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Via email

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Santa Clara County Board of Supervisors  
Santa Clara County, California

**Re: Integrated Helicopter Mapping System**

To the Supervisors of Santa Clara County:

I write on behalf of the Electronic Frontier Foundation (EFF) about the proposal from the Santa Clara County Sheriff to the Santa Clara County Board of Supervisors to purchase an Integrated Helicopter Mapping System (IHMS). The Sheriff has submitted in support of this proposal an Anticipated Surveillance Impact Report and a Proposed Surveillance Use Policy.<sup>1</sup>

EFF is a non-profit member-supported civil liberties organization based in San Francisco, California, that works to protect rights in the digital world. EFF has more than 24,000 members and supporters across the country.

**1. Is the IHMS necessary?**

When government considers acquiring any new technology that might be used to subject members of the public to surveillance, the very first question should be: Is there an actual need for this new surveillance technology? This is especially true given the all-too-common disparate impact that municipal surveillance technologies have on residents of color.

According to the Use Policy, the primary purpose of the IHMS will be to navigate helicopters and to support ground units during, for example, vehicle pursuits and rescue attempts. At this point, EFF is not aware of any information indicating that the Sheriff's existing helicopters are not up to the task of navigation and ground support, or that the IHMS will meaningfully improve these helicopter functions.

EFF urges the Board of Supervisors, early in its process of reviewing the Sheriff's proposal, to carefully explore whether the IHMS is necessary.

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<sup>1</sup> At: [http://sccgov.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=7199&MediaPosition=&ID=82483&CssClass=](http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=7199&MediaPosition=&ID=82483&CssClass=)

## **2. What else can the IHMS be used for?**

Another question that EFF urges the Board to address early in its review process is: What can be done with the IHMS, beyond the uses set forth in the Use Policy and Impact Report? We take at face value the statements in these documents about how the Sheriff intends to use this IHMS. We do not know what additional uses future sheriffs might wish to make of this same technology. So it is critical for policy makers today to learn now how else the IHMS might be used in the future.

Any form of aerial surveillance raises profound concerns. Just last month, the people of Baltimore learned that their police were secretly using airplanes to subject them to a vast and powerful aerial surveillance system. *See, e.g.,* Monte Reel, “Secret cameras record Baltimore’s every move from above,” *Bloomberg Businessweek* (Aug. 23, 2016). EFF does not yet know enough about IHMS to opine on whether it might be retrofitted to contribute to a similar “eye in the sky” system of continuous, no-suspicion monitoring. The Use Policy and Impact Statement indicate that the mapping and night vision functions would only be deployed during emergency situations. But how might a future Sheriff be able to re-purpose this technology?

EFF also is concerned about the IMHS’s thermal imaging devices. Some thermal imaging devices can be used to learn what people are doing behind the walls of their homes and other private places. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court held that police need a warrant to make this use of thermal imaging devices. The Use Policy and Impact Statement indicate that the thermal imaging power of the IMHS would not be used to look through walls, but only to identify fleeing suspects and the like. Before acquiring this tool, it is important to learn whether a future Sheriff might reconfigure the thermal imaging capacity of this IMHS to peer through walls.

All surveillance technologies, even if acquired for an apparently benevolent purpose, come with an inherent danger of “mission creep” towards less benevolent purposes. Once the equipment is purchased and deployed, some policy makers may be tempted, with the stroke of a pen, to authorize new uses.

## **3. The overlong retention period**

The Use Policy at Section 6 has a one-year retention period for images captured by the IHMS. EFF believes that is too long. If an image is known to be relevant (for example, because it relates to a criminal investigation or a civilian complaint), it should be retained only so long as it is needed. All other images should be deleted after a month.

Also, EFF suggests the elimination of the following sentence: “Data downloaded onto a disc or thumb drive or by other electronic means or hard copy image will be maintained in strict accordance to applicable state or federal evidentiary laws.” In other words, if the images are downloaded, the Use Policy provides no retention period and other unspecified retention rules apply. The privacy right not to have one’s image needlessly languish in a government database should not turn on the fortuity of storage of the image in the IHMS as opposed to another medium.

#### **4. The denial of public access**

The Use Policy at Section 7 asserts that images captured by IHMS are exempt from disclosure under the California Public Records Act (CPRA). EFF strongly disagrees with this interpretation of Exemption F to the CPRA, and is litigating this question right now before the California Supreme Court. *See ACLU and EFF v. Superior Court*, No. S227106 (Cal. Supreme Ct.). Moreover, even if Santa Clara County could withhold IHMS images, it does not follow that the County always should. In many cases, IHMS images taken from the vantage of a police helicopter looking down on an incident between officers and civilians may shed important light on contested facts. Such images should be released under the CPRA.

Thus, at a minimum, the current Section 7 should be struck.

Even better, the Use Policy should state that the Sheriff will decide whether to grant CPRA requests for images captured by IHMS under the test set forth in the CPRA's catch-all exception. That is: "The agency shall justify withholding any record by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." *See* Cal. Govt. Code 6255(a).

#### **5. The audit log**

Section 10 of the Use Policy, which concerns oversight, requires documentation of the use of the IHMS. This oversight tool can be improved. First, for each deployment of the IHMS, the log should document the reason for using the IHMS, and whether the IHMS provided any value. Second, there should be a system that brings all documentation of IHMS into a single database, to facilitate meaningful oversight. Third, this integrated log should be incorporated into annual review of the IHMS system.

#### **6. Supreme Court review of aerial surveillance**

The Impact Report favorably cites a Supreme Court case upholding police use of a helicopter to look down on private land from a height of 400 feet. *See Florida v. Riley*, 488 U.S. 445 (1989). EFF believes that this is not the correct lens to consider the constitutional ramifications of the IHMS technology.

The police helicopters of a generation ago were far less sophisticated, and far less capable of invading privacy, than the airborne police surveillance tools of today. For example, the helicopter in *Florida v. Riley*, unlike helicopters with IHMS, did not have night vision cameras or GPS-based mapping precision. Nor did the helicopter in *Florida v. Riley* have access to modern police technologies like powerful zooming from a distance, facial recognition, and interoperability with legions of cameras on the ground.

As technologies become more invasive, the Supreme Court provides new protection. In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court held that the primitive "beeper" tracking technology of yesteryear did not trigger Fourth Amendment protection. Then in *United States v. Jones*, 132 S. Ct. 945 (2012), the Court held that more invasive GPS tracking

technology of today did trigger Fourth Amendment protection. *See also Riley v. California*, 134 S. Ct. 2473, 2488 (2014) (holding that a search of a phone is more invasive than a search of a purse, and that the government’s contrary argument “is like saying a ride on horseback is materially indistinguishable from a flight to the moon”). EFF believes that when the Supreme Court next addresses the sophisticated police aerial surveillance technologies of today, the Court will readily distinguish the decades-old helicopter at issue in *Florida v. Riley*.

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In sum, EFF respectfully suggests that the Board of Supervisors, before deciding whether to approve the Sheriff’s acquisition of IHMS, should obtain further information about (1) whether the IHMS is necessary, and (2) how a future Sheriff might use the IHMS in ways that are more intrusive on privacy than the ones planned today. If the County purchases the equipment, EFF urges revisions to the Use Policy regarding data retention, public access, and audit logs.

Thank you for considering EFF’s views about the IHMS. We may have further input after we have a chance to take a closer look at this issue. If EFF can be of any further assistance, please do not hesitate to call me at (415) 436-9333, extension 176, or to email me at adam@eff.org.

Sincerely,

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Senior Staff Counsel

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