SENATE . . . . . No. 3084

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

SENATE, July 30, 2022.

The committee on Senate Ways and Means, to whom was referred the House Bill to improve and modernize the information technology systems and capacities of the judiciary (House, No. 5076),- reported, in part (in so much as relates to section 63), a "Bill to regulate face surveillance" (Senate, No. 3084).

For the committee,
Michael J. Rodrigues

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An Act to regulate face surveillance.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 6 of the General Laws, as amended by chapter 253 of the acts of 2020, is hereby amended by striking section 220 and inserting in place thereof the following section: -

Section 220. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Biometric surveillance technology", any computer software that performs facial recognition or other remote biometric recognition.

"Facial recognition", an automated or semi-automated process that assists in identifying or verifying an individual or analyzing or capturing information about an individual based on the physical characteristics of an individual's face, head or body, or that uses characteristics of an individual's face, head or body to derive information about the associations, activities or location of an individual; provided, however, that "facial recognition" shall not include the use of search terms to sort images in a database.

"Facial recognition search", the use of facial recognition to analyze an image.

"Law enforcement agency", as defined in section 1 of chapter 6E.

"Law enforcement officer" or "officer", as defined in section 1 of chapter 6E.

"Other remote biometric recognition", an automated or semi-automated process that assists in identifying or verifying an individual or analyzing or capturing information about an individual based on an individual's gait, voice or other biometric characteristic or that uses such characteristics to derive information about the associations, activities or location of an individual; provided, however, that "other remote biometric recognition" shall not include the identification or verification of an individual using deoxyribonucleic acid, fingerprints, palm prints or other information derived from physical contact.

"Public agency", any: (i) agency, executive office, department, board, commission, bureau, division or authority of the commonwealth; (ii) political subdivision thereof; or (iii) authority established by the general court to serve a public purpose.

"Public official", any officer, employee, agent, contractor or subcontractor of any public agency.

(b) Absent express authorization in a general or special law to the contrary, it shall be unlawful for a law enforcement agency or officer to acquire, possess, access, use, assist with the use of or provide resources for the development or use of any biometric surveillance technology, or to enter into a contract with or make a request to a third party, including any federal agency, for the purpose of acquiring, possessing, accessing or using information derived from a biometric surveillance technology.

Except in a judicial proceeding alleging a violation of this section, no information obtained in violation of this section shall be admissible in any criminal, civil, administrative or other proceeding.

(c) The registrar of motor vehicles may acquire, possess, or use facial recognition technology to verify an individual's identity when issuing licenses, permits or other documents pursuant to chapter 90; provided, however, that the registrar shall not allow any other entity to access or otherwise use its facial recognition technology except in accordance with subsection (d).

(d) The department of state police may perform a facial recognition search, or request the federal bureau of investigation to perform such a search, for the following purposes:

(1) to execute a warrant duly authorized by a judge based on probable cause that an unidentified or unconfirmed individual in an image has committed a felony;

(2) upon reasonable belief that an emergency involving immediate danger of death or serious physical injury to any individual or group of people requires the performance of a facial recognition search without delay;

(3) to identify a deceased person; or

(4) on behalf of another law enforcement agency or a federal agency, provided that such agency obtained a warrant pursuant to clause (1) or documented in writing the reason for a search requested under clauses (2) or (3).

One facial recognition operations group within the department shall be charged with receiving and evaluating law enforcement requests for facial recognition searches, performing

facial recognition searches, reporting results, and recording relevant data. The department shall only use existing facial recognition technology used by the registrar of motor vehicles or federal bureau of investigations or facial recognition technology approved by the executive office of technology services and security, which may only be approved following a public hearing on the proposed software.

Any search performed or search request made to the federal bureau of investigation under this section shall be documented in writing.

(e) For any emergency facial recognition search performed or requested under subsection (d)(2), the law enforcement agency shall immediately document the factual basis for its belief that an emergency requires the performance of such a search without delay, and any emergency facial recognition search shall be narrowly tailored to address the emergency. Not later than 48 hours after the law enforcement agency obtains access to the results of a facial recognition search, the agency shall file with the superior court in the relevant jurisdiction a signed, sworn statement made by a supervisory official of a rank designated by the head of the agency setting forth the grounds for the emergency search.

(f) All individuals charged with a crime who were identified using a facial recognition search under this subsection shall be provided notice that they were subject to such search, pursuant to rule 14 of the rules of criminal procedure. Law enforcement agencies and district attorneys must make readily available to defendants and their attorneys in criminal prosecutions all records and information pertaining to any facial recognition searches performed or requested during the course of the investigation of the crime or offense that is the object of the criminal prosecution. This information shall include, but not be limited to, the results of the facial

recognition search (including other possible matches identified by the search), as well as records regarding the particular program or algorithm used to conduct the facial recognition search, the accuracy rate of the facial recognition system, any audit testing of the facial recognition system, the identity of the individual or individuals who conducted the facial recognition search, training provided to law enforcement officials involved in conducting facial recognition searches, and the process by which the defendant was selected as the most likely match.

(g) The department shall document, as a public record, each facial recognition search request and each facial recognition search performed pursuant to this section and report this information quarterly to the executive office of public safety and security. Reported information shall include: the date and time of the search or request; the system used for the search; the specific criminal offense or offenses under investigation; the number of matched individuals returned, if any; the name and position of the requesting individual and employing law enforcement agency; a copy of the warrant or, if no warrant exists, a copy of the written emergency request; and data detailing the individual characteristics included in the facial recognition search or request, including the presumed race and gender of the person in the probe image(s), as assessed by the officer conducting the search.

(h) Annually, not later than March 31, the executive office of public safety and security shall publish on its website the following data for the previous calendar year: (i) the total number of facial recognition searches performed by the department of state police, disaggregated by law enforcement agency or federal agency on whose behalf the search was performed; (ii) the total number of facial recognition searches performed by the federal bureau of investigation on behalf of law enforcement agencies, disaggregated by law enforcement agency on whose behalf the search was performed. For each category of data and each law enforcement agency, the

published information shall include: the number of searches performed pursuant to a warrant, by alleged offense; the number of searches performed pursuant to an emergency; and the race and gender of the subjects of the searches, as assessed by the officer conducting the search.

(i) Each non-law enforcement public agency shall document, as a public record, each facial recognition search requested and each facial recognition search performed by its public officials and report this information quarterly to the executive office of public safety and security. Reported information shall include: the date and time of the search or request; the name and position of the requesting individual; the reason for the search or request; the name, position, and employer of the individual who conducted the search; the system used for the search; the number of matched individuals returned, if any; and data detailing the individual characteristics included in the facial recognition search or request, including the presumed race and gender of the person in the probe image(s), as assessed by the individual conducting the search.

(j) Annually, not later than March 31, the executive office of public safety and security shall publish on its website the following data for the previous calendar year: (i) the total number of facial recognition searches performed by or at the request of non-law enforcement public agencies, disaggregated by the public agency on whose behalf the search was performed. For each public agency, the published information shall include the race and gender of the subjects of the searches, as assessed by the individual conducting the search.

(k) Notwithstanding subsection (b), it shall be unlawful for a law enforcement agency of officer to use a biometric surveillance system to infer a person's emotions or affect. It shall also be unlawful for a law enforcement agency or officer to use a biometric surveillance system to analyze moving images or video data, whether in real time or as applied to archived information;

provided, however, that facial recognition may be used on a still image taken from moving images or video data if authorized pursuant to subsection (d).

(l) Notwithstanding subsection (b), a law enforcement agency or officer may: (i) acquire and possess personal electronic devices, such as a cell phone or tablet, that utilize facial recognition technology for the sole purpose of user authentication; (ii) acquire, possess and use automated video or image redaction software; provided, that such software does not have the capability of performing facial recognition or other remote biometric recognition; and (iii) receive evidence related to the investigation of a crime derived from a biometric surveillance technology; provided, that the use of a biometric surveillance technology was not knowingly solicited by a law enforcement agency or officer in violation of subsection (b).