

December 5, 2023

Regarding the Office of Management and Budget's Request for Comment on its Draft Memorandum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

<https://www.regulations.gov/document/OMB-2023-0020-0001>

Dear Director Young,

We write today in response to your recent request for comment regarding draft guidance on artificial intelligence, representing the perspectives of advocates and organizations devoted to government transparency, accountability, and ethics.

President Biden's Executive Order on AI<sup>1</sup>, issued on October 30, 2023, requires each agency to designate a Chief AI Officer (CAIO) within 60 days of the date of the issuance of this memorandum.

Regrettably, the E.O. does not address making the use of AI in the federal government accountable to anyone *outside* the Executive Branch, nor establish any principles or proposed rules or practices to make the decisions of how and when to use AI in any way open to public scrutiny. That failure to incorporate openness and public accountability is replicated in this Draft Memorandum. Specifically, we have serious concerns regarding language around the specific minimum risk management practices for uses of AI that impact the rights and safety of the public.

In footnote 8 in the draft guidance, OMB states that "Agencies must only publicly report use cases to the extent practicable and consistent with applicable law and government-wide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information." Such hedging language raises deep accountability concerns.

We assess that developing, implementing, and driving good governance of artificial intelligence across the massive enterprises of the federal government will require the White House to apply key lessons from the past decade of open government data. In the continued absence of the formal guidance from OMB on the OPEN Government Data Act<sup>2</sup> mandated by Congress in 2018, we still see no broad standardization and

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<sup>1</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>

<sup>2</sup> <https://data.gov/open-gov/>

compliance with enterprise data inventories, much less enterprise artificial intelligence (AI) uses.

While the CIO Council has done important work in creating a [schema](#)<sup>3</sup> for AI use inventories, agencies are not universally adopting and implementing it, in parallel to the uneven compliance with enterprise data inventories a decade after President Obama's memorandum on machine-readable data.

We now see an opportunity to do both, moving forward with a holistic strategy for proactive disclosures across the United States government in the aftermath of the sunset of FOIA Online this fall.

We believe that public participation and collaboration is essential to rebuilding and keeping public trust in government, which remains at historic lows. This context requires fresh thinking and recommitment to good governance.

As with any government-wide initiative, successful implementation of this guidance will depend on senior leadership at the White House accountable for transparency and good governance and increased human capacity at the Office of Management and Budget in the office of the U.S.

Accordingly, we propose the following approaches to strengthen AI governance:

### **Recommendation 1: Establish an AI Oversight Board**

The Executive Order upon which this RFC is based notes that the United States must “foster public trust and confidence in AI” and must “protect civil liberties, privacy, and American values.”

As you are well aware, the private sector is deeply interested in the federal government's engagement in AI. Indeed, the White House and executive branch entities have met numerous times with corporate leaders in this field. The private sector has legitimate interests, but they do not overlap with those of civil society accountability advocates.

Open, transparent, and accountable government are American values that are key to fostering and protecting all *other* values. We have variously worked for decades, both

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<sup>3</sup> <https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf>

inside the government at times and outside in civil society, to promote, advance, and protect these core values. For this reason, we are deeply concerned that a draft OMB regulation has the potential to not only affect how the government does its work but also to profoundly affect how – and *if* -- the American public will know how our government is deploying this radically new technology and how/whether they have a real-time say in how it is being deployed.

As an example, the Draft Memorandum recommends that agencies “consider... fairness and non-discrimination” “in accordance with law.” The text does not propose a definition of fairness or non-discrimination in this context, nor does it instruct agencies to cooperate in arriving at a shared definition..

The Draft Memorandum notes that “applications of AI could increase human autonomy,” but encourages agencies to “consider the sufficiency of existing or evolving *legal, policy, and regulatory environments before contemplating additional measures for disclosure and transparency.*” The OMB’s guidance interprets “appropriate disclosure and transparency” as “context specific.”

As comments submitted by the Harvard Cyberlaw Clinic note, however, this recommendation assumes that disclosure and transparency are tradeoffs that require sacrificing the benefits of AI. Transparency, as they note, should not be cast as a “necessary evil” but rather as an essential mode of protecting individual and community rights against dangers posed by AIs. Elsewhere, while OMB is correct that the need for disclosure and transparency is greater where the potential harms are more significant, we agree with Harvard Cyberlaw that it is dangerous to suggest that the potential benefits of an AI application could justify use of a non-transparent “black box” technology.

For these reasons, and other problematic language in the Draft Memorandum, we urge the White House to create in the Executive Office a public-facing Oversight Board, answering to the President, composed of civil society experts in fields including

cognitive science, civil liberties, and public-interest law who have demonstrated expertise in ethical, regulatory, and rights-based approaches to AI.

## **Recommendation 2: Appoint a U.S. Chief AI Officer and U.S. Chief Ethics Officer**

We believe personnel is policy. Accordingly, we recommend that President Biden appoint the first White House AI Officer and the first U.S. Chief Ethics Officer to work with a U.S. Chief Data Officer, a U.S. Chief Data Officer, and U.S. CIO Martorana to oversee implementation of the AI EO and the OPEN Government Data Act.

We assess that there will also need to be direct, ongoing presidential involvement with the Justice Department, Department of Homeland Security, and all civilian agencies to drive the regular, accurate accounting of their uses of artificial intelligence in public, proactive disclosures online.

## **Recommendation 3: Institutionalize Good Governance Around AI Use**

The most effective enforcement mechanisms for mandatory disclosure, combine congressional intent with agency capacity to implement it and regular, ongoing updates on progress that do not require adversarial oversight.

Scientific and regulatory agencies that have proactive disclosure of public data, information, and knowledge as an express part of their mission are typically better resourced to lead in these areas, particularly culturally. The quality in periodicity of such disclosures, however, varies across these agencies, as we have seen from the Federal Election Commission to the Securities and Exchange Commission to NASA and the EPA.

The political will to resource agencies adequately to build modernized systems has often been lacking, particularly at the National Archives and Records Administration. Agencies need resources and hiring flexibility to attract and retain experienced product managers and designers, who can work with best-in-class private sector engineers to upgrade and improve data collection, structuring, and disclosures.

The most effective enforcement mechanisms for ongoing data quality are typically associated with a thriving, healthy community of actors, inside *and* outside of government that expect and consume regular disclosures of trustworthy quality.

A useful example of this dynamic exists at the Bureau of Labor and Statistics, which regularly releases economically significant employment numbers. There are legal

consequences for disclosing these numbers early and a Greek chorus of upset when they are not available during a shutdown.

The components of agencies that conduct scientific research and are committed to publishing data, methodology, and code with it are well suited to speak to the challenges and rewards from these approaches.

The lesson from the open government data world that is most applicable here, however, is a requirement for strong, dedicated leadership from the White House Office of Management and Budget coupled with ongoing coordination across agencies through intra-agency working groups.

The mothballed federal data strategy is a useful framework for thinking about what should be happening right now, and could be happening next, with respect to mandatory disclosures of data and AI cases. The Chief Data Officers Council and Chief Information Officers Council are key coordinating bodies for his work that will need to replenish both talent and resources in 2024 to improve upon the failures of the last decade.

**Recommendation 4: Enterprise AI inventories must be comprehensive & modern, not static PDFs of “top uses”**

Every agency would stand up a machine, readable file of AI used cases at a rebuilt/open page, which is updated weekly, and combined into a database operated by the General Services Administration, with an API at Data.gov.

This weekly report would then flow into a database maintained by the General Services Administration, with an API at Data.gov. The White House, agencies, GAO, Congress, the press, watchdogs, and American people would all be able to access this to see at a glance, who was up-to-date, and whether they were compliant with the schema.

This would be coupled with narratives that *\*explain\** these uses on an interactive table at an agency open government page, coupled with waivers. Each use case should also have an independent, risk-limiting audit with sign off by a third-party regarding the risk of human rights or civil liberties violations, or a linked waiver signed by an accountable official explaining.

Agencies should present these inventories to the public as an interactive table based on an open database, *not* a static PDF. Agencies should evaluate whether publishing structure data as JSON, or XML might lead to improved display through interactive dashboards on responsive websites.

It is not inconceivable that agencies might embed a chat function that people can query about these use cases, as an innovative application of AI to explain what is disclosed, how, and with what intent and impact. We favor the government publishing a machine-readable file for each agency, as they do on [agency.gov/data](https://www.data.gov/), hosting a prize internally to come up with the best in class approaches, and hosting a challenge *externally* through [Challenge.gov](https://www.challenge.gov/) to leverage the collective intelligence of the American people to improve over time.

### **Recommendation 5: Create a secure means for all three branches of government to access and review all AI use cases across government**

There should be a strong predisposition to disclose uses of AI in classified programs, without disclosing the programs themselves. These efforts should be made with an eye towards broader, declassification efforts, and rigorous examination of the purpose of keeping these kinds of disclosures from the broader public.

Agencies should follow the above regimen for disclosure for use cases that cannot be disclosed under such a rubric, with ongoing updates. It is essential that national security officials, the so-called “Gang of Eight” in Congress, and members of the Privacy and Civil Liberties Oversight Board can all access and regularly assess the expanding portfolio of use cases of AI across government. Secrecy around 21st century tools and technologies must not hinder the oversight and accountability essential to preserving the constitutional protections that officials seek to protect and defend.

### **Recommendation 6: Lead on creating state, local, and international standards for AI disclosures**

The United States is not operating alone. We should be cooperating and collaborating with other democracies to improve how we disclose the data, code, and uses of artificial intelligence. In an ideal situation, these might be combined into a global catalog.

In the interim, the White House should be encouraging states and cities to reboot their open government pages with proactive, machine-readable disclosures of data, code, and artificial intelligence use inventories.

The federal government should allocate dedicated capacity to help do so, from a cultural, technical, and design perspective through US Digital Service, US Digital Corps, Presidential Innovation Fellows and 18F. It would also be sensible to seek to collaborate with the legislative and judiciary branch, should Congress and the courts seek to catalog all federal uses of artificial intelligence and seek the consent of the governed.

We also assess that a multi-stakeholder approach can be applied at federal agencies, through the creation of advisory councils – or AI subcommittee of existing ones – that includes people with expertise in human rights, design, and social sciences to evaluate ongoing programs and provide quarterly updates at public meetings. Relevant models could be found in the President’s Council on Science and Technology, PCLOB, and PIDB, all of which are implicated with this work.

It would be also useful and appropriate for the United States to add a new commitment to implement the disclosure elements of this AI order to the Fifth National Action Plan for open government for the Open Government Partnership<sup>4</sup>, which includes a mechanism to add such commitments and is the natural vessel for such an effort. The US government could then show its work at the next Summit for Democracy in 2024.

If you have any questions or wish to discuss our proposals further, please feel free to contact Alexander Howard at [alex@governing.digital](mailto:alex@governing.digital) and Patrice McDermott at [pmcdermott@govinfowatch.net](mailto:pmcdermott@govinfowatch.net).

Respectfully submitted,

The Digital Democracy Project  
Government Information Watch  
Society of Professional Journalists  
The Data Foundation  
Advocacy For Principled Action In Government  
Organization for Identity & Cultural Development

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<sup>4</sup> <https://www.opengovpartnership.org/members/united-states/>