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## HOUSE BILL NO. 1339

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Public Safety  
on February 11, 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.

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.

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, is committing, or is planning the commission of 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 Facial 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

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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 constitute probable cause for an arrest but shall be admissible as exculpatory evidence.

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

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

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

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

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

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

101 **§ 23.1-815.1. Facial recognition technology; approval.**

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

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

121 "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 Facial 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 constitute probable cause for an arrest but shall be admissible as exculpatory evidence.

D. A campus police department shall publicly post 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.

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 from facial recognition technology; (vi) what types of criminal offenses are being investigated; (vii) the nature of the image repository being compared or queried; and (viii) if applicable, any other entities with which the department shared facial recognition data.

F. Any chief of a campus police department whose agency uses facial recognition technology shall publicly post and annually update a report by April 1 each year to provide information to the public regarding the agency'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 campus police 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

183 subsection E when such disclosure is related to a writ of habeas corpus.

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

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

191 **§ 52-4.5. Department to establish a State Police Model Facial Recognition Technology Policy.**

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

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

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

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

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

204 For purposes of this section, "publicly post" shall have the same meaning as defined in  
205 § 15.2-1723.2.