28 Temple Street

Belmont, MA 02478

July 22, 2021

Commission on Facial Recognition

Senator Jamie Eldridge and Representative Michael S. Day, Co-Chairs

**Public Comment**

**Government Use of Facial Recognition Technology**

Dear Senator Eldridge, Representative Day, and members of the commission,

I am writing on behalf of Digital Fourth, the Boston-area chapter of national civil liberties organization Restore The Fourth. We wish to comment on the use of facial recognition technology in Massachusetts, and believe that the Commission should recommend that the Legislature strengthen existing facial recognition law, to ensure that Massachusetts residents and visitors are shielded from both discriminatory and dragnet surveillance.

We are a nonpartisan volunteer-run civil liberties organization, founded in 2012 in Massachusetts. Our members include attorneys, tech workers, private investigators, cryptographers and other citizens interested in privacy issues. We are focused on the Fourth Amendment and on Article XIV of the Massachusetts Constitution, which together argue *against* government having the power to collect and sift through images of the general public, without *probable cause* of a *specified person*’s involvement in an *actual crime*.

We have worked extensively on passing facial recognition bans in Cambridge, Somerville, Brookline and now Boston, and we observe that none of these communities have faced crime waves as a result. Refraining from using this biased technology may in fact increase the effectiveness of policing, by preventing police from wasting time chasing falsely identified leads.

Other organizations will have testified in depth relating to the well-known racial biases and inequities of facial recognition use by law enforcement. Our main roles here are to emphasize that even **accurate facial recognition systems are a bad thing**; and to emphasize that **for the Commonwealth’s rules on facial recognition to be Constitutional, the standard must be warrants based on probable cause.**

In general, even if facial recognition systems were to achieve the impossible goal of 100% accuracy, that would be a bad thing; so bad, in fact, that it would represent the death of all privacy in public. Imagine, for example, that as a legislator, your every move outside the State House were tracked and placed in a police database. The police would know every meeting you go to, where you eat every meal, and everyone you meet with. Police interests already have enough power on Beacon Hill. Failing to regulate facial recognition will give them full power over legislators, and require you simply to trust that they won’t abuse it. This is too great a power for any organization to have in a democracy.

Specifically, in December 2020, Governor Baker signed into law “An Act Relative To Justice, Equity And Accountability In Law Enforcement In The Commonwealth,” an omnibus police reform legislation. The law, codified in Chapter 253 of the Acts of 2020, contains several provisions pertaining to government agencies’ use of facial recognition technology.

While we support the creation of this Commission, the regulations governing police use of facial recognition fall far short of what was presented by the Legislature to the Governor. Governor Baker’s amendments took advantage of the lack of a veto-proof majority for the overall police reform bill in the House, to force changes in the text that gutted face surveillance reforms both chambers had agreed on.

Instead of face surveillance being conducted only via the RMV subject to a probable cause warrant, under the police reform bill face surveillance can currently be conducted by the state police, the RMV or the FBI, subject to an *“order”* issued by a court and *“based upon specific and articulable facts and reasonable inferences therefrom that provide reasonable grounds to believe that the information sought would be relevant and material to an ongoing criminal investigation”* or *“to mitigate a substantial risk of harm to any individual or group of people”* or *“without an order to identify a deceased person*,” or without an order in case of an emergency. In other words, for more or less any reason they please, so long as it's connected somehow to an “ongoing criminal investigation.” **This is a steep step down from what the Fourth Amendment requires.**

As a Fourth Amendment organization, probable cause warrants matter to us, precisely because they require a court to provide independent review, to make sure that the government is only searching or seizing if they already have good reason to suspect that you in particular are involved in an actual crime. What Governor Baker’s amendments gave us is not prohibition, or even really a regulation; it's much more in the nature of a permission, to feed your image into face surveillance systems whether you in particular are involved in a crime or not.

How can a court refuse an *“order”* like this, and rule that the information sought - a likeness of the person the police believe to be a suspect - is not *“relevant and material to an ongoing criminal investigation”*? The language is structured so as to make it essentially impossible for the court to refuse it. Meanwhile, the police will have free rein to misidentify anyone they like as a suspect, on a trivial showing to a court (not even, note, to a judge; the current text permits the use of unqualified “clerk magistrates”).[[1]](#footnote-1)

Yes, there are also reporting requirements tacked on, to get an idea of how much face surveillance they do. But **there's not required to be “any underlying suspected crime”; police can still use facial recognition searches when there isn't.** There's reporting on the number of searches performed, but not on the number of different Massachusetts residents whose images are part of the search, or how

many times your image is part of a search. There will be no evaluation of how racially or gender-biased the systems are, and there are no remedies specified for not following the few requirements

that remain. Instead, the final bill text suggests that there would be an “evaluation” of whether to adopt probable cause warrants at some unspecified future point.

**The time for that evaluation is now, and the answer should be, “Yes” to warrants.**

Thankfully, H.135, An Act To Regulate Face Surveillance, sponsored by Representatives Rogers and Ramos, and S.47, An Act To Regulate Face Surveillance, sponsored by Senator Creem, provide for some useful policy solutions to the issue we outline above.

H.135 and S. 47 prohibit all public entities, including public schools, the department of transportation, and other public agencies in the Commonwealth, from using and possessing this technology. The only agencies allowed to use and possess this technology are the Registrar of Motor Vehicles and the State Police, subject to strict limitations and civil rights protections.

They clearly establish that only the RMV would be allowed to acquire and possess the technology and use it to verify an individual’s identity when issuing licenses, permits, or other documents. The bills also make a special caveat for the MSP so that its officers can only access the RMV system in three limited cases, i.e., to execute a warrant issued under probable cause to investigate violent felonies, in case of an emergency involving immediate danger of death or serious physical injury, and to identify a deceased person.

They would also clearly establish an exclusionary rule that would apply when law enforcement uses facial recognition in a manner that does not conform with the law.

Therefore, these bills would, in our estimation, re-establish compliance with the Fourth Amendment and with Article XIV; and enable law enforcement to use the technology only as Constitutional provisions permit.

I encourage you to consider bills H.135 and S.47 when you decide on further regulations of the use of biometric surveillance technology. We need strong regulations to ensure it does not infringe on our civil rights and civil liberties, and this legislation provides an excellent model.

Thank you for your attention and consideration.

Sincerely,

A picture containing insect

Description automatically generated

Alex Marthews

Chair, Digital Fourth

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1. See <https://www.delsignoredefense.com/blog/boston-globe-lawsuit-attempts-to-make-massachusetts-clerk-magistrate-hearings-public-record/>. [↑](#footnote-ref-1)