
SUBSTITUTE SENATE BILL 6280

State of Washington

66th Legislature

2020 Regular Session

By Senate Environment, Energy & Technology (originally sponsored by Senators Nguyen, Carlyle, Wellman, Salomon, Lovelett, Das, Randall, Pedersen, Wilson, C., and Hunt)

READ FIRST TIME 01/24/20.

1 AN ACT Relating to the use of facial recognition services; adding
2 a new section to chapter 9.73 RCW; adding a new chapter to Title 43
3 RCW; creating a new section; and providing an expiration date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds that:

6 (1) Unconstrained use of facial recognition services by state and
7 local government agencies poses broad social ramifications that
8 should be considered and addressed. Accordingly, legislation is
9 required to establish safeguards that will allow state and local
10 government agencies to use facial recognition services in a manner
11 that benefits society while prohibiting uses that threaten our
12 democratic freedoms and put our civil liberties at risk.

13 (2) However, state and local government agencies may use facial
14 recognition services in a variety of beneficial ways, such as
15 locating missing or incapacitated persons, identifying victims of
16 crime, and keeping the public safe.

17 NEW SECTION. **Sec. 2.** The definitions in this section apply
18 throughout this chapter unless the context clearly requires
19 otherwise.

1 (1) "Accountability report" means a report developed in
2 accordance with section 3 of this act.

3 (2) "Enroll," "enrolled," or "enrolling" means the process by
4 which a facial recognition service creates a facial template from one
5 or more images of an individual and adds the facial template to a
6 gallery used by the facial recognition service for recognition or
7 persistent tracking of individuals. It also includes the act of
8 adding an existing facial template directly into a gallery used by a
9 facial recognition service.

10 (3) "Facial recognition service" means technology that analyzes
11 facial features and is used for recognition or persistent tracking of
12 individuals in still or video images.

13 (4) "Facial template" means the machine-interpretable pattern of
14 facial features that is extracted from one or more images of an
15 individual by a facial recognition service.

16 (5) "Meaningful human review" means review or oversight by one or
17 more individuals who are trained in accordance with section 8 of this
18 act and who have the authority to alter the decision under review.

19 (6) "Ongoing surveillance" means tracking the physical movements
20 of a specified individual through one or more public places over
21 time, whether in real time or through application of a facial
22 recognition service to historical records. It does not include a
23 single recognition or attempted recognition of an individual, if no
24 attempt is made to subsequently track that individual's movement over
25 time after they have been recognized.

26 (7) "Persistent tracking" means the use of a facial recognition
27 service to track the movements of an individual on a persistent basis
28 without identification or verification of that individual. Such
29 tracking becomes persistent as soon as:

30 (a) The facial template that permits the tracking is maintained
31 for more than forty-eight hours after first enrolling that template;
32 or

33 (b) Data created by the facial recognition service is linked to
34 any other data such that the individual who has been tracked is
35 identified or identifiable.

36 (8) "Recognition" means the use of a facial recognition service
37 to determine whether an unknown individual matches:

38 (a) Any individual who has been enrolled in a gallery used by the
39 facial recognition service; or

1 (b) A specific individual who has been enrolled in a gallery used
2 by the facial recognition service.

3 (9) "Serious criminal offense" means any felony under chapter
4 9.94A RCW, crimes against persons under RCW 9.94A.411, or an offense
5 enumerated by Title 18 U.S.C. Sec. 2516.

6 NEW SECTION. **Sec. 3.** (1) A state or local government agency
7 using or intending to develop, procure, or use a facial recognition
8 service must produce an accountability report for that service. The
9 report must be clearly communicated to the public at least ninety
10 days prior to the agency putting the facial recognition service into
11 operational use, posted on the agency's public web site, and
12 submitted to the consolidated technology services agency established
13 in RCW 43.105.006. The consolidated technology services agency must
14 post each submitted accountability report on its public web site.

15 (2) Each accountability report must include, at minimum, clear
16 and understandable statements of the following:

17 (a) (i) The name of the facial recognition service, vendor, and
18 version; and (ii) a description of its general capabilities and
19 limitations, including reasonably foreseeable capabilities outside
20 the scope of the proposed use of the agency;

21 (b) (i) The type or types of data inputs that the technology uses;
22 (ii) how that data is generated, collected, and processed; and (iii)
23 the type or types of data the system is reasonably likely to
24 generate;

25 (c) (i) A description of the purpose and proposed use of the
26 facial recognition service, including what decision or decisions will
27 be used to make or support it; (ii) whether it is a final or support
28 decision system; and (iii) its intended benefits, including any data
29 or research demonstrating those benefits;

30 (d) A clear use and data management policy, including protocols
31 for the following:

32 (i) How and when the facial recognition service will be deployed
33 or used and by whom including, but not limited to, the factors that
34 will be used to determine where, when, and how the technology is
35 deployed, and other relevant information, such as whether the
36 technology will be operated continuously or used only under specific
37 circumstances. If the facial recognition service will be operated or
38 used by another entity on the agency's behalf, the facial recognition

1 service accountability report must explicitly include a description
2 of the other entity's access and any applicable protocols;

3 (ii) Any measures taken to minimize inadvertent collection of
4 additional data beyond the amount necessary for the specific purpose
5 or purposes for which the facial recognition service will be used;

6 (iii) Data integrity and retention policies applicable to the
7 data collected using the facial recognition service, including how
8 the agency will maintain and update records used in connection with
9 the service, how long the agency will keep the data, and the
10 processes by which data will be deleted;

11 (iv) Any additional rules that will govern use of the facial
12 recognition service and what processes will be required prior to each
13 use of the facial recognition service;

14 (v) Data security measures applicable to the facial recognition
15 service including how data collected using the facial recognition
16 service will be securely stored and accessed, if and why an agency
17 intends to share access to the facial recognition service or the data
18 from that facial recognition service with any other entity, and the
19 rules and procedures by which an agency sharing data with any other
20 entity will ensure that such entities comply with the sharing
21 agency's use and data management policy as part of the data sharing
22 agreement; and

23 (vi) The agency's training procedures, including those
24 implemented in accordance with section 8 of this act, and how the
25 agency will ensure that all personnel who operate the facial
26 recognition service or access its data are knowledgeable about and
27 able to ensure compliance with the use and data management policy
28 prior to use of the facial recognition service;

29 (e) The agency's testing procedures, including its processes for
30 periodically undertaking operational tests of the facial recognition
31 service in accordance with section 6 of this act;

32 (f) A description of any potential impacts of the facial
33 recognition service on civil rights and liberties, including
34 potential impacts to privacy and potential disparate impacts on
35 marginalized communities, and the specific steps the agency will take
36 to mitigate the potential impacts and prevent unauthorized use of the
37 facial recognition service; and

38 (g) The agency's procedures for receiving feedback, including the
39 channels for receiving feedback from individuals affected by the use

1 of the facial recognition service and from the community at large, as
2 well as the procedures for responding to feedback.

3 (3) Prior to finalizing and implementing the accountability
4 report, the agency must consider issues raised by the public through:

5 (a) A public review and comment period; and

6 (b) Community consultation meetings during the public review
7 period.

8 (4) The accountability report must be updated every two years and
9 each update must be subject to the public comment and community
10 consultation processes described in this section.

11 (5) An agency seeking to use a facial recognition service for a
12 purpose not disclosed in the agency's existing accountability report
13 must first seek public comment and community consultation on the
14 proposed new use and adopt an updated accountability report pursuant
15 to the requirements contained in this section.

16 (6) The accountability report required for the facial recognition
17 matching system authorized in RCW 46.20.037 is due July 1, 2021.

18 NEW SECTION. **Sec. 4.** (1) State and local government agencies
19 using a facial recognition service are required to prepare and
20 publish an annual report that discloses:

21 (a) The extent of their use of such services;

22 (b) An assessment of compliance with the terms of their
23 accountability report;

24 (c) Any known or reasonably suspected violations of their
25 accountability report, including categories of complaints alleging
26 violations; and

27 (d) Any revisions to the accountability report recommended by the
28 agency during the next update of the policy.

29 (2) The annual report must be submitted to the office of privacy
30 and data protection.

31 (3) All agencies must hold community meetings to review and
32 discuss their annual report within sixty days of its public release.

33 NEW SECTION. **Sec. 5.** State and local government agencies using
34 a facial recognition service to make decisions that produce legal
35 effects concerning individuals or similarly significant effects
36 concerning individuals must ensure that those decisions are subject
37 to meaningful human review. Decisions that produce legal effects
38 concerning individuals or similarly significant effects concerning

1 individuals means decisions that result in the provision or denial of
2 financial and lending services, housing, insurance, education
3 enrollment, criminal justice, employment opportunities, health care
4 services, or access to basic necessities such as food and water.

5 NEW SECTION. **Sec. 6.** Prior to deploying a facial recognition
6 service in the context in which it will be used, state and local
7 government agencies using a facial recognition service to make
8 decisions that produce legal effects on individuals or similarly
9 significant effect on individuals must test the facial recognition
10 service in operational conditions. State and local government
11 agencies must take reasonable steps to ensure best quality results by
12 following all reasonable guidance provided by the developer of the
13 facial recognition service.

14 NEW SECTION. **Sec. 7.** (1) A state or local government agency
15 that deploys a facial recognition service must require a facial
16 recognition service provider to make available an application
17 programming interface or other technical capability, chosen by the
18 provider, to enable legitimate, independent, and reasonable tests of
19 those facial recognition services for accuracy and unfair performance
20 differences across distinct subpopulations. However, making such an
21 application programming interface or other technical capability
22 available does not require the disclosure of proprietary data, trade
23 secrets, intellectual property, or other information, or if doing so
24 would increase the risk of cyberattacks including, without
25 limitation, cyberattacks related to unique methods of conducting
26 business, data unique to the product or services, or determining
27 prices or rates to be charged for services. Such subpopulations are
28 defined by visually detectable characteristics such as: (a) Race,
29 skin tone, ethnicity, gender, age, or disability status; or (b) other
30 protected characteristics that are objectively determinable or self-
31 identified by the individuals portrayed in the testing dataset. If
32 the results of the independent testing identify material unfair
33 performance differences across subpopulations, and the methodology,
34 data, and results are disclosed in a manner that allows full
35 reproduction directly to the provider who, acting reasonably,
36 determines that the methodology and results of that testing are
37 valid, then the provider must develop and implement a plan to
38 mitigate the identified performance differences.

1 (2) This section does not apply to the facial recognition
2 matching system authorized in RCW 46.20.037 under contract as of the
3 effective date of this section. Upon renewal or extension of the
4 contract as of the effective date of this section, or upon entering
5 into a new contract for facial recognition services, the department
6 of licensing must ensure that the facial recognition service provider
7 of the system authorized in RCW 46.20.037 fulfills the requirements
8 of this section.

9 NEW SECTION. **Sec. 8.** State and local government agencies using
10 a facial recognition service must conduct periodic training of all
11 individuals who operate a facial recognition service or who process
12 personal data obtained from the use of a facial recognition service.
13 The training must include, but not be limited to, coverage of:

14 (1) The capabilities and limitations of the facial recognition
15 service;

16 (2) Procedures to interpret and act on the output of the facial
17 recognition service; and

18 (3) To the extent applicable to the deployment context, the
19 meaningful human review requirement for decisions that produce legal
20 effects concerning individuals or similarly significant effects
21 concerning individuals.

22 NEW SECTION. **Sec. 9.** (1) State local and government agencies
23 must disclose their use of a facial recognition service on a criminal
24 defendant to that defendant in a timely manner prior to trial.

25 (2) State and local government agencies using a facial
26 recognition service shall maintain records of their use of the
27 service that are sufficient to facilitate public reporting and
28 auditing of compliance with agencies' facial recognition policies.

29 (3) In January of each year, any judge who has issued a warrant
30 for ongoing surveillance, or an extension thereof, as described in
31 section 12(1) of this act, that expired during the preceding year, or
32 who has denied approval of such a warrant during that year shall
33 report to the Washington state supreme court:

34 (a) The fact that a warrant or extension was applied for;

35 (b) The fact that the warrant or extension was granted as applied
36 for, was modified, or was denied;

37 (c) The period of ongoing surveillance authorized by the warrant
38 and the number and duration of any extensions of the warrant;

1 (d) The identity of the applying investigative or law enforcement
2 officer and agency making the application and the person authorizing
3 the application; and

4 (e) The nature of the public spaces where the surveillance was
5 conducted.

6 NEW SECTION. **Sec. 10.** This chapter does not apply to a state or
7 local government agency that is mandated to use a specific facial
8 recognition service pursuant to a federal regulation or order.

9 NEW SECTION. **Sec. 11.** (1)(a) A legislative task force on facial
10 recognition services is established, with members as provided in this
11 subsection.

12 (i) The president of the senate shall appoint one member from
13 each of the two largest caucuses of the senate;

14 (ii) The speaker of the house of representatives shall appoint
15 one member from each of the two largest caucuses of the house of
16 representatives;

17 (iii) Two representatives from advocacy organizations that
18 represent individuals or protected classes of communities
19 historically impacted by surveillance technologies including, but not
20 limited to, African American, Hispanic American, Native American, and
21 Asian American communities, religious minorities, protest and
22 activist groups, and other vulnerable communities;

23 (iv) Two members from law enforcement or other agencies of
24 government;

25 (v) One representative from a retailer or other company who
26 deploys facial recognition services in physical premises open to the
27 public;

28 (vi) Two representatives from companies that develop and provide
29 facial recognition services; and

30 (vii) Two representatives from universities or research
31 institutions who are experts in either facial recognition services or
32 their sociotechnical implications, or both.

33 (b) The task force shall choose two cochairs from among its
34 legislative membership.

35 (2) The task force shall review the following issues:

36 (a) Provide recommendations addressing the potential abuses and
37 threats posed by the use of a facial recognition service to civil
38 liberties and freedoms, privacy and security, and discrimination

1 against vulnerable communities, as well as other potential harm,
2 while also addressing how to facilitate and encourage the continued
3 development of a facial recognition service so that individuals,
4 businesses, government, and other stakeholders in society continue to
5 utilize its benefits;

6 (b) Provide recommendations regarding the adequacy and
7 effectiveness of applicable Washington state laws; and

8 (c) Conduct a study on the quality, accuracy, and efficacy of a
9 facial recognition service including, but not limited to, its
10 quality, accuracy, and efficacy across different subpopulations.

11 (3) Staff support for the task force must be provided by senate
12 committee services and the house of representatives office of program
13 research.

14 (4) Legislative members of the task force are reimbursed for
15 travel expenses in accordance with RCW 44.04.120. Nonlegislative
16 members are not entitled to be reimbursed for travel expenses if they
17 are elected officials or are participating on behalf of an employer,
18 governmental entity, or other organization. Any reimbursement for
19 other nonlegislative members is subject to chapter 43.03 RCW.

20 (5) The expenses of the task force must be paid jointly by the
21 senate and the house of representatives. Task force expenditures are
22 subject to approval by the senate facilities and operations committee
23 and the house of representatives executive rules committee, or their
24 successor committees.

25 (6) The task force shall report its findings and recommendations
26 to the governor and the appropriate committees of the legislature by
27 September 30, 2021.

28 (7) This section expires May 1, 2022.

29 NEW SECTION. **Sec. 12.** A new section is added to chapter 9.73
30 RCW to read as follows:

31 (1) State and local government agencies may not use a facial
32 recognition service to engage in ongoing surveillance unless the use
33 is in support of law enforcement activities and the ongoing
34 surveillance may provide evidence of a serious criminal offense, and
35 either:

36 (a) A search warrant has been obtained to permit the use of the
37 facial recognition service for ongoing surveillance; or

38 (b) Where the agency reasonably determines that ongoing
39 surveillance is necessary to prevent or respond to an emergency

1 involving imminent danger or risk of death or serious physical injury
2 to a person, but only if written approval is obtained from the
3 agency's director or the director's designee prior to using the
4 service. For the purpose of ongoing surveillance, an ex parte order
5 for a search warrant must be obtained within forty-eight hours after
6 the emergency surveillance begins. In the absence of an authorizing
7 order, such use must immediately terminate at the earliest of the
8 following:

9 (i) The information sought is obtained;

10 (ii) The application for the order is denied; or

11 (iii) When forty-eight hours have lapsed since the beginning of
12 the emergency surveillance for the purpose of ongoing surveillance.

13 (2) State and local government agencies must not apply a facial
14 recognition service to any individual based on their religious,
15 political, or social views or activities, participation in a
16 particular noncriminal organization or lawful event, or actual or
17 perceived race, ethnicity, citizenship, place of origin, age,
18 disability, gender, gender identity, sexual orientation, or other
19 characteristic protected by law. The prohibition in this subsection
20 does not prohibit state and local government agencies from applying a
21 facial recognition service to an individual who happens to possess
22 one or more of these characteristics where an officer of that agency
23 holds a reasonable suspicion that that individual has committed, is
24 committing, or is about to commit a serious criminal offense.

25 (3) State and local government agencies may not use a facial
26 recognition service to create a record describing any individual's
27 exercise of rights guaranteed by the First Amendment of the United
28 States Constitution and by Article I, section 5 of the state
29 Constitution, unless:

30 (a) Such use is specifically authorized by applicable law and is
31 pertinent to and within the scope of an authorized law enforcement
32 activity; and

33 (b) There is reasonable suspicion to believe the individual has
34 committed, is committing, or is about to commit a serious criminal
35 offense.

36 (4) Law enforcement agencies that utilize body worn camera
37 recordings shall comply with the provisions of RCW 42.56.240(14).

1 NEW SECTION. **Sec. 13.** Sections 1 through 10 of this act
2 constitute a new chapter in Title 43 RCW.

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