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HOUSE BILL NO. 1339

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Surovell
on February 28, 2022)

(Patron Prior to Substitute—Delegate Leftwich)

A BILL to amend and reenact §§ 15.2-1723.2 and 23.1-815.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 52-4.5, relating to facial recognition technology; Department of State Police and authorized uses; report; penalty.

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-1723.2 and 23.1-815.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 52-4.5 as follows:

§ 15.2-1723.2. Facial recognition technology; approval; penalty.

A. For purposes of this section, "facial:

"Authorized use" means the use of facial recognition technology to (i) help identify an individual when there is a reasonable suspicion the individual has committed a crime; (ii) help identify a crime victim, including a victim of online sexual abuse material; (iii) help identify a person who may be a missing person or witness to criminal activity; (iv) help identify a victim of human trafficking or an individual involved in the trafficking of humans, weapons, drugs, or wildlife; (v) help identify an online recruiter of criminal activity, including but not limited to human, weapon, drug, and wildlife trafficking; (vi) help a person who is suffering from a mental or physical disability impairing his ability to communicate and be understood; (vii) help identify a deceased person; (viii) help identify a person who is incapacitated or otherwise unable to identify himself; (ix) help identify a person who is reasonably believed to be a danger to himself or others; (x) help identify an individual lawfully detained; (xi) help mitigate an imminent threat to public safety, a significant threat to life, or a threat to national security, including acts of terrorism; (xii) ensure officer safety as part of the vetting of undercover law enforcement; (xiii) determine whether an individual may have unlawfully obtained one or more state driver's licenses, financial instruments, or other official forms of identification using information that is fictitious or associated with a victim of identity theft; or (xiv) help identify a person who an officer reasonably believes is concealing his true identity and about whom the officer has a reasonable suspicion has committed a crime other than concealing his identity.

"Facial recognition technology" means an electronic system or service for enrolling, capturing, extracting, comparing, and matching an individual's geometric facial data to identify individuals in photos, videos, or real time conducting an algorithmic comparison of images of a person's facial features for the purpose of identification. "Facial recognition technology" does not include the use of an automated or semi-automated process to redact a recording in order to protect the privacy of a subject depicted in the recording prior to release or disclosure of the recording outside of the law-enforcement agency if the process does not generate or result in the retention of any biometric data or surveillance information.

"Publicly post" means to post on a website that is maintained by the entity or on any other website on which the entity generally posts information and that is available to the public or that clearly describes how the public may access such data.

"State Police Model Facial Recognition Technology Policy" means the model policy developed and published by the Department of State Police pursuant to § 52-4.5.

B. ~~No~~ Pursuant to § 2.2-1112, the Division of Purchases and Supply (the Division) shall determine the appropriate facial recognition technology for use in accordance with this section. The Division shall not approve any facial recognition technology unless it has been evaluated by the National Institute of Standards and Technology (NIST) as part of the Face Recognition Vendor Test. Any facial recognition technology utilized shall utilize algorithms that have demonstrated (i) an accuracy score of at least 98 percent true positives within one or more datasets relevant to the application in a NIST Face Recognition Vendor Test report and (ii) minimal performance variations across demographics associated with race, skin tone, ethnicity, or gender. The Division shall require all approved vendors to annually provide independent assessments and benchmarks offered by NIST to confirm continued compliance with this section.

C. A local law-enforcement agency ~~shall purchase or deploy~~ may use facial recognition technology unless such purchase or deployment of facial recognition technology is expressly authorized by statute for authorized uses. For purposes of this section, a statute that does not refer to facial recognition technology shall not be construed to provide express authorization. Such statute shall require that any facial recognition technology purchased or deployed by the local law-enforcement agency be maintained under the exclusive control of such local law-enforcement agency and that any data contained by such

60 facial recognition technology be kept confidential, not be disseminated or resold, and be accessible only
61 by a search warrant issued pursuant to Chapter 5 (§ 19.2-52 et seq.) of Title 19.2 or an administrative or
62 inspection warrant issued pursuant to law. A match made through facial recognition technology shall not
63 be included in an affidavit to establish probable cause for purposes of issuance of a search warrant or
64 an arrest warrant but shall be admissible as exculpatory evidence.

65 C. D. A local law-enforcement agency shall publicly post and annually update its policy regarding
66 the use of facial recognition technology before employing such facial recognition technology to
67 investigate a specific criminal incident or citizen welfare situation. A local law-enforcement agency that
68 uses facial recognition technology may adopt the State Police Model Facial Recognition Technology
69 Policy. If a local law-enforcement agency uses facial recognition technology but does not adopt such
70 model policy, such agency shall develop its own policy within 90 days of publication of the State Police
71 Model Facial Recognition Technology Policy that meets or exceeds the standards set forth in such
72 model policy. A local law-enforcement agency shall not utilize any facial recognition technology until
73 after the publication of the State Police Model Facial Recognition Technology Policy and after
74 publication of the agency's policy regarding the use of facial recognition technology.

75 E. Any local law-enforcement agency that uses facial recognition technology shall maintain records
76 sufficient to facilitate discovery in criminal proceedings, post-conviction proceedings, public reporting,
77 and auditing of compliance with such agency's facial recognition technology policies. Such agency shall
78 collect data pertaining to (i) a complete history of each user's queries; (ii) the total number of queries
79 conducted; (iii) the number of queries that resulted in a list of possible candidates; (iv) how many times
80 an examiner offered law enforcement an investigative lead based on his findings; (v) how many cases
81 were closed due to an investigative lead from facial recognition technology; (vi) what types of criminal
82 offenses are being investigated; (vii) the nature of the image repository being compared or queried;
83 (viii) demographic information for the individuals whose images are queried; and (ix) if applicable, any
84 other entities with which the agency shared facial recognition data.

85 F. Any chief of police whose agency uses facial recognition technology shall publicly post and
86 annually update a report by April 1 each year to provide information to the public regarding the
87 agency's use of facial recognition technology. The report shall include all data required by clauses (ii)
88 through (viii) of subsection E in addition to (i) all instances of unauthorized access of the facial
89 recognition technology, including any unauthorized access by employees of the agency; (ii) vendor
90 information, including the specific algorithms employed; and (iii) if applicable, data or links related to
91 third-party testing of such algorithms, including any reference to variations in demographic
92 performance. If any information or data (a) contains an articulable concern for any person's safety; (b)
93 is otherwise prohibited from public disclosure by federal or state statute; or (c) if disclosed, may
94 compromise sensitive criminal justice information, such information or data may be excluded from
95 public disclosure. Nothing herein shall limit disclosure of data collected pursuant to subsection E when
96 such disclosure is related to a writ of habeas corpus.

97 For purposes of this subsection, "sensitive criminal justice information" means information related to
98 (1) a particular ongoing criminal investigation or proceeding, (2) the identity of a confidential source,
99 or (3) law-enforcement investigative techniques and procedures.

100 G. At least 30 days prior to procuring facial recognition technology, a local law-enforcement agency
101 shall notify in writing the governing body of the locality that such agency serves of such intended
102 procurement, but such notice shall not be required if such procurement is directed by the governing
103 body.

104 H. Nothing in this section shall apply to commercial air service airports.

105 I. Any facial recognition technology operator employed by a local law-enforcement agency who (i)
106 violates the agency's policy for the use of facial recognition technology or (ii) conducts a search for any
107 reason other than an authorized use is guilty of a Class 3 misdemeanor and shall be required to
108 complete training on the agency's policy on and authorized uses of facial recognition technology before
109 being reinstated to operate such facial recognition technology. The local law-enforcement agency shall
110 terminate from employment any facial recognition technology operator who violates clause (i) or (ii) for
111 a second time.

112 § 23.1-815.1. Facial recognition technology; approval; penalty.

113 A. For purposes of this subsection, "facial section:

114 "Authorized use" means the use of facial recognition technology to (i) help identify an individual
115 when there is a reasonable suspicion the individual has committed a crime; (ii) help identify a crime
116 victim, including a victim of online sexual abuse material; (iii) help identify a person who may be a
117 missing person or witness to criminal activity; (iv) help identify a victim of human trafficking or an
118 individual involved in the trafficking of humans, weapons, drugs, or wildlife; (v) help identify an online
119 recruiter of criminal activity, including but not limited to human, weapon, drug, and wildlife trafficking;
120 (vi) help a person who is suffering from a mental or physical disability impairing his ability to
121 communicate and be understood; (vii) help identify a deceased person; (viii) help identify a person who

is incapacitated or otherwise unable to identify himself; (ix) help identify a person who is reasonably believed to be a danger to himself or others; (x) help identify an individual lawfully detained; (xi) help mitigate an imminent threat to public safety, a significant threat to life, or a threat to national security, including acts of terrorism; (xii) ensure officer safety as part of the vetting of undercover law enforcement; (xiii) determine whether an individual may have unlawfully obtained one or more state driver's licenses, financial instruments, or other official forms of identification using information that is fictitious or associated with a victim of identity theft; or (xiv) help identify a person who an officer reasonably believes is concealing his true identity and about whom the officer has a reasonable suspicion has committed a crime other than concealing his identity.

"Facial recognition technology" means an electronic system or service for enrolling, capturing, extracting, comparing, and matching an individual's geometric facial data to identify individuals in photos, videos, or real time conducting an algorithmic comparison of images of a person's facial features for the purpose of identification. "Facial recognition technology" does not include the use of an automated or semi-automated process to redact a recording in order to protect the privacy of a subject depicted in the recording prior to release or disclosure of the recording outside of the law-enforcement agency if the process does not generate or result in the retention of any biometric data or surveillance information.

"Publicly post" means to post on a website that is maintained by the entity or on any other website on which the entity generally posts information and that is available to the public or that clearly describes how the public may access such data.

"State Police Model Facial Recognition Technology Policy" means the model policy developed and published by the Department of State Police pursuant to § 52-4.5.

B. No Pursuant to § 2.2-1112, the Division of Purchases and Supply (the Division) shall determine the appropriate facial recognition technology for use in accordance with this section. The Division shall not approve any facial recognition technology unless it has been evaluated by the National Institute of Standards and Technology (NIST) as part of the Face Recognition Vendor Test. Any facial recognition technology utilized shall utilize algorithms that have demonstrated (i) an accuracy score of at least 98 percent true positives within one or more datasets relevant to the application in a NIST Face Recognition Vendor Test report and (ii) minimal performance variations across demographics associated with race, skin tone, ethnicity, or gender. The Division shall require all approved vendors to annually provide independent assessments and benchmarks offered by NIST to confirm continued compliance with this section.

C. A campus police department shall purchase or deploy may use facial recognition technology unless such purchase or deployment of facial recognition technology is expressly authorized by statute for authorized uses. For purposes of this section, a statute that does not refer to facial recognition technology shall not be construed to provide express authorization. Such statute shall require that any facial recognition technology purchased or deployed by the campus police department be maintained under the exclusive control of such campus police department and that any data contained by such facial recognition technology be kept confidential, not be disseminated or resold, and be accessible only by a search warrant issued pursuant to Chapter 5 (§ 19-2-52 et seq.) of Title 19-2 or an administrative or inspection warrant issued pursuant to law. A match made through facial recognition technology shall not be included in an affidavit to establish probable cause for purposes of issuance of a search warrant or an arrest warrant but shall be admissible as exculpatory evidence.

D. A campus police department shall publicly post and annually update its policy on use of facial recognition technology before employing such facial recognition technology to investigate a specific criminal incident or citizen welfare situation. A campus police department that uses facial recognition technology may adopt the State Police Model Facial Recognition Technology Policy. If a campus police department uses facial recognition technology but does not adopt the State Police Model Facial Recognition Technology Policy, such department shall develop its own policy within 90 days of publication of the State Police Model Facial Recognition Technology Policy that meets or exceeds the standards set forth in such model policy. Any policy adopted or developed pursuant to this subsection shall be updated annually. A campus police department shall not utilize any facial recognition technology until after the publication of the State Police Model Facial Recognition Technology Policy and after publication of the department's policy regarding use of facial recognition technology.

E. Any campus police department that uses facial recognition technology shall maintain records sufficient to facilitate discovery in criminal proceedings, post-conviction proceedings, public reporting, and auditing of compliance with such department's facial recognition technology policies. Such department that uses facial recognition technology shall collect data pertaining to (i) a complete history of each user's queries; (ii) the total number of queries conducted; (iii) the number of queries that resulted in a list of possible candidates; (iv) how many times an examiner offered campus police an investigative lead based on his findings; (v) how many cases were closed due to an investigative lead

183 from facial recognition technology; (vi) what types of criminal offenses are being investigated; (vii) the
184 nature of the image repository being compared or queried; (viii) demographic information for the
185 individuals whose images are queried; and (ix) if applicable, any other entities with which the
186 department shared facial recognition data.

187 F. Any chief of a campus police department whose department uses facial recognition technology
188 shall publicly post and annually update a report by April 1 each year to provide information to the
189 public regarding the department's use of facial recognition technology. The report shall include all data
190 required by clauses (ii) through (viii) of subsection E in addition to (i) all instances of unauthorized
191 access of the facial recognition technology, including any unauthorized access by employees of the
192 campus police department; (ii) vendor information, including the specific algorithms employed; and (iii)
193 if applicable, data or links related to third-party testing of such algorithms, including any reference to
194 variations in demographic performance. If any information or data (a) contains an articulable concern
195 for any person's safety; (b) is otherwise prohibited from public disclosure by federal or state statute; or
196 (c) if disclosed, may compromise sensitive criminal justice information, such information or data may be
197 excluded from public disclosure. Nothing herein shall limit disclosure of data collected pursuant to
198 subsection E when such disclosure is related to a writ of habeas corpus.

199 For purposes of this subsection, "sensitive criminal justice information" means information related to
200 (1) a particular ongoing criminal investigation or proceeding, (2) the identity of a confidential source,
201 or (3) law-enforcement investigative techniques and procedures.

202 G. At least 30 days prior to procuring facial recognition technology, a campus police department
203 shall notify in writing the institution of higher education that such department serves of such intended
204 procurement, but such notice shall not be required if such procurement is directed by the institution of
205 higher education.

206 H. Any facial recognition technology operator employed by a campus police department who (i)
207 violates the department's policy for the use of facial recognition technology or (ii) conducts a search for
208 any reason other than an authorized use is guilty of a Class 3 misdemeanor and shall be required to
209 complete training on the department's policy on and authorized uses of facial recognition technology
210 before being reinstated to operate such facial recognition technology. The campus police department
211 shall terminate from employment any facial recognition technology operator who violates clause (i) or
212 (ii) for a second time.

213 **§ 52-4.5. Facial recognition technology; authorized uses; Department to establish a State Police**
214 **Model Facial Recognition Technology Policy; penalty.**

215 A. For purposes of this section:

216 "Authorized use" means the use of facial recognition technology to (i) help identify an individual
217 when there is a reasonable suspicion the individual has committed a crime; (ii) help identify a crime
218 victim, including a victim of online sexual abuse material; (iii) help identify a person who may be a
219 missing person or witness to criminal activity; (iv) help identify a victim of human trafficking or an
220 individual involved in the trafficking of humans, weapons, drugs, or wildlife; (v) help identify an online
221 recruiter of criminal activity, including but not limited to human, weapon, drug, and wildlife trafficking;
222 (vi) help a person who is suffering from a mental or physical disability impairing his ability to
223 communicate and be understood; (vii) help identify a deceased person; (viii) help identify a person who
224 is incapacitated or otherwise unable to identify himself; (ix) help identify a person who is reasonably
225 believed to be a danger to himself or others; (x) help identify an individual lawfully detained; (xi) help
226 mitigate an imminent threat to public safety, a significant threat to life, or a threat to national security,
227 including acts of terrorism; (xii) ensure officer safety as part of the vetting of undercover law
228 enforcement; (xiii) determine whether an individual may have unlawfully obtained one or more state
229 driver's licenses, financial instruments, or other official forms of identification using information that is
230 fictitious or associated with a victim of identity theft; or (xiv) help identify a person who an officer
231 reasonably believes is concealing his true identity and about whom the officer has a reasonable
232 suspicion has committed a crime other than concealing his identity.

233 "Facial recognition technology" means an electronic system or service for conducting an algorithmic
234 comparison of images of a person's facial features for the purpose of identification. "Facial recognition
235 technology" does not include the use of automated or semi-automated process to redact a recording in
236 order to protect the privacy of a subject depicted in the recording prior to release or disclosure of the
237 recording outside of the law-enforcement agency if the process does not generate or result in the
238 retention of any biometric data or surveillance information.

239 "Publicly post" means to post on a website that is maintained by the entity or on any other website
240 on which the entity generally posts information and that is available to the public or that clearly
241 describes how the public may access such data.

242 B. Pursuant to § 2.2-1112, the Division of Purchases and Supply (the Division) shall determine the
243 appropriate facial recognition technology for use in accordance with this section. The Division shall not
244 approve any facial recognition technology unless it has been evaluated by the National Institute of

Standards and Technology (NIST) as part of the Face Recognition Vendor Test. Any facial recognition technology utilized shall utilize algorithms that have demonstrated (i) an accuracy score of at least 98 percent true positives within one or more datasets relevant to the application in a NIST Face Recognition Vendor Test report and (ii) minimal performance variations across demographics associated with race, skin tone, ethnicity, or gender. The Division shall require all approved vendors to annually provide independent assessments and benchmarks offered by NIST to confirm continued compliance with this section.

C. The Department shall create a model policy regarding the use of facial recognition technology, which shall be known as the State Police Model Facial Recognition Technology Policy. The Department shall publicly post such policy no later than January 1, 2023, and such policy shall be updated annually thereafter and shall include:

1. The nature and frequency of specialized training required for an individual to be authorized by a law-enforcement agency to utilize facial recognition as authorized by this section;

2. The extent to which a law-enforcement agency shall document (i) instances when facial recognition technology is used for authorized purposes and (ii) how long such information is retained;

3. Procedures for the confirmation of any initial findings generated by facial recognition technology by a secondary examiner; and

4. Promulgation of standing orders, policies, or public materials by law-enforcement agencies that use facial recognition technology.

D. The Department may use facial recognition technology for authorized uses. A match made through facial recognition technology shall not be included in an affidavit to establish probable cause for purposes of issuance of a search warrant or an arrest warrant but shall be admissible as exculpatory evidence.

E. The Department shall maintain records regarding its use of facial recognition technology. Such records shall be sufficient to facilitate discovery in criminal proceedings, post-conviction proceedings, public reporting, and auditing of compliance with the Department's policy. The Department shall collect data pertaining to (i) a complete history of each user's queries; (ii) the total number of queries conducted; (iii) the number of queries that resulted in a list of possible candidates; (iv) how many times an examiner offered the Department an investigative lead based on his findings; (v) how many cases were closed due to an investigative lead from facial recognition technology; (vi) what types of criminal offenses are being investigated; (vii) the nature of the image repository being compared or queried; (viii) demographic information for the individuals whose images are queried; and (ix) if applicable, any other entities with which the Department shared facial recognition data.

F. The Superintendent shall publicly post and annually update a report by April 1 each year to provide information to the public regarding the Department's use of facial recognition technology. The report shall include all data required by clauses (ii) through (viii) of subsection E in addition to (i) all instances of unauthorized access of the facial recognition technology, including any unauthorized access by employees of the Department; (ii) vendor information, including the specific algorithms employed; and (iii) if applicable, data or links related to third-party testing of such algorithms, including any reference to variations in demographic performance. If any information or data (a) contains an articulable concern for any person's safety; (b) is otherwise prohibited from public disclosure by federal or state statute; or (c) if disclosed, may compromise sensitive criminal justice information, such information or data may be excluded from public disclosure. Nothing herein shall limit disclosure of data collected pursuant to subsection E when such disclosure is related to a writ of habeas corpus.

For purposes of this subsection, "sensitive criminal justice information" means information related to (1) a particular ongoing criminal investigation or proceeding, (2) the identity of a confidential source, or (3) law-enforcement investigative techniques and procedures.

G. Any facial recognition technology operator employed by the Department who (i) violates the Department's policy for the use of facial recognition technology or (ii) conducts a search for any reason other than an authorized use is guilty of a Class 3 misdemeanor and shall be required to complete training on the Department's policy on and authorized uses of facial recognition technology before being reinstated to operate such facial recognition technology. The Department shall terminate from employment any facial recognition technology operator who violates clause (i) or (ii) for a second time.

2. That the Department of Criminal Justice Services (the Department) shall analyze and report on the usage data of facial recognition technology reported and published by local law-enforcement agencies, campus police departments, and the Department of State Police pursuant to the provisions of this act. The Department shall include in its report an analysis of and recommendations for (i) improving the use of facial recognition technology as it relates to demographics associated with race, skin tone, ethnicity, and gender; (ii) specialized training, data storage, data retention, and the use of a second examiner pursuant to the State Police Model Facial Recognition Technology Policy established by § 52-4.5 of the Code of Virginia, as created by

306 this act; and (iii) investigations and investigative outcomes related to the accuracy of identification
307 across different demographic groups. The Department shall submit its report to the Chairmen of
308 the Senate Committee on the Judiciary and the House Committee on Public Safety by November
309 1, 2025.
310 3. That the provisions of this act shall expire on July 1, 2026.