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Re: BART Surveillance & Community Safety Act – SUPPORT

Dear members of the BART Board of Directors:

On behalf of the Electronic Frontier Foundation (EFF), I write to urge the BART Board of Directors (Board) to adopt the BART Surveillance & Community Safety Act (Act).

EFF also urges the Board to make two changes to the version of the Act that the BART Technology Committee approved earlier this month. First, the Board should remove the vague and overbroad exemptions for “security sensitive information” and “sensitive security information.” Second, to ensure effective enforcement of the Act, the Board should add to the private cause of action the remedy of fee shifting for prevailing plaintiffs.

EFF is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy rights in the digital world. EFF was founded in 1990, is headquartered in San Francisco, and has over 33,000 members.

1. Why BART should adopt the Act.

New technology has the power to improve our lives. It can make our government more accountable and efficient. But it also can intrude on our privacy, chill our free speech, and unfairly burden communities of color.

Each government surveillance technology raises a thicket of difficult questions. Should it be used at all? What are the benefits and the costs? Will it actually make us safer? If it is adopted, who will be targeted? What are the privacy safeguards?



These are questions that the BART Board of Directors should answer before BART adopts surveillance technology. The general public should be heard, too. When all concerned stakeholders participate, we make better decisions.

This Act now before the BART Board is part of a statewide movement to ensure community control over whether government adopts surveillance technology, and if so, how government may use such technology. Last year, Santa Clara County adopted an ordinance requiring this community control.¹ In Oakland² and Palo Alto,³ city council committees recently advanced similar proposed laws. Further, the State of California in 2015 enacted statutes requiring transparency and oversight of automatic license plate readers⁴ and cell site simulators.⁵

2. What the Act would do.

The Act would require the following:

- BART entities must seek Board approval before acquiring new surveillance technology.
- BART entities seeking such approval must provide the Board a Surveillance Impact Report and a proposed Surveillance Use Policy. The Board in turn must provide these documents to the public.
- To approve a surveillance technology, the Board must determine, at a properly-noticed public meeting, that the benefits outweigh the costs, and that the Policy will reasonably safeguard civil liberties and civil rights.
- If the Board approves a surveillance technology, the BART entity using the technology must annually submit a Surveillance Report to the Board. The Board, in turn, must determine whether the costs continue to outweigh the benefits, and whether the Policy actually safeguards rights and liberties. If not, the Board must modify the Policy or end use of the technology.

¹ See Santa Clara County Code A40, at https://www.municode.com/library/ca/santa_clara_county/codes/code_of_ordinances.

² See Darwin BondGraham, "Oakland Privacy Commission approves surveillance transparency and oversight law," *East Bay Express* (1/6/17), at <http://www.eastbayexpress.com/SevenDays/archives/2017/01/06/oakland-privacy-commission-approves-surveillance-transparency-and-oversight-law>.

³ See Gennady Sheyner, "Policing surveillance in Palo Alto," *Palo Alto Online* (4/29/16), at <http://www.paloaltoonline.com/news/2016/04/29/policing-surveillance-in-palo-alto>.

⁴ See S.B. 34, codified at Cal. Civil Code Title 1.81.23, at <http://law.justia.com/codes/california/2015/code-civ/division-3/part-4/title-1.81.23>.

⁵ See S.B. 741, codified at Cal. Govt. Code Section 53166, at <http://law.justia.com/codes/california/2015/code-gov/title-5/division-2/part-1/chapter-1/article-11/section-53166>.



- As to surveillance technologies that predate this Act, the BART entity using them must submit a proposed Policy to the Board for its review and approval.
- Members of the public may bring a private cause of action to seek a court injunction to enforce the Act.

3. Two necessary improvements to the Act.

EFF urges the Board to adopt the Act. EFF also urges the Board to make two necessary changes to the version of the Act that the BART Technology Committee approved earlier this month.

First, EFF urges the Board to remove the exemptions for “sensitive security information” and “security sensitive information.” The former term includes any specifications, reports, and data about BART facilities that BART designates as SSI.⁶ The latter term is defined by reference to federal regulations.⁷

Federal agencies have deployed this federal SSI exemption in many controversial ways, such as withholding TSA rules applicable to travelers and thereby creating secret law.⁸ These SSI exemptions would apply to the aforementioned Surveillance Impact Reports, Surveillance Use Policies, and Surveillance Reports.⁹ Future BART officials might use these vague and overbroad SSI exemptions to withhold all manner of information from the public, thereby subverting the Act.

Second, EFF urges the Board to improve the private cause of action by awarding attorney fees and costs to successful plaintiffs. Fee shifting is necessary to ensure access to the courts and enforcement of the Act. It is a common part of salutary good government laws, such as the California Public Records Act.¹⁰ It is also part of the surveillance technology oversight laws enacted by Santa Clara County¹¹ and the State of California.¹²

⁶ See Act at Section 3(3), defining “security sensitive information” in relevant part as: “District Drawings, Specifications, and related Record Drawings, Reports and Studies together with all attached documents, including specifications, drawings, photographs, plans, designs, and data (including electronic data) concerning certain District facilities that are stamped or otherwise denoted by the District as ‘SSI’.”

⁷ See Act at Section 3(4), citing 49 C.F.R. 1520.5.

⁸ See *Gilmore v. Gonzales*, No. 06-211 (Sup. Ct.), Amici Curiae brief of EFF et al. in support of certiorari, at https://www.eff.org/files/filenode/gilmore_amicus.pdf.

⁹ See Act at Sections 3(2), 5, 6(1), 6(3), 7(4), & 7(5).

¹⁰ See Cal. Govt. Code 6259(d), at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=6259.&lawCode=GOV.

¹¹ See Santa Clara County Code A40-10.

¹² See Cal. Civil Code 1798.90.54(b)(3); Cal. Govt. Code 53166(d)(3).



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Public safety requires trust between government and the community served. To ensure that trust, we need a participatory process for deciding whether to adopt new government surveillance technologies, and ongoing transparency and oversight of any adopted technologies. Thus, EFF urges the Board to adopt the BART Surveillance & Community Safety Act.

If you have any questions, please do not hesitate to call me at (415) 436-9333, extension 176, or to email me at adam@eff.org.

Sincerely,

Adam Schwartz
Senior Staff Attorney

cc: Matthew Burrows, BART General Counsel (mburrow@bart.gov)