



February 8, 2019

Senate Committee on Environment, Energy and Technology

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Re: S.B. 5528 and H.B. 1654 (face surveillance moratorium) – SUPPORT

Dear Senators and Representatives:

The Electronic Frontier Foundation strongly supports S.B. 5528 and H.B. 1654 and urges their swift enactment in the State of Washington. These critical bills would create a moratorium on an urgent threat to personal privacy, free speech, and racial justice: government use of face surveillance technology. The bills also would ban the application of face surveillance technology to images captured by police body worn cameras.

EFF is a non-profit, non-partisan advocacy organization with more than 39,000 members dedicated to digital liberty, including freedom from government surveillance.

1. Why Washington needs S.B. 5528 and H.B. 1654

EFF objects to government use of face surveillance technology for several reasons.¹

¹ See generally <https://www.eff.org/pages/face-recognition>; <https://www.eff.org/wp/law-enforcement-use-face-recognition>.

First, face surveillance is a growing threat to personal privacy. Surveillance cameras in public spaces are proliferating, operated by myriad government and private entities. These cameras are increasingly networked into unified systems. Face surveillance technologies are growing increasingly powerful. In combination, these technologies can track everyone who lives and works in public spaces by means of a unique identifying marker that is difficult to change or hide – our own faces. We must not build an infrastructure that empowers government to easily track where everyone is going, what they are doing, and who they are with. Once government builds this infrastructure, there is the inherent risk that thieves will steal this sensitive data, employees will misuse it, and policy makers will redeploy it in unforeseen manners.

Second, government use of face surveillance technology in public places will chill people from engaging in protests. Courts have long recognized that government surveillance of First Amendment activity has a “deterrent effect.” *See, e.g., Lamont v. Postmaster*, 381 U.S. 301 (1965). Empirical research confirms this problem. *See, e.g., Stoycheff, “Facebook’s spiral of silence effects in the wake of NSA Internet monitoring”* (2016); Penney, “Online surveillance and Wikipedia use” (2016).²

Third, surveillance technologies have an unfair disparate impact against people of color, immigrants, and other vulnerable populations. Governments use these technologies to spy on advocates for racial justice. For example, police have used phony accounts and powerful automated tools to spy on the social media advocacy of Black Lives Matter.³ Surveillance technologies often criminalize entire neighborhoods. For example, watch lists are often over-inclusive and error-riddled, and cameras often are over-deployed in minority areas.⁴ And these spying tools increasingly are being used in conjunction with powerful mathematical algorithms, which often amplify bias.⁵

Notably, studies show that face surveillance technologies have higher error rates when used with minorities, women, and young people. *See, e.g., “Facial recognition is accurate, if you’re a white guy,”* N.Y. Times (Feb. 9, 2018) (reporting on a study by Joy Buolamwini of the M.I.T. Media Lab); “Amazon is pushing facial technology that a study says could be biased,” N.Y. Times (Jan. 24, 2019) (reporting on another study by Buolamwini).⁶

² <https://journals.sagepub.com/doi/pdf/10.1177/1077699016630255>;
<https://scholarship.law.berkeley.edu/btlj/vol31/iss1/5/>.

³ <https://www.theguardian.com/technology/2016/oct/11/aclu-geofeedia-facebook-twitter-instagram-black-lives-matter>; https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/memphis-police-used-fake-facebook-account-to-monitor-black-lives-matter-trial-reveals/?utm_term=.13db56fe4bb8.

⁴ <https://www.eff.org/deeplinks/2017/04/next-steps-toward-reforming-californias-unfair-gang-databases>;
<https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data>.

⁵ <https://www.newscientist.com/article/2166207-discriminating-algorithms-5-times-ai-showed-prejudice/>.

⁶ <https://www.nytimes.com/2019/01/24/technology/amazon-facial-technology-study.html>;
<https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html>.

2. What S.B. 5528 and H.B. 1654 would do

S.B. 5528 and H.B. 1654 would create a moratorium on the use of face surveillance technology, and information obtained from such technology, by state and local government. That moratorium would last until: (a) the Washington Attorney General certifies that independent auditing shows that such technology has no statistically significant variation in accuracy based on race, gender, or age; (b) a community task force provides the Washington Legislature a report on the potential unfair impact of such technology on vulnerable communities; and (c) the Washington Legislature passes new legislation finding that the foregoing conditions have been met. *See* bills at Section 3.

These bills also would ban two especially troubling uses of face surveillance technology by state and local government: (a) to analyze any footage obtained from a police body worn camera; and (b) to monitor public spaces without a warrant. *See* bills at Section 4.

Finally, these bills would remedy violations of the moratorium and the substantive bans by: (a) excluding evidence derived from such violations from judicial and other proceedings; and (b) empowering members of the public to bring a private cause of action to enforce the law. *See* bills at Section 5.

3. The face surveillance provisions of S.B. 5376 and H.B. 1854 are no substitute

EFF is concerned about Section 14(4) of S.B. 5376 and H.B. 1854. This provision would provide that members of the public consent to face surveillance in a physical or online space merely by entering that space after having been notified that face surveillance occurs there. EFF disagrees that this comprises “consent” to face surveillance.

The remaining face surveillance provisions in Sections 14 and 15 of S.B. 5376 and H.B. 1854 are not up to the task of protecting the public from the privacy, free speech, and racial justice hazards presented by government face surveillance, especially when compared to S.B. 5528 and H.B. 1654.

* * *

We urge the State of Washington to swiftly enact S.B. 5528 and H.B. 1654. These salutary bills would place a moratorium on all government use of face surveillance, and ban use of face surveillance on images captured by police body worn cameras. These bills are an important way to address the threats posed by government face surveillance to privacy, free speech, and racial justice.

Sincerely,

Adam Schwartz
Senior Staff Attorney