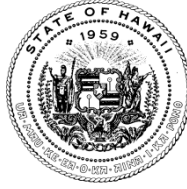


DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDUARDO P. MANGLALLAN
PATRICK H. MCCAIN
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 8, 2022
3:15 p.m.
State Capitol, Teleconference

LATE

S.B. NO. 2293
RELATING TO FACIAL RECOGNITION SYSTEMS

Senate Committee(s) on Government Operations and Transportation

The Department of Transportation (DOT) **supports the intent** of this bill to protect traveler safety and privacy at our airports

The DOT enables the State of Hawaii, Safe Travels program space at our airport facilities to conduct their mission.

NEC Corporation installed and maintains thermal screening and facial imaging equipment operations at the Daniel K. Inouye International, Kahului, Lihue, Ellison Onizuka Kona International Airport at Keahole and Hilo International Airports on behalf of the State of Hawaii, Safe Travels program.

Thank you for the opportunity to provide testimony.



Hawai'i

LATE

Committee: Committees on Government Operations and Transportation
Hearing Date/Time: 3:15pm, February 8, 2022
Place: Via Videoconference
Re: Testimony of the ACLU of Hawai'i with comments on SB2293, Relating to Facial Recognition Systems

Dear Chairs Moriwaki and Lee, Vice Chairs Dela Cruz and Inouye, and Committee Members:

The American Civil Liberties of Hawai'i ("ACLU of Hawai'i") offers comments on SB. 2293, which would limit the Department of Transportation's use of facial recognition technology ("FRT") to certain specified situations. The bill does not apply to personal use of a privately owned facial recognition system when acting in an unofficial capacity. The ACLU of Hawai'i supports the intent of the bill of protecting Hawai'i residents from government's unregulated use of FRT. We agree that FRT poses significant implications to the civil rights and civil liberties of Hawai'i residents and therefore propose an **amendment to strike subsection (d) and the private use in an unofficial capacity exception entirely.**

Face Surveillance and Government Intrusion

Face surveillance technology gives the government unprecedented power to track who we are, where we go, what we do and who we know. Without strict procedural safeguards, government officials could secretly use FRT to track every person's every movement in public space – whether we attend a protest, a place of worship, visit a medical provider, and so forth - not on one day, but on every day-merely with the push of a button. It could also be used to create a secret, perpetual line-up in which ordinary people are implicated without their knowledge nor consent. Moreover, research shows that face and biometric¹ surveillance are flawed and reinforce racial and gender bias.² Consequently, the cost of this technology to both civil rights and civil liberties substantially outweigh any benefits.

¹ Face surveillance means using computer programs to analyze images of human faced in order to identify or track people at a distance, without their knowledge or consent. Biometric surveillance refers to any an automated or semi-automates process that identifies someone at a distance using unique characteristics like their face, gait or voice.

² A landmark study by the National Institute of Standards and Technology found that many leading face recognition algorithms exhibit racial bias, with Black and Asian people up to 100 times more likely to be misidentified than white men. Similarly, a study by Joy Buolamwini at MIT found that face surveillance technology misclassified Black women up to 35 percent of the time, while working nearly perfectly for white men.

Historical Background to ACLU's Concerns

On June 19, 2020, we sent a letter to government officials citing serious constitutional, civil rights, and privacy concerns about the State of Hawai'i Department of Transportation's installation of FRT cameras at all major airports. While we understand the urgency to fight the spread of COVID-19 and safely open Hawaii's economy, the indiscriminate and rushed use of FRT—particularly without adequate regulations, transparency, and public discussion—is ineffective, unnecessary, expensive, potentially unconstitutional.

FRT is neither effective nor tailored to address the spread of COVID-19. Based on the limited information available to the public, we understand that FRT is being used to recognize people who are exceeding the 100.4 degree temperature. The use of such prying technology for this purpose is ineffective, particularly in light of simpler, more accurate, and significantly safer alternatives such as prescreening people prior to arrival, using thermal imaging technology, and having sufficient and properly-trained staff to identify people with COVID-19 symptoms for additional screening. Such alternative is preferable, not only because it raises fewer civil liberties and rights concerns, but also because it is better tailored to preventing the spread of COVID-19.

Another concern is the State's lack of transparency on how and why it decided to implement FRT, and the boundaries on its use. As companies like Amazon, Microsoft and IBM are rightfully hitting the brakes on the development of FRT³ and several jurisdictions are banning its use,⁴ the State deployed FRT to screen millions of travelers without the public knowing the companies involved, the costs, the rules and guidelines, the algorithm used, access limitation, security measures, time and place limitations, the contracts with the companies, data gathering, audits, notices being posted, and other similar critical information that should have been publicly disclosed and discussed prior to its deployment.

³ Kori Hale, *Amazon, Microsoft & IBM Slightly Social Distancing From The \$8 Billion Facial Recognition Market*, FORBES (June 15, 2020), <https://www.forbes.com/sites/korihale/2020/06/15/amazon-microsoft-ibm-slightly-social-distancing-from-the-8-billion-facial-recognition-market/#29d6c7d54a9a>.

⁴ San Francisco, Oakland, Berkley, and Alameda in California and Cambridge, Brookline, Northampton, and Somerville in Massachusetts have banned the use of FRT in their cities. See Maria G. Gonzalez, *Cambridge City Council Votes to Ban Facial Recognition Technology*, THE HARVARD CRIMSON (Jan. 16, 2020), <https://www.thecrimson.com/article/2020/1/16/cambridge-city-council-bans-facial-recognition/>; Peter Hegarty, *East Bay city becomes latest to ban use of facial recognition technology*, EAST BAY TIMES (Dec. 18, 2019), <https://www.eastbaytimes.com/2019/12/18/east-bay-city-becomes-latest-to-ban-use-of-facial-recognition-technology/>.

Proposed Amendments

- (1) The ACLU recommends the following amendment to this bill: pp. 4-6, strike subsection (d) and insert the following language:

“Restriction on government use of facial recognition (a) Except as provided in subsection (d), it shall be unlawful for the government or any other government official to obtain, retain, share, access or use: (1) Any facial recognition system; or (2) Any information obtained from a facial recognition system.”

- (2) Alternatively, if the committee is inclined to retain subsection (d) and the private-use in an unofficial capacity exception, we ask that, a minimum, the following language be inserted into the bill to ensure that FRT used by government actors, state departments and agencies, and private-use unofficial capacity parties, does not carry racial or gender bias:

“The permissible uses provided for in subsection (d) and private-use in an unofficial capacity exception shall only be allowed where the face surveillance technology or the face surveillance system from which the information is obtained has been demonstrated, through independent testing, to produce no greater rates of false positive identifications for any class of persons protected by the constitutions and laws of the United States of America and State of Hawai‘i.”

Privacy protections must keep up with technological advancements to ensure that the government continues to uphold our Hawai‘i constitutional right to privacy. While we appreciate and support the intent of the bill, subsection (d) and the private-use in an unofficial capacity exception must be stricken entirely or amended to prevent racial or gender bias. The ACLU of Hawai‘i **requests that the Committee support this measure, with our proposed amendments.** Thank you for the opportunity to testify.

Sincerely,

Carrie Ann Shirota

Carrie Ann Shirota
Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for over 50 years.



February 6, 2022

Hawaii Senate
Committees on Government Operations/Transportation

Subject: Written Testimony of the Security Industry Association in Opposition to SB 2293

Dear Chair Moriwaki, Chair Lee, Vice Chair Dela Cruz, Vice Chair Inouye, and Committee Members:

On behalf of the Security Industry Association (SIA) and our members, I would like to share our concerns with SB2293 in its current form.

The Security Industry Association (SIA) is a nonprofit trade association representing businesses that provide a broad range of safety and security products for government, commercial, and residential users in Hawaii and throughout the United States. Our members include many of the leading manufacturers of facial recognition technology, as well as those who are integrating these technologies into a wide variety of building security systems and other security solutions.

SIA Support for Ensure Responsible, Ethical Use of Technology

We believe all technology products must only be used for purposes that are lawful, ethical, and non-discriminatory. Addressing concerns about public sector applications of facial recognition can and should be accomplished through policies and governance frameworks ensuring appropriate transparency, accountability, accuracy, training, and other safeguards. We support policies ensuring that facial recognition is only used for appropriate purposes and in acceptable ways.¹

Blanket Ban vs. Sensible Safeguards

As currently drafted, the bill under consideration imposes a blanket ban on use of facial recognition technology by Department of Transportation, except in one limited use case. A use case-and application-specific approach to policymaking on facial recognition is critically important, and we commend the Committees' efforts to carefully consider current and potential future Department of Transportation uses of facial recognition technologies. However, this bill would prevent the Department of Transportation from fully leveraging the solutions currently deployed at Hawaii airports, facilitate contactless check in and boarding at airports, enable secure and hygienic access control in government buildings and other facilities, and/or conduct contact tracing for individuals who opt-in.

Importantly, the bill would also preclude the Department of Transportation from utilizing facial recognition in its drivers license issuance process, in order to detect and mitigate fraud, protect against identity theft, and to meet the "one driver, one license" requirement in the REAL ID Act.

¹ See SIA's recommendations - <https://www.securityindustry.org/report/sia-principles-for-the-responsible-and-effective-use-of-facial-recognition-technology/>

Recommendations

We urge the committee to consider amending the bill in a way that replaces the current blanket ban on most Department of Transportation uses of facial recognition technologies with a process for strengthening oversight and allowing new uses that meet specified, robust conditions for transparency, accuracy, and accountability.

Attached you will find SIA's recommended edits, which generally:

- Increase the technical accuracy of the definition of "facial recognition" in the bill; and
- Provide an oversight and approval process for further Department facial recognition technology implementations beyond the existing exceptions, provided the additional implementations meet specified requirements.

SIA and our members stand ready to provide any additional information or expertise that you may need.

Respectfully,

A handwritten signature in black ink, appearing to read "Jake Parker", with a long horizontal flourish extending to the right.

Jake Parker
Senior Director, Government Relations
Security Industry Association
jparker@securityindustry.org

JAN 21 2022

RELATING TO FACIAL RECOGNITION SYSTEMS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the unregulated and
2 unfettered use of facial recognition technology poses unique and
3 significant implications with respect to the civil rights and
4 liberties of residents of and visitors to Hawaii. The
5 legislature recognizes, however, that in certain limited
6 circumstances, the use of this technology does not infringe on
7 an individual's privacy rights and can produce numerous benefits.

8 The legislature also finds that detecting infectious
9 travelers is a necessary step to ensure that Hawaii's economy
10 can fully function while keeping the public safe. In May 2021,
11 facial imaging equipment became operational throughout the
12 State's five major airports that accept trans-Pacific flights.
13 The equipment is being used in conjunction with thermal
14 screening equipment as part of the Hawaii department of
15 transportation airports division project to screen travelers for
16 fevers—elevated body temperatures and help detect those who may be
infected with coronavirus
17 disease 2019 (COVID-19) or other infectious diseases that pose a

S. B. NO. 2293

1 public health risk. According to a department of transportation
2 news release dated May 17, 2021, any images collected under the
3 project will remain anonymous, meaning no traveler's image will
4 be connected to personal identifying information; images will
5 not contain information on criminal history or outstanding
6 warrants; images will not be shared with other agencies and will
7 be deleted within thirty minutes; and travelers having a core
8 body temperature of 100.3 degrees Fahrenheit and lower will not
9 have their image recorded at all.

10 The legislature believes that the airports division of the
11 department of transportation should be allowed to continue its
current airport thermal screening program and should be
allowed to use using
12 facial recognition technology, solely within airports, for the
13 purposes of emergency response and protection of public health.

~~14~~ However, before the department potentially expands
its use of facial recognition technology in any
new programs, new facial recognition technology
programs must be subject to oversight and
reporting requirements that ensure that the new
programs will promote any screening or monitoring must be
properly balanced

~~15~~

~~16~~ with the constitutional right to privacy, other civil rights and
civil liberties, social justice, safety, security, efficiency, and
innovation. The department's use of facial recognition technology
also must adhere to data management best practices, including
the immediate

~~17~~ destruction of obtained data that is no longer necessary to retain,
and prohibitions—limitations on sharing that
17 data.

18 The purpose of this Act is to ensure that the legislature
19 has the opportunity to properly vet future uses of rapidly

1 freedom of persons in the State -- as has occurred in other
2 jurisdictions -- by limiting promoting accountability,
effectiveness, integrity, and transparency
through oversight and reporting requirements for the department
of transportation's

~~3~~ use of facial recognition systems ~~to certain specified~~
~~4~~
53 ~~4~~ situations.

5 SECTION 2. Section 26-19, Hawaii Revised Statutes, is
6 amended to read as follows:

7 **"§26-19 Department of transportation .** (a) The department
8 of transportation shall be headed by a single executive to be
9 known as the director of transportation. The department shall
10 establish, maintain, and operate transportation facilities of
11 the State, including highways, airports, harbors, and such other
12 transportation facilities and activities as may be authorized by
13 law.

14 The department shall plan, develop, promote, and coordinate
15 various transportation systems management programs that shall
16 include, but not be limited to, alternate work and school hours
17 programs, bicycling programs, and ridesharing programs.

18 The department shall develop and promote ridesharing
19 programs which shall include but not be limited to, carpool and
20 vanpool programs, and may assist organizations interested in
21 promoting similar programs, arrange for contracts with private

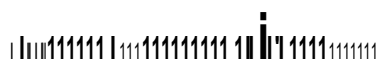
1 organizations to manage and operate these programs, and assist
2 in the formulation of ridesharing arrangements. Ridesharing
3 programs include informal arrangements in which two or more
4 persons ride together in a motor vehicle.

5 The functions and authority heretofore exercised by
6 the department of public works with respect to highways are
7 transferred to the department of transportation established by
8 this chapter.

9 On July 1, 1961, the Hawaii aeronautics commission,
10 the board of harbor commissioners and the highway commission
11 shall be abolished and their remaining functions, duties, and
12 powers shall be transferred to the department of transportation.

13 (d) Without gaining approval according to the process in
subsection (e), it shall be unlawful for the department or any
14 departmental official to obtain, retain, share, access, or use
15 any facial recognition system, or any information obtained from
16 a facial recognition system, unless the department is
facilitating commercial or Federal Government programs
or, in the case of state programs, all of the following
17 conditions are met:

18 (1) The director of health has determined that there
19 exists the potential for a serious outbreak of a
20 communicable or dangerous disease or that there exists
21 the likelihood of extensive injury or death;



S.B. NO. 2293

1 (2) Use of the facial recognition system, ~~and any~~
2 ~~information obtained therefrom,~~ occurs solely within
3 state airports;

4 (3) The facial recognition system is used in conjunction
5 with thermal scanning technology for the purpose of
6 identifying an individual when there is reason to
7 believe, based on the results of the thermal scan,
8 that the individual may presently be infected with a
9 communicable or dangerous disease; and

10 (4) Information obtained from the facial recognition
11 system is:

12 (A) Destroyed within ~~sixty minutes~~ fourteen days of the
13 date on which the individual's health status has been ascertained ~~after~~
14 being
15 ~~obtained~~;

16 (B) Not connected to any personal identifying data,
17 including an individual's name, address, or
18 driver's license or passport number, without
19 obtaining the individual's consent to connect such
20 information;

 (C) Not automatically connected to any information
on an
individual's criminal history or outstanding
arrest warrants;

 (D) Not shared outside of the department without
documenting with whom the information is shared and for what purpose the
information is shared; and

1 (E) Not used as the sole basis to establish probable
cause for an

2 arrest;

(F) Every two years, a departmental official using a facial recognition system must submit an accountability report detailing the use of that facial recognition system to the Director of Transportation by the close of the fiscal year. The departmental official shall post a public summary of the accountability report on its website within ninety days of submitting the report to the Director of Transportation and shall provide an opportunity for public comment. Within sixty days of the close of the public comment period, the departmental official shall post a statement or take other actions to respond to the public comments. The biannual accountability report that the departmental official submits to the Director of Transportation shall include:

- (i) The name of the facial recognition system vendor;
- (ii) Test results from a recent National Institute of Standards and Technology (NIST) report;
- (iii) Plans to upgrade the facial recognition system on a regular basis to promote accuracy overall and across demographic groups;
- (iv) The policy governing the use of the facial recognition system and the management of data from the facial recognition system;
- (v) Information about how the facial recognition system has been used to collect and process data and any changes to the scope of the original purpose for which the departmental official planned to use the facial recognition system;
- (vi) Information about the facial recognition system's performance and any measures that the departmental official has taken or plans to take to address any identified performance issues;
- (vii) Information about training to ensure compliance with policies governing the use of the facial recognition system and the management of data from the facial recognition system;
- (viii) Any known or reasonably suspected violations of the policy governing the use of the facial recognition system and the management of data from the facial recognition system and any actions taken in response to the known or reasonably suspected violations.
- (ix) Information about the departmental official's efforts to ensure that the use of the facial

recognition system supports privacy and other civil rights and civil liberties.

(I) The departmental official shall post a public summary of the accountability report on its website within ninety days of submitting the report to the Director of Transportation and shall provide an opportunity for public comment. Within sixty days of the close of the public comment period, the departmental official shall post a statement or take other actions to respond to the public comments.

3 provided that this subsection shall not apply to a departmental
4 official's personal use of a privately owned facial recognition
5 system when the departmental official is acting in an unofficial
6 capacity.

7 (e) (1) The Director of Transportation shall approve new facial recognition system uses when, and only when, they satisfy the following requirements:

(A) At least ninety days before the planned facial recognition system deployment is set to become operational, a departmental official intending to use a facial recognition system shall post a public notice on its website detailing:

8 (i) the planned use of the facial recognition system;
(ii) the purpose of the use;

(iii) the specific facial recognition system and vendor that the departmental official plans to use;

(iv) test results from a recent National Institute of Standards and Technology (NIST) report;

(v) a certification indicating that the departmental official has satisfied any applicable Information Privacy and Security Council (IPSC) data privacy requirements, IPSC data breach requirements, and/or other relevant IPSC requirements;

(vi) the plans for training departmental officials to operate the facial recognition system; and

(vii) the departmental official's statement of intent to comply with the requirements in subsection (d).

(B) The departmental official shall provide an opportunity for public comment in response to the posted notice.

(C) Within sixty days of the close of the public comment period, the departmental official shall post a statement or take other actions to respond to the public comments.

9 (2) If a public health or other state emergency exists, a departmental official may obtain a temporary approval process waiver that would allow immediate use of facial recognition systems for the limited purpose of helping to combat the emergency. In such an emergency situation, the departmental official would still

be responsible for completing the approval process within a reasonable time period after obtaining the temporary approval process waiver.

10

7 (fe) As used in this section:

8 "Departmental official" means any person or entity acting

9 on behalf of the department of transportation, including any

10 officer, employee, agent, contractor, subcontractor, or vendor.

11 "Facial recognition" means an automated or semiautomated

12 process that:

(1) ~~13~~ (1) generates a mathematical representation of an individual's face, known as a probe facial template and either:

(a) queries a gallery populated with many facial templates linked to personally identifiable information to help assess the similarity between the probe facial template and one or more facial templates in the gallery; or

(b) compares the probe facial template to a specific facial template linked to personally identifiable information in a gallery to help assess the similarity between the probe facial template and the gallery facial template.~~Assists in identifying or verifying the identity of an~~

~~individual or capturing information about an~~

~~individual based on the physical characteristics of~~

~~the individual's face; or~~

~~(2) Uses characteristics of an individual's face, head, or~~

~~body to infer emotion, associations, activities, or~~

~~the location of the individual.~~

20 "Facial recognition system" means any computer software or

21 application that performs facial recognition."

1 SECTION 3. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 4. New statutory material is underscored.

5 SECTION 5. This Act shall take effect upon its approval.

6

INTRODUCED BY:

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke, positioned above a horizontal line.

February 6, 2022

S.B. 2293 Relating to Facial Recognition Systems
Senate Committees on Government Operations and Transportation
Hearing Date/Time: Tuesday, February 8, 2022, 3:15 p.m.

Dear Chairs Moriwaki and Lee, Vice Chairs Dela Cruz and Inouye, and members of the Government Operations and Transportation Committees:

I write in SUPPORT of S.B. 2293 Relating to Facial Recognition Systems.

As a privacy expert, I have worked in the field of data privacy for over 15 years and was a member of the 21st Century Privacy Law Task Force, created by H.C.R. 225 in 2019.

S.B. 2293 addresses an important area of emerging technology that is already in active use by both the public and private sector, but is currently entirely unregulated. Since the facial recognition systems in question have already been procured and deployed by the Hawaii Department of Transportation, the alternative to passing this bill would be to leave the systems operating without limits or legislative oversight.

This bill seeks to strike the right balance between the need for public safety and the right of personal privacy in an increasingly digital world. This balance is sorely needed while the accuracy of this technology is still being established and while best practices are still being defined for acceptable use.

Thank you for your consideration and the opportunity to support this legislation.



Kelly McCanlies
Fellow of Information Privacy, CIPP/US, CIPM, CIPT

