



July 29, 2021

Commission on Facial Recognition
Senator Jamie Eldridge and Representative Michael S. Day, Co-Chairs

Re: Public Comment on Government Use of Facial Recognition Technology

Dear Senator Eldridge, Representative Day, and members of the Commission:

I write to you today on behalf of the Electronic Frontier Foundation, the leading digital rights nonprofit organization dedicated to furthering privacy, free expression, and innovation. EFF is supported by more than 35,000 members nationwide, including a good many in the Commonwealth of Massachusetts.

We respectfully ask that the Commission recommend a ban on all government use of face recognition technology. Such a ban is needed to ensure Massachusetts residents and visitors are shielded from this discriminatory, dragnet surveillance and the chilling effect on essential First and Fourth Amendment freedoms that is inseparable from government use of the technology.

The omnibus police reform legislation signed into law by Governor Baker last December and codified in Chapter 253 contains several provisions pertaining to law enforcement use of face recognition technology. However, with an appreciation of the legislature's intent, the effort falls far short of what is needed to preserve and protect residents' rights and liberties.

As written, the legislation only regulates face recognition technology as used by law enforcement agencies. It provides no prohibition or regulation on the use of the technology by other public agencies (beyond its ban on use at the express request of law enforcement). There is currently no regulation or instruction on how these agencies employ face recognition, which non-law enforcement officials may access that data, how long that information can be retained, or under what circumstances this information can be proactively shared with law enforcement or other third parties.

This legislative gap creates real risk. Already, thousands of face images collected from U.S. residents and visitors crossing our nation's southern border have been compromised through a CBP subcontractor's failure to control access to the data adequately. Unlike with a passport or driver's license, the many individuals impacted by this breach cannot simply replace their faces to mitigate the harm to their privacy and safety. Massachusetts residents should not be forced to take on this same risk merely because they choose to attend a public school, park, or medical facility. Nor should they have to fear that their visits to cultural or medical institutions or engagement in First Amendment-protected protest will be tracked and documented. Research shows—and Courts have long recognized—that government surveillance of First Amendment activity has a deterrent effect on the exercise of this fundamental freedom.

Furthermore, even where the law does limit the use of face recognition technology by local law enforcement agencies, it does not provide sufficient enforcement mechanisms to ensure public officials comply with the law. All privacy laws need effective enforcement. Most importantly, a person who discovers that their privacy rights are being violated must have a "private right of action" robust enough to provide accountability. Face surveillance is a particularly pernicious form of surveillance because of the scope at which it amplifies already existing bias and the scale at which it provides for the persistent, untiring, and covert monitoring of our actions and associations.

In addition, all residents must have the right to initiate proceedings alleging a violation of the law in a court of competent jurisdiction. It is overwhelmingly difficult for the subject of prohibited face surveillance to prove that they have been personally impacted, so the action should not be limited only to surveilled people. This right should also include access to fee-shifting for a prevailing plaintiff. Without fee-shifting, the only private entities with access to the enforcement process will be well-heeled advocacy organizations and financially privileged individuals.

In closing, EFF thanks you all for your efforts to protect the people of Massachusetts from this particularly pernicious form of mass surveillance. We look forward to seeing legislation passed that bans government use of face recognition and other biometric surveillance in Massachusetts.

Sincerely,

Nathan Sheard
Organizing Director
Electronic Frontier Foundation

cc: