

**NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY
JOINTLY WITH THE COMMITTEE ON TECHNOLOGY**

HEARING:

Oversight – NYPD’s Implementation of the Public Oversight of Surveillance Technology (POST) Act

DATE:

December 15, 2023

TESTIMONY OF KATIE KINSEY
CHIEF OF STAFF, POLICING PROJECT AT NYU SCHOOL OF LAW

Honorable Members of the Committees on Public Safety and Technology of the New York City Council:

Thank you for calling this important public hearing to discuss the NYPD’s implementation of the Public Oversight of Surveillance Technology (POST) Act. In my testimony today, I want to make three points:

- First, I agree with the chorus of advocates and NYPD’s own Inspector General that NYPD’s incomplete and inadequate policy disclosures flout the intent of the POST Act and violate the public’s interest in transparency.
- Second, I want to express support for the three amendments offered today that are designed to strengthen the Act’s disclosure requirements.
- Finally, I urge this body to pass an additional amendment that would do two things: (1) require City Council approval of NYPD’s Impact and Use Policies (IUPs); and (2) add enforcement mechanisms to ensure that the Act’s important transparency requirements have teeth.

But first, some brief background on our work. I’m an attorney at the Policing Project at New York University School of Law. Our organization’s mission is to “partner with communities and police to promote public safety through transparency, equity, and democratic engagement.”¹ Our work is focused on ensuring democratic accountability and public participation *on the front end*. By this we mean that the public has a voice in setting transparent, ethical, and effective policing

¹ *Our Mission*, Policing Project, <https://www.policingproject.org/our-mission>.

policies and practices *before* the police act. Although this type of accountability is common in other areas of government, it is rare in policing.

Legislation like the POST Act is essential to democratic accountability because it fosters the sort of transparency that is essential to sound governance. In aiming to provide basic information to the public about the surveillance technologies that NYPD is deploying, and by requiring the NYPD to assess the impact of those technologies, this Act was intended to ensure an informed public debate about whether and how these powerful technologies should be used to keep New Yorkers safe. When a policing agency wants to use tools that are capable of identifying, tracking, and monitoring citizens' activities and whereabouts, the transparency envisioned by the POST Act should be the baseline. "Just trust us" is not a workable policy from an agency with a history of spying on ordinary people at mosques and using Stingrays to surveil protestors.²

We have no doubt that the POST Act's heart is in the right place, which is why we testified in favor of it at a hearing before this Committee in 2019. We likewise have no doubt that the NYPD broke this law's heart with its "general and generic" disclosure policy disclosures.³ The inadequacy of NYPD's Impact and Use Policy (IUP) disclosures is well-documented by reports from both the agency's own Inspector General's Office and the advocacy community alike.⁴

We will not re-tread that ground here, but we will note that the NYPD's flagrant disregard for this law's goals continues apace. Just this summer, the NYPD deployed an autonomous police robot with sophisticated surveillance capabilities in Times Square without first disclosing an IUP as required by this law.⁵ NYPD attempted to excuse this violation by claiming that these robots represented only an "enhancement[] to existing technologies" because it already uses stationary surveillance cameras.⁶ But as the NYPD well knows, there is no equivalence between a traditional stationary CCTV camera and a nearly 400-pound roving autonomous police robot. This robot is a new technology and as such it required a new IUP by law.

In its response to the OIG report detailing its inadequate disclosures, the NYPD protests that the report contains "no acknowledgment" that it has "exhibited a significant level of public

² Ed Pilkington, *NYPD settles lawsuit after illegally spying on Muslims*, THE GUARDIAN, (Apr. 5, 2018), <https://www.theguardian.com/world/2018/apr/05/nypd-muslim-surveillance-settlement>; Ali Winston, *Did the Police Spy on Black Lives Matter Protestors? The Answer May Come Out Soon*, N.Y. TIMES, (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/nyregion/nypd-black-lives-matter-surveillance.html>

³ See Jocelyn Strauber & Jeanene Barrett, *An Assessment of NYPD's Response to the POST Act*, OIG-NYPD (November 2022), https://www.nyc.gov/assets/doi/reports/pdf/2022/20PostActRelease_Rpt_11032022.pdf.

⁴ See generally *id.*; Eleni Manis & Albert Fox Cahn, *Above the Law? NYPD Violations of the Public Oversight of Surveillance Technology Act*, (Oct. 7, 2021), <https://www.stopspying.org/above-the-law>.

⁵ Ari Ephraim Feldman, *Critics call out NYPD surveillance robot over transparency concerns*, SPECTRUM NEWS NY1, (May 4, 2023), <https://ny1.com/nyc/all-boroughs/news/2023/05/03/critics-call-out-new-surveillance-robot-over-transparency-concerns>.

⁶ Chris Sommerfeldt, *NYPD robot Digidog reboot start of NYC tech push*, N.Y. DAILY NEWS (Apr. 12, 2023), <https://www.nydailynews.com/2023/04/12/mayor-adams-vows-nypd-robot-digidog-reboot-only-the-beginning-of-his-tech-push-amid-progressive-backlash>.

transparency surrounding its technologies prior to this law taking effect.”⁷ To support this claim, the NYPD cites some work we did with the agency in 2017 to help facilitate a public comment period around a new body-worn camera policy. Putting aside the fact that – against our recommendation – the NYPD did not follow public opinion on critical issues raised about that policy – soliciting public input one time, on one policy, for one technology, does not amount to a robust transparency practice around its technology use.

Although it is clear that NYPD has violated the spirit and intent of the POST Act, the agency has maintained repeatedly that its policy disclosures are “in compliance with the POST Act as written” and that OIG concluded as much.⁸ But even allowing for NYPD’s interpretation of the law’s IUP disclosure requirements, it is not the only requirement of the POST Act as written. The Act also empowers OIG with oversight responsibility to review NYPD’s actual use of surveillance technologies. Crucially, OIG also found that NYPD’s responses were “insufficient to enable OIG-NYPD to conduct full annual audits (as the Act also requires) and to achieve appropriate transparency with the public.”⁹

From OIG’s report, it is clear that the NYPD is not operating in good faith when it comes to its transparency responsibilities with the public. Fortunately for the citizens of New York, our democracy runs on laws not faith and this law can be amended to ensure robust transparency reporting is required. Members of this body already have taken steps to edit the law’s language to forestall any colorable argument from the NYPD that its barebones disclosures will be compliant moving forward. As such, we support the amendments proposed by Councilmembers Farías, Hudson, and Won and believe they will go a long way toward ending the NYPD’s brinkmanship.

Yet these amendments alone will not suffice to ensure New Yorkers receive the democratic accountability they deserve when it comes to their public safety. Meaningful democratic accountability requires this body to go one step further and amend the POST Act to include additional oversight and enforcement mechanisms.

Regarding oversight, the Council should amend the POST Act to require City Council approval of the NYPD’s IUPs. This way, the NYPD will not just get to set its own rules but rather will be accountable to democratically elected officials. In a recent survey of local surveillance ordinances like the POST Act, Berkeley Law found that only New York’s law lacked a requirement for elected-body approval of agencies’ surveillance policies and impact reports.¹⁰

⁷ Letter from Carrie B. Talansky, Acting Deputy Commission, Legal Matters, NYPD to Mayor Eric L. Adams et al., (Nov. 3, 2022), <https://www.nyc.gov/assets/nypd/downloads/pdf/oig-report-responses/nypd-response-2022-post-act.pdf>.

⁸ *Id.*

⁹ OIG-NYPD Report, *supra* note 3 at 4.

¹⁰ ARI CHIVUKULA & TYLER TAKEMOTO, LOCAL SURVEILLANCE OVERSIGHT ORDINANCES, SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC AT UC BERKELEY SCHOOL OF LAW 10 (2021), <https://www.law.berkeley.edu/wp-content/uploads/2021/02/Local-Surveillance-Ordinances-White-Paper.pdf>

Even a perfectly written statute will fail if it lacks effective enforcement mechanisms. Examples of enforcement mechanisms typically found in surveillance ordinances like the POST Act include a private right of action to sue the covered agency for violations; making it a misdemeanor for an official to intentionally violate the ordinance; including a suppression remedy to allow parties in lawsuits to exclude any evidence collected in violation of the ordinance; mandatory discipline for employees who violate the ordinance; and a termination or suspension of vendor contracts that violate the ordinance.¹¹ All of these enforcement mechanisms have merit. This body should amend the law to ensure at least one of these mechanisms is incorporated.

To be sure, there are technologies that play a valuable role in fostering public safety and the public actors entrusted with our safety should have access to them. Likewise, there certainly are some details about the police's use of certain surveillance technologies – for example, about tactical plans – that might not make sense to disclose publicly.

Neither of those truths, however, is inconsistent with the public's rights to information and accountability. Policing agencies should stop treating transparency and public safety as a zero-sum game. And legislative bodies like this one need to hold them to account.

¹¹ *Id.* at 13-16.