RECOMMENDATION: Require Public Use Policies for High-Risk AI

The National Artificial Intelligence Advisory Committee (NAIAC)
Law Enforcement Subcommittee (NAIAC-LE Subcommittee)

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RECOMMENDATION

<u>**Recommendation:**</u>
Require public use policies for high-risk AI.

A. Background:

The Office of Management and Budget's (OMB) draft guidance outlines a number of "minimum practices" for safety-impacting and rights-impacting AI.[1] Among these requirements are mandatory AI Impact Assessments,[2] ongoing monitoring,[3] adequate training,[4] and providing public notice and plain language documentation through the AI use case inventory.[5]

These requirements are substantial. Many of these requirements, such as a meaningful determination of risks and benefits, would be difficult to fulfill unless the agency drafts an acceptable use policy — a set of principles and rules that define how a given technology may be used, and the responsibilities of agency personnel. But there is no explicit requirement that agencies draft (or publish) a use policy.

At present, law enforcement agencies across the country make methodical use of policy manuals. From general expectations to the specific procedures that officers must follow, manuals govern most aspects of day-to-day policing. Policies are reviewed and updated on a regular basis. A lack of written policies, by contrast, can contribute to legal liability findings.[6] Given the central role that policies play in law enforcement agencies today, we expect that most agencies adopting safety- or right-impacting AI will create policies.

Written policies are important, but for policing to be a shared endeavor between communities and police, the public needs access to the police department's manual

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[1] Shalanda D. Young, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Section 5.c.vi - .v., U.S. OMB, November 2023, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf.

[2] OMB, "Advancing Governance…," Section 5.c.iv.A, requiring the agency to document the purpose for the AI, its expected benefits, its potential risks, the appropriateness of training data, and other aspects of the technology and its use.

[3] OMB, "Advancing Governance…," Section 5.c.iv.D.

[4] OMB, "Advancing Governance…," Section 5.c.iv.F.

[5] OMB, "Advancing Governance…," Section 5.c.iv.H.

[6] *See, e.g.*, Vineyard v. County of Murray, 990 F.2d 1207 (11th Cir.), cert. denied 510 U.S. 1024 (1993).

— the document that sets policies and actions. Being able to read and compare departmental policies is essential to evaluate how your community is being policed.[7]

B. Recommendation:

<u>We recommend that OMB (or appropriate arm of the executive branch) require:</u>

- <u>That law enforcement agencies create a use policy for each safety-impacting and rights-impacting AI tool</u>

- <u>That these use policies should be made public if the AI tool is subject to inclusion in the use case inventory</u>

The federal government has imposed a similar policy requirement on law enforcement in other contexts. President Biden's 2022 Executive Order included policy requirements regarding use of force, no-knock warrants, and body-worn cameras.[8] And when it comes to body-worn cameras, federal rules impose policy requirements on grant recipients.[9] Requiring that agencies publish their use policies serves as a useful supplement to the UCIs, which, on their own, provide little meaningful information about what the technology is or how it is used.[10] Publishing policies also creates an opportunity within the law enforcement community, allowing agencies to learn from one another.[11]

<u>We further recommend that OMB (or appropriate arm of the executive branch) include minimum requirements for an acceptable use policy, such as:</u>

- Description and purpose of the technology

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[7] "The Manual Initiative," Policing Project, NYU School of Law, n.d., https://www.policingproject.org/manuals-overview-findings.

[8] Executive Order 14074 of May 25, 2022, "Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety," Code of Federal Regulations, 32945-32963, https://www.federalregister.gov/documents/2022/05/31/2022-11810/advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and: Sections 7 & 8 (force); Section 10 (no-knocks); Section 13 (BWCs).

[9] "BJA FY 2022 Edward Byrne Memorial Justice Assistance Grant Program – Local Solicitation," U.S. DOJ, June 22, 2022, https://bja.ojp.gov/funding/o-bja-2022-171368.pdf (requiring that any department purchasing body-worn cameras with JAG funds certify that the recipient "has policies and procedures in place related to BWC equipment usage, data storage and access, privacy considerations, and training").

[10] "2023 Agency Inventory of AI Use Cases," U.S. DOJ, https://www.justice.gov/open/page/file/1517316/download.

[11] By publishing policies, the federal government would also create a trickle-down effect — disseminating best practices to smaller, less-resourced agencies.

- Authorized and prohibited use(s), including:
  - Purposes for which the technology may and may not be used
  - Offenses (or categories of offenses) that the technology may and may not be used to investigate

- Protocols to ensure lawful and consistent use, including:
  - The legal and evidentiary standards that will govern each authorized use
  - The procedural rules that will govern use, including whether prior approval from a supervisor or court is required before the technology is used
  - Internal reporting requirements

- Authorized users
  - Which agency personnel are authorized to use the technology
  - Training or other prerequisites required for users of the technology

- Data collection and retention, including:
  - The types of data that will be collected, purchased, repurposed, or analyzed using the tool
  - Any measures that the agency will take to minimize the inadvertent collection of additional data
  - How long data will be retained
  - The process by which data will be deleted after the retention period elapses

- Data access, analysis, and release:
  - The circumstances under which data collected using the technology may be accessed for further investigation or included in a database
  - The circumstances under which data may be shared with other government agencies, private entities, or with members of the public
  - The circumstances under which data may be received from other government agencies

- Documentation and supervisory review:
  - Whether and how agency officials must document their use of the technology or database
  - What responsibilities supervisors will have, if any, to document and review each deployment or use

ACKNOWLEDGEMENTS

The NAIAC-LE Subcommittee participated in the preparation of this document.

A quorum of the membership of NAIAC reviewed and approved this document.

ABOUT NAIAC-LE SUBCOMMITTEE

The Law Enforcement Subcommittee of the National Artificial Intelligence Advisory Committee (NAIAC) has the responsibility to make recommendations and provide advice on matters relating to the development, adoption, or use of AI in the context of law enforcement.

The Subcommittee was established in Section 5104 (e) of the National Artificial Intelligence Initiative Act of 2020. It is charged with providing advice to the President, through recommendations that will be considered by the full NAIAC, on a range of legal and ethical issues that will arise as law enforcement increases its use of AI tools. These issues include AI bias, data security, adoption protocols, and legal standards. (Section 5104 (e) (2).)

The Law Enforcement Subcommittee was established in the summer of 2023 and began its work in August 2023.

ABOUT NAIAC

The National Artificial Intelligence Advisory Committee (NAIAC) advises the President and the White House National AI Initiative Office (NAIIO) on the intersection of AI and innovation, competition, societal issues, the economy, law, international relations, and other areas that can and will be impacted by AI in the near and long term. Their work guides the U.S. government in leveraging AI in a uniquely American way — one that prioritizes democratic values and civil liberties, while also increasing opportunity.

NAIAC was established in April 2022 by the William M. (Mac) Thornberry National Defense Authorization Act. It first convened in May 2022. It consists of leading experts in AI across a wide range of domains, from industry to academia to civil society. https://www.ai.gov/naiac/

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