures that is

¹⁵ Georgia Gee, *Unalarmed*, The Intercept, May 7, 2023, available at <https://theintercept.com/2023/05/07/ai-gun-weapons-detection-schools-evolv/> [last accessed May 3, 2024]

¹⁶ Felipe De La Hoz, *NYC Has Tried AI Weapons Scanners Before. The Result: Tons of False Positives*, Hell Gate, April 2, 2024, available at <https://hellgatency.com/nyc-ai-weapons-scanners-pilot-false-positives> [last accessed May 3, 2024]

¹⁷ *Id.*

¹⁸ *NCS4's Secretly Paid-For, Manipulated Research Results*, Internet Protocol Video Market (IPVM), Dec. 6, 2022, available at <https://ipvm.com/reports/ncs4-sponsorships> [last accessed May 3, 2024]

¹⁹ Nikita Ermolaev and Conor Healy, *BBC Exposes Evolv with IPVM Research*, Internet Protocol Video Market (IPVM), November 2, 2022, available at <https://ipvm.com/reports/bbc-evolv> [last accessed May 3, 2024]

²⁰ Annie McDonough, *Company Behind Gun Detection Tech Previewed In Subway Faces Multiple Lawsuits And Federal Investigations*, City and State New York, April 2, 2024 available at <https://www.cityandstateny.com/policy/2024/04/company-behind-gun-detection-tech-previewed-subway-faces-multiple-lawsuits-and-federal-investigations/395394/> [last accessed May 3, 2024]

²¹ Shalon Stevens, *Why A Utica High School Had To Replace Its Weapon-Detecting Security System*, Spectrum News 1, March 6, 2023 available at <https://spectrumlocalnews.com/nys/central-ny/news/2023/03/05/utica-csd-replaces-security-system-after-october-stabbing> [last accessed May 3, 2024]

²² Annie McDonough, *Company Behind Gun Detection Tech Previewed In Subway Faces Multiple Lawsuits And Federal Investigations*, City and State New York, April 2, 2024 available at <https://www.cityandstateny.com/policy/2024/04/company-behind-gun-detection-tech-previewed-subway-faces-multiple-lawsuits-and-federal-investigations/395394/> [last accessed May 3, 2024]

also under scrutiny from both private and governmental entities. Not only is the IUP vague, but the manufacturers' websites are opaque – hiding demo videos, providing only marketing copy, and refusing to comment on how their technology works.²³ Considering NYPD's own history of, and continued, lack of transparency regarding their contracts with companies providing surveillance technology, the public cannot simply trust that such a generic policy will truly safeguard their rights.²⁴

Policies & Procedures Relating to Retention, Access & Use of the Data and Safeguard & Security Measures against Unauthorized Access

The draft IUP does not adequately address legitimate privacy concerns and safeguarding data, nor does it recognize the need for retaining information for discovery purposes. The retention and use policy provides that if an alert is relevant to a criminal matter, “the still image. . . will be downloaded and retained within an appropriate NYPD computer or case management system. Otherwise, data is automatically deleted on . . . a first-in-first-out basis . . . or thirty (30) days after the alert was created, whichever is sooner.” This policy fails in every way to create a system of retention that adequately conforms to discovery obligations in a criminal proceeding.

The safeguard and security measures simply repeat the boilerplate language from previous IUPs, without addressing any measures specific to this data, or previous security breaches of NYPD systems. The policy is inadequate and fails to properly balance the need to retain information for discovery purposes and privacy concerns.

Training & Internal Audits and Oversight Mechanisms

The barebones policy of auditing and oversight provided in the IUP are insufficient to ensure that the civil and privacy rights of New Yorkers are adequately protected. As to training, the IUP states only that NYPD personnel will receive “specialized command level training.” There are no details regarding who will provide the training, the length of the training, or whether the training will include any testing or field work of any kind.

The auditing policy is similarly brief and does not provide any true oversight of the type envisioned by the POST Act. The policy only provides that supervisors “will be responsible for

²³ Aaron Gordon, ‘The Least Safe Day’: Rollout of Gun-Detecting AI Scanners in Schools Has Been a ‘Cluster,’ *Emails Show*, Vice, August 25, 2022, available at <https://www.vice.com/en/article/5d3dw5/the-least-safe-day-rollout-of-gun-detecting-ai-scanners-in-schools-has-been-a-cluster-emails-show> [last accessed May 3, 2024]

(“Both Evolv and CMS declined to discuss details about how the security system works, the sensitivity settings it uses, and what objects can and can’t get through at various settings.”)

²⁴ Jason Beeferman, *NYPD Spent \$2.7B On Technology. A Court Ruled For It To Release The Details*, Politico Pro, October 20, 2023 available at <https://subscriber.politicopro.com/article/2023/10/nypd-spent-2-7b-on-technology-a-court-ruled-for-it-to-release-the-details-00124282> [last accessed May 3, 2024]

security and proper utilization” and that they are “directed to inspect all areas containing NYPD computer systems at least once a tour and ensure that all systems are being used within NYPD guidelines.” Not only are these duties extraordinarily vague, there is absolutely no recordkeeping of any kind to ensure that audits are completed thoroughly and accurately.

Disparate Impacts

Yet again, the NYPD has drafted an IUP that fails to acknowledge in any way the history and harm of years of discriminatory NYPD practices and disproportionate use of surveillance technology against already overpoliced communities.²⁵ The NYPD remains under the supervision of a third-party federal monitor appointed pursuant to the *Floyd* settlement,²⁶ arising from the NYPD’s discriminatory and unconstitutional use of Stop-and-Frisk. The NYPD also already has a history of disproportionately policing communities of color in the subway.²⁷ In the New York City area, where Black and brown residents are more likely to take public transportation to work than white residents who are more likely to drive their car to work,²⁸ these devices will serve as nothing more than a high tech Stop-and-Frisk.

Aggressive policing tactics such as the one proposed here are not only unconstitutional but they also lead to unnecessary police interactions with the public. The heightened tension in these encounters, with suspicion built off faulty devices, will unnecessarily place New Yorkers, particularly New Yorkers of color, in dangerous situations. If previous pilots are any indication, this technology will be far more successful at perpetuating the cycle of mistrust between the NYPD and terrorizing New Yorkers just trying to go to work, than ever uncovering an unlawful weapon.

Rules, Processes, and Guidelines Relating to Use of the Technology

The POST Act also requires IUPs to detail “whether the department obtains a court authorization for such use of a surveillance technology, and, if so, the specific type of court authorization sought.” In their IUP, the NYPD claims, without basis, that “the NYPD is deploying the electromagnetic weapons detection system pursuant to the special needs doctrine under the Fourth Amendment and will not seek court authorization in connection with its use.”

²⁵ See Sidney Fussell, *How Surveillance Has Always Reinforced Racism*, Wired, June 19, 2020, available at <https://www.wired.com/story/how-surveillance-reinforced-racism/> [last accessed on May 3, 2024]

²⁶ *Floyd, et al. v. City of New York, et al.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)

²⁷ Anna Flagg and Ashley Nerbovig, *Subway Policing in New York City Still Has A Race Problem*, *The Marshall Project*, September 12, 2018 available at <https://www.themarshallproject.org/2018/09/12/subway-policing-in-new-york-city-still-has-a-race-problem> [last accessed May 3, 2024]

²⁸ See TransCenter: Equity Dashbord, *The New York Story* available at <https://dashboard.transitcenter.org/story/nyc> and Julianne Cuba, *Report: Racial and Economic Inequities in Transit Affect Accessibility to Jobs, Healthcare*, Streetsblog NYC, June 18, 2021, available at <https://nyc.streetsblog.org/2021/06/18/report-racial-and-economic-inequities-in-transit-affect-accessibility-to-jobs-healthcare> [last accessed May 3, 2024]

Under Federal and State Law, a police officer may not stop or detain a member of the public unless the officer has reasonable suspicion to believe the person has committed, is committing, or is about to commit a crime.²⁹ Under New York law, in order to conduct a frisk, an officer must have reasonable suspicion that an individual is armed. The NYPD cannot simply circumvent the constitution by stating that they are utilizing the device in accordance with the special needs exception, especially when it is clear that the exception is inapplicable here. The Supreme Court has consistently held that the special needs exception can only be justified by “concerns other than crime detection.”³⁰

In 2005, the NYPD asserted that a newly enacted random bag search program was justified under the special needs exception to the Fourth Amendment, specifically, to combat alleged terrorist attacks. In successfully defending the program, the NYPD argued that the program’s only purpose was to deter terrorism and not to “to detect evidence of ordinary criminal wrongdoing” or to address a “general interest in crime control.”³¹ The United States Court of Appeals for the Second Circuit held that “[w]here, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need” and was not as the plaintiffs contended a program with an objective “merely to gather evidence for the purpose of enforcing the criminal law.” The Second Circuit also previously upheld the placement of metal detectors at airports because the purpose of the program was the extraordinary need of “preventing hijackings” and was not intended “as a general means for enforcing the criminal laws.”³²

The United States Supreme Court has however strongly cautioned that ordinary crime control can never qualify as a special need. In *Indianapolis v. Edmond* the city of Indianapolis erected checkpoints across the city in an effort to stop the trafficking of unlawful drugs.³³ The court acknowledged that “traffic in illegal narcotics creates social harms of the first magnitude” and that the “law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns.” Nonetheless, “because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.”

Public comments from both the Mayor and NYPD leave no doubt that scanners are being used for ordinary law enforcement purposes. “Random acts of violence play on the psyche of New York,” Mayor Adams said at a news conference announcing the program. “We are going to evolve in a way to ensure that technology becomes part of the public safety apparatus.” The Mayor acknowledged that the odds of being a victim of a crime on the subway are remote but justified the

²⁹ New York Criminal Procedure Law § 140.50 *codifying Terry v. Ohio*, 392 U.S. 1 (1968)

³⁰ *Chandler v. Miller*, 520 U.S. 305, 314 (1997)

³¹ *MacWade v. Kelly*, 05 CIV 6921 (RMB)(FM), 2005 WL 3338573, (S.D.N.Y. Dec. 7, 2005), *aff’d*, 460 F.3d 260 (2d Cir 2006)

³² *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974)

³³ *Indianapolis v. Edmond*, 531 U.S. 32 (2000)

program on the grounds that “if they don’t feel safe, we are not accomplishing our task.”³⁴ By the Mayor’s own admission, the very purpose of the program is ordinary crime control prohibited by the Fourth Amendment.³⁵

In relation to unconstitutional drug checkpoints the Supreme Court held, “We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”³⁶ Similarly, here the current program cannot be sanctioned by a general suspicion of each of the millions of individuals who utilize the New York City public transit system. New Yorkers have the right to freely move about the city – go to work, to the grocery store, to visit friends – without being treated like suspects of a crime. The program is an unconstitutional intrusion into the rights of New Yorkers who are simply using public transportation.

Summary

Where the NYPD seeks to implement new, and largely untested technology, they are under an obligation to provide a draft IUP 90 days prior to implementation. This requirement is not one of simply *notice*, it is one of *oversight*. As with the existing IUPs, the NYPD has failed to draft a policy that adheres to the requirements of the POST Act and empower the public and the Office of the Inspector General to properly oversee and audit the NYPD’s use of surveillance technology. The NYPD has failed to provide any concrete information regarding the electro-magnetic scanners or their use, and completely omitted any of the well-documented information about its prior failures, while asserting baseless legal claims of right to utilize it. The NYPD proves again that they believe themselves to be above the law and beyond oversight.

Regards,

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³⁴ Hurubie Meko and Ana Ley, *New York Will Test Gun-Detecting Technology in Subway System, Mayor Says*, New York Times, March 28, 2024 available at <https://www.nytimes.com/2024/03/28/nyregion/nyc-subway-gun-detector.html> [last accessed May 3, 2024]

³⁵ It should further be noted that unlike the anti-terrorism bag search program found to be constitutional in which the intrusion only lasted a matter of seconds, here the exceptionally high false positive rate necessarily requires an intrusion of a far greater length in time, enough for commuters to miss their train and arrive late to work, a doctor’s appointment, etc.

³⁶ *Indianapolis v. Edmond*, 531 U.S. 32 (2000)

Cc: NYC Council Speaker Adrienne E. Adams (Via Email)
NYC Council Public Safety Committee Chair Yusef Salaam (Via Email)
NYC Council Technology Committee Chair Jennifer Gutiérrez (Via Email)
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