CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 6280

Chapter 257, Laws of 2020

(partial veto)

66th Legislature
2020 Regular Session

FACIAL RECOGNITION--STATE AND LOCAL GOVERNMENT

EFFECTIVE DATE: July 1, 2021

Passed by the Senate March 12, 2020
  Yeas 27 Nays 21

CYRUS HABIB

President of the Senate

Passed by the House March 12, 2020
  Yeas 53 Nays 43

LAURIE JINKINS

Speaker of the House of Representatives

Approved March 31, 2020 11:19 AM with the exception of section 10, which is vetoed.

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6280** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

March 31, 2020

JAY INSLEE

Governor of the State of Washington

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 6280

AS AMENDED BY THE HOUSE

Passed Legislature - 2020 Regular Session

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 chapter to Title 43 RCW; providing an effective date; and
3 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 to locate or identify missing persons, and
15 identify deceased persons, including missing or murdered indigenous
16 women, subjects of Amber alerts and silver alerts, and other possible
17 crime victims, for the purposes of keeping the public safe.

18   NEW SECTION. **Sec. 2.** The definitions in this section apply
19 throughout this chapter unless the context clearly requires
20 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)(a) "Facial recognition service" means technology that
11 analyzes facial features and is used by a state or local government
12 agency for the identification, verification, or persistent tracking
13 of individuals in still or video images.
14   (b) "Facial recognition service" does not include: (i) The
15 analysis of facial features to grant or deny access to an electronic
16 device; or (ii) the use of an automated or semiautomated process for
17 the purpose of redacting a recording for release or disclosure
18 outside the law enforcement agency to protect the privacy of a
19 subject depicted in the recording, if the process does not generate
20 or result in the retention of any biometric data or surveillance
21 information.
22   (4) "Facial template" means the machine-interpretable pattern of
23 facial features that is extracted from one or more images of an
24 individual by a facial recognition service.
25   (5) "Identification" means the use of a facial recognition
26 service by a state or local government agency to determine whether an
27 unknown individual matches any individual whose identity is known to
28 the state or local government agency and who has been enrolled by
29 reference to that identity in a gallery used by the facial
30 recognition service.
31   (6) "Legislative authority" means the respective city, county, or
32 other local governmental agency's council, commission, or other body
33 in which legislative powers are vested. For a port district, the
34 legislative authority refers to the port district's port commission.
35 For an airport established pursuant to chapter 14.08 RCW and operated
36 by a board, the legislative authority refers to the airport's board.
37 For a state agency, "legislative authority" refers to the technology
38 services board created in RCW 43.105.285.

(7) "Meaningful human review" means review or oversight by one or more individuals who are trained in accordance with section 7 of this act and who have the authority to alter the decision under review.

(8) "Nonidentifying demographic data" means data that is not linked or reasonably linkable to an identified or identifiable individual, and includes, at a minimum, information about gender, race or ethnicity, age, and location.

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

(10) "Persistent tracking" means the use of a facial recognition service by a state or local government agency to track the movements of an individual on a persistent basis without identification or verification of that individual. Such tracking becomes persistent as soon as:

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

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

(11) "Recognition" means the use of a facial recognition service by a state or local government agency to determine whether an unknown individual matches:

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

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

(12) "Verification" means the use of a facial recognition service by a state or local government agency to determine whether an individual is a specific individual whose identity is known to the state or local government agency and who has been enrolled by reference to that identity in a gallery used by the facial recognition service.

NEW SECTION. **Sec. 3.** (1) A state or local government agency using or intending to develop, procure, or use a facial recognition service must file with a legislative authority a notice of intent to develop, procure, or use a facial recognition service and specify a purpose for which the technology is to be used. A state or local government agency may commence the accountability report once it files the notice of intent by the legislative authority.

(2) Prior to developing, procuring, or using a facial recognition service, a state or local government agency must produce an accountability report for that service. Each accountability report must include, at minimum, clear and understandable statements of the following:

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

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

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

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

(i) How and when the facial recognition service will be deployed or used and by whom including, but not limited to, the factors that will be used to determine where, when, and how the technology is deployed, and other relevant information, such as whether the technology will be operated continuously or used only under specific circumstances. If the facial recognition service will be operated or used by another entity on the agency's behalf, the facial recognition service accountability report must explicitly include a description of the other entity's access and any applicable protocols;

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

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

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

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

(vi) How the facial recognition service provider intends to fulfill security breach notification requirements pursuant to chapter 19.255 RCW and how the agency intends to fulfill security breach notification requirements pursuant to RCW 42.56.590; and

(vii) The agency's training procedures, including those implemented in accordance with section 7 of this act, and how the agency will ensure that all personnel who operate the facial recognition service or access its data are knowledgeable about and able to ensure compliance with the use and data management policy prior to use of the facial recognition service;

(e) The agency's testing procedures, including its processes for periodically undertaking operational tests of the facial recognition service in accordance with section 5 of this act;

(f) Information on the facial recognition service's rate of false matches, potential impacts on protected subpopulations, and how the agency will address error rates, determined independently, greater than one percent;

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

(h) The agency's procedures for receiving feedback, including the channels for receiving feedback from individuals affected by the use of the facial recognition service and from the community at large, as well as the procedures for responding to feedback.

(3) Prior to finalizing the accountability report, the agency must:

(a) Allow for a public review and comment period;

(b) Hold at least three community consultation meetings; and

(c) Consider the issues raised by the public through the public review and comment period and the community consultation meetings.

(4) The final accountability report must be updated every two years and submitted to a legislative authority.

(5) The final adopted accountability report must be clearly communicated to the public at least ninety days prior to the agency putting the facial recognition service into operational use, posted on the agency's public web site, and submitted to a legislative authority. The legislative authority must post each submitted accountability report on its public web site.

(6) A state or local government agency seeking to procure a facial recognition service must require vendors to disclose any complaints or reports of bias regarding the service.

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

(8) This section does not apply to a facial recognition service under contract as of the effective date of this section. An agency must fulfill the requirements of this section upon renewal or extension of the contract.

NEW SECTION. **Sec. 4.** A state or local government agency using a facial recognition service to make decisions that produce legal effects concerning individuals or similarly significant effects concerning individuals must ensure that those decisions are subject to meaningful human review. Decisions that produce legal effects concerning individuals or similarly significant effects concerning individuals means decisions that result in the provision or denial of financial and lending services, housing, insurance, education enrollment, criminal justice, employment opportunities, health care

1 services, or access to basic necessities such as food and water, or
2 that impact civil rights of individuals.

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

11 NEW SECTION. **Sec. 6.** (1)(a) A state or local government agency
12 that deploys a facial recognition service must require a facial
13 recognition service provider to make available an application
14 programming interface or other technical capability, chosen by the
15 provider, to enable legitimate, independent, and reasonable tests of
16 those facial recognition services for accuracy and unfair performance
17 differences across distinct subpopulations. Such subpopulations are
18 defined by visually detectable characteristics such as: (i) Race,
19 skin tone, ethnicity, gender, age, or disability status; or (ii)
20 other protected characteristics that are objectively determinable or
21 self-identified by the individuals portrayed in the testing dataset.
22 If the results of the independent testing identify material unfair
23 performance differences across subpopulations, the provider must
24 develop and implement a plan to mitigate the identified performance
25 differences within ninety days of receipt of such results. For
26 purposes of mitigating the identified performance differences, the
27 methodology and data used in the independent testing must be
28 disclosed to the provider in a manner that allows full reproduction.
29 (b) Making an application programming interface or other
30 technical capability does not require providers to do so in a manner
31 that would increase the risk of cyberattacks or to disclose
32 proprietary data. Providers bear the burden of minimizing these risks
33 when making an application programming interface or other technical
34 capability available for testing.
35 (2) Nothing in this section requires a state or local government
36 agency to collect or provide data to a facial recognition service
37 provider to satisfy the requirements in subsection (1) of this
38 section.

1   NEW SECTION. **Sec. 7.** A state or local government agency using a
2 facial recognition service must conduct periodic training of all
3 individuals who operate a facial recognition service or who process
4 personal data obtained from the use of a facial recognition service.
5 The training must include, but not be limited to, coverage of:
6   (1) The capabilities and limitations of the facial recognition
7 service;
8   (2) Procedures to interpret and act on the output of the facial
9 recognition service; and
10   (3) To the extent applicable to the deployment context, the
11 meaningful human review requirement for decisions that produce legal
12 effects concerning individuals or similarly significant effects
13 concerning individuals.

14   NEW SECTION. **Sec. 8.** (1) A state or local government agency
15 must disclose their use of a facial recognition service on a criminal
16 defendant to that defendant in a timely manner prior to trial.
17   (2) A state or local government agency using a facial recognition
18 service shall maintain records of its use of the service that are
19 sufficient to facilitate public reporting and auditing of compliance
20 with the agency's facial recognition policies.
21   (3) In January of each year, any judge who has issued a warrant
22 for the use of a facial recognition service to engage in any
23 surveillance, or an extension thereof, as described in section 11 of
24 this act, that expired during the preceding year, or who has denied
25 approval of such a warrant during that year shall report to the
26 administrator for the courts:
27   (a) The fact that a warrant or extension was applied for;
28   (b) The fact that the warrant or extension was granted as applied
29 for, was modified, or was denied;
30   (c) The period of surveillance authorized by the warrant and the
31 number and duration of any extensions of the warrant;
32   (d) The identity of the applying investigative or law enforcement
33 officer and agency making the application and the person authorizing
34 the application; and
35   (e) The nature of the public spaces where the surveillance was
36 conducted.
37   (4) In January of each year, any state or local government agency
38 that has applied for a warrant, or an extension thereof, for the use
39 of a facial recognition service to engage in any surveillance as

described in section 11 of this act shall provide to a legislative
authority a report summarizing nonidentifying demographic data of
individuals named in warrant applications as subjects of surveillance
with the use of a facial recognition service.

NEW SECTION. **Sec. 9.** (1) This chapter does not apply to a state
or local government agency that: (a) Is mandated to use a specific
facial recognition service pursuant to a federal regulation or order,
or that are undertaken through partnership with a federal agency to
fulfill a congressional mandate; or (b) uses a facial recognition
service in association with a federal agency to verify the identity
of individuals presenting themselves for travel at an airport or
seaport.

(2) A state or local government agency must report to a
legislative authority the use of a facial recognition service
pursuant to subsection (1) of this section.

*NEW SECTION. Sec. 10. (1)(a) The William D. Ruckelshaus center
must establish a facial recognition task force, with members as
provided in this subsection.*

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

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

*(iii) Eight representatives from advocacy organizations that
represent individuals or protected classes of communities
historically impacted by surveillance technologies including, but not
limited to, African American, Latino American, Native American,
Pacific Islander American, and Asian American communities, religious
minorities, protest and activist groups, and other vulnerable
communities;*

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

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

(vi) Two representatives from consumer protection organizations;

*(vii) Two representatives from companies that develop and provide
facial recognition services; and*

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

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

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

(a) Provide recommendations addressing the potential abuses and threats posed by the use of a facial recognition service to civil liberties and freedoms, privacy and security, and discrimination against vulnerable communities, as well as other potential harm, while also addressing how to facilitate and encourage the continued development of a facial recognition service so that individuals, businesses, government, and other stakeholders in society continue to utilize its benefits;

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

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

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

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

(5) This section expires September 30, 2022.

*Sec. 10 was vetoed. See message at end of chapter.

NEW SECTION. **Sec. 11.** (1) A state or local government agency may not use a facial recognition service to engage in ongoing surveillance, conduct real-time or near real-time identification, or start persistent tracking unless:

(a) A warrant is obtained authorizing the use of the service for those purposes;

(b) Exigent circumstances exist; or

(c) A court order is obtained authorizing the use of the service for the sole purpose of locating or identifying a missing person, or

identifying a deceased person. A court may issue an ex parte order
under this subsection (1)(c) if a law enforcement officer certifies
and the court finds that the information likely to be obtained is
relevant to locating or identifying a missing person, or identifying
a deceased person.

(2) A state or local government agency may not apply a facial
recognition service to any individual based on their religious,
political, or social views or activities, participation in a
particular noncriminal organization or lawful event, or actual or
perceived race, ethnicity, citizenship, place of origin, immigration
status, age, disability, gender, gender identity, sexual orientation,
or other characteristic protected by law. This subsection does not
condone profiling including, but not limited to, predictive law
enforcement tools.

(3) A state or local government agency may not use a facial
recognition service to create a record describing any individual's
exercise of rights guaranteed by the First Amendment of the United
States Constitution and by Article I, section 5 of the state
Constitution.

(4) A law enforcement agency that utilizes body worn camera
recordings shall comply with the provisions of RCW 42.56.240(14).

(5) A state or local law enforcement agency may not use the
results of a facial recognition service as the sole basis to
establish probable cause in a criminal investigation. The results of
a facial recognition service may be used in conjunction with other
information and evidence lawfully obtained by a law enforcement
officer to establish probable cause in a criminal investigation.

(6) A state or local law enforcement agency may not use a facial
recognition service to identify an individual based on a sketch or
other manually produced image.

(7) A state or local law enforcement agency may not substantively
manipulate an image for use in a facial recognition service in a
manner not consistent with the facial recognition service provider's
intended use and training.

NEW SECTION. **Sec. 12.** Nothing in this chapter applies to the
use of a facial recognition matching system by the department of
licensing pursuant to RCW 46.20.037.

1   NEW SECTION. **Sec. 13.**   Sections 1 through 12 of this act
2 constitute a new chapter in Title 43 RCW.

3   NEW SECTION. **Sec. 14.**   Sections 1 through 9 and 11 through 13 of
4 this act take effect July 1, 2021.

         Passed by the Senate March 12, 2020.
         Passed by the House March 12, 2020.
         Approved by the Governor March 31, 2020, with the exception of
certain items that were vetoed.
         Filed in Office of Secretary of State March 31, 2020.

         Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to Section 10,
Engrossed Substitute Senate Bill No. 6280 entitled:

     "AN ACT Relating to the use of facial recognition services."

Section 10 establishes a legislative task force on facial recognition
services with the purpose of:
     • providing recommendations addressing the potential abuses and
threats posed by the use of facial recognition services, while also
addressing how to facilitate and encourage the continued development
of these services;
     • providing recommendations regarding the adequacy and
effectiveness of applicable Washington state laws; and
     • conducting a study on the quality, accuracy, and efficacy of a
service.

While the purpose of this task force is very important, it was not
funded in the budget. I recommend that the Legislature engage the
Ruckelshaus Center in preparing a situation assessment that would
inform policy recommendations on facial recognition technologies.
Such an assessment would answer many questions about how best to
proceed, and could better inform the creation of a task force in a
subsequent legislative session.

For these reasons I have vetoed Section 10 of Engrossed Substitute
Senate Bill No. 6280.

With the exception of Section 10, Engrossed Substitute Senate Bill
No. 6280 is approved."

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