

HJ 48: STUDY OF FACIAL RECOGNITION TECHNOLOGY DRAFT RECOMMENDATIONS FOR DISCUSSION

BACKGROUND AND PURPOSE

House Joint Resolution 48 (2021), assigned to the Economic Affairs Interim Committee (EAIC), is an interim study of the use of facial recognition technology in Montana, including the security and limitations of use and the protection of privacy for Montana's citizens.

This paper outlines potential policy options the EAIC could implement in a committee bill for the upcoming 2023 legislative session. *It is important to note* that these are draft recommendations, options, and reasons developed by staff based on committee hearings and discussions to date.

OPTIONS

Options are categorized into three parts: general policy options, government policy options, and consumer protection.

GENERAL POLICY OPTIONS

ISSUE: LACK OF DEFINITIONS

Explanation:

The term "facial recognition" appears in the Montana Code Annotated (MCA) twice: relating to notarial acts (1-5-602, MCA) and regarding remote breathalyzers (46-9-108, MCA).

The term "biometric" appears in the MCA five times: relating to notarial acts (1-5-602, MCA), the protection and wellness of youth (20-7-1324, MCA), licensing for physicians (37-3-356, MCA), licensing for nurses (37-8-501, MCA), and in the National Crime Prevention and Privacy Compact (44-5-601).

No definitions exist in the MCA for either term. Additionally, the MCA does not include terms common in other states' legislation enacting policies on facial recognition technology.

Recommendation:

Define the terms "facial recognition" and "biometric" in the MCA, where appropriate.

Committee options:

Option A: Add definitions to the MCA where appropriate.

Option B: Take no action.

ISSUE: OUTDATED ADVISORY COUNCIL APPOINTMENT PROCESS

Explanation:

The appointment of a legislative member of the criminal intelligence advisory council by the attorney general is outside the current procedure for legislative appointments.

44-5-501. Creation of criminal intelligence information section – advisory council. (1) The department of justice may create a criminal intelligence information section.

(2) (a) If a section is created under subsection (1), the attorney general shall establish a criminal intelligence information advisory council in accordance with 2-15-122, consisting of . . . *a member of the judiciary committee of either the house of representatives or the senate . . .* (emphasis added)

The advisory council cited in 44-5-501, MCA, oversees the Montana Fusion Center. The advisory council was authorized in statute in 1985 and has never been amended. The appointment of members in 44-5-501, MCA, follows 2-15-122, MCA, in which a department head is allowed to set up an advisory council and appoint its members who serve at the pleasure of the creating authority. However, 2-15-122, MCA, is silent on the procedure for the treatment of legislators.

Present legislative appointment procedures are outlined in the Bill Drafting Manual (6-5). In pertinent part:

6-5. Bills Making Legislative Appointments

If a bill contains a provision for the appointment of legislators to a committee or other entity, use the traditional appointment methods, which require the Committee on Committees in the Senate and the Speaker of the House to make appointments.

...

If the appointment is for an interim study committee, task force, etc., follow the following guidelines.

(1) If a bill or amendment provides for one or more legislators to be appointed to a new committee, commission or task force, etc., the bill or amendment must contain:

...

(c) a provision specifying the appointing authorities using one of the following methods:

(i) a senator must be appointed by the committee on committees and a representative must be appointed by the speaker, both in consultation with the minority leaders prior to appointment; or

(ii) the president, speaker, majority leader, or minority leader is the appointing authority for each caucus's legislative members;

...

(e) a provision specifying whether reimbursement for salary as provided in 5-2-302, MCA, is or is not authorized and whether reimbursement for expenses as provided in 2-18-501 through 2-18-503, MCA, is or is not authorized and, if authorized, identifying the party or agency responsible for reimbursement.

(2) If a legislator is appointed by someone other than the legislator's respective legislative leadership for any nonlegislative committee, the appointing authority must be responsible for the reimbursement provided for in subsection (1)(e).

Statutes affected:

44-5-501, MCA

Recommendations:

- 1) The committee could add provisions to 44-5-501(2), MCA, that delegate who should be appointing the member of one of the judiciary committees. Since the current statute calls for only one member and they can be from either the House or the Senate, there are several options to change this provision:
 - a) specify which house will serve on the advisory council;
 - b) expand the membership to include one member from each house;
 - c) specify that the Committee on Committees and Speaker of the House jointly appoint a member; or
 - d) specify something else (e.g., the presiding officers of the two committees make the decision, the minority leaders make the decision, etc.).
- 2) Include a term limit for the legislative member to serve on the advisory council. There is no guarantee that a legislator will continue to serve on a judiciary committee in subsequent sessions, provided that legislator even returns to the Legislature.
- 3) Include a provision regarding reimbursement requirements for the legislative member (44-5-501(2)(e), MCA) to ensure the legislator receives expenses and a salary.

Committee options:

Option A: Amend 44-5-501, MCA.

Option B: Take no action.

GOVERNMENT POLICY OPTIONS

ISSUE: NOTICE REQUIREMENT

Should the MCA include requirements for disclosure of use of facial recognition by a government agency?

Explanation:

The current MCA does not require any government entity – state or local - to disclose to the public the use of facial recognition, whether firsthand or through a third-party vendor. The criminal statutes do not require the disclosure of the use of facial recognition services in an investigation to criminal defendants.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions
- Notice requirements for general use by a state agency (e.g., DMV database)
- Notice requirements for use in a criminal investigation
- Notice requirements as part of discovery rights for civil procedure, criminal procedure, or both
- Establishment of timeframes for notice requirements

Committee options:

Option A: Add provisions for notice requirements

Option B: Take no action

ISSUE: ACCESS TO NONCRIMINAL DATABASES

Should state agencies and law enforcement be allowed to use facial recognition technology on noncriminal databases?

Explanation:

Title 44, chapter 2, part 3, MCA, outlines the Criminal Justice Information Network (CJIN) within the Department of Justice. The CJIN is responsible for providing Montana's law enforcement with access to state and national criminal justice information and facilitates communication among participating agencies. The CJIN manages databases with varying types of identifying information. Several databases contain information about noncriminal Montanans, such as the vehicle registration database and the hunting and fishing licenses database.

Several constituents expressed concern that the use of noncriminal databases in criminal investigations impedes on the privacy of law-abiding Montanans.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions
- Applicability
- Permissive actions
- Exceptions

Committee options:

Option A: Disallow the use of noncriminal databases.

Option B: Take no action.

ISSUE: THRESHOLDS FOR LAW ENFORCEMENT TO ACCESS FACIAL RECOGNITION TECHNOLOGY

Should the thresholds for law enforcement to utilize facial recognition technology be established in statute?

Explanation:

Title 44, chapter 2, part 3, MCA, outlines the Criminal Justice Information Network (CJIN) within the Department of Justice. The CJIN is responsible for providing Montana's law enforcement with access to state and national criminal justice information and facilitates communication among participating agencies. The CJIN manages databases with varying types of identifying information. Several databases contain information about noncriminal Montanans, such as the vehicle registration database and the hunting and fishing licenses database.

Title 44, chapter 5, part 5, MCA, outlines the provisions for the Montana Fusion Center, also known as the Montana Analysis and Technical Information Center (MATIC), within the Department of Justice. The MATIC acts as an information exchange facilitator to assist law enforcement with criminal investigations and utilizes the databases managed by the CJIN.

The CJIN and the MATIC have internal policies and procedures for access to databases, and the MATIC recently enacted a facial recognition policy; however, neither section of the MCA contains provisions or limitations for the use of facial recognition technology.

Statutes affected:

Possible amendments to existing statutes in Title 44, chapter 2, part 3, MCA, and Title 44, chapter 5, part 5, MCA; however, a new section of law would likely need to be established. Consider provisions for:

- Definitions for biometric identifier, biometric information, confidential and sensitive information, facial recognition technology, personally identifiable information, sensitive information, etc.
- Scope of limitations for use (e.g., felonies, egregious crimes)
- Applicability

- Threshold for utilizing technology (e.g., court-approved warrant)
- Provisions for access when a minor is involved
- Provisions for use of existing photographic databases (e.g., DMV database)
- Records retention and destruction policy
- Reporting requirement
- Disclosure policy
- Use in court
- Violation and relief policy
- Authorization for procurement

Committee options:

Option A: Establish a policy on facial recognition technology use by law enforcement.

Option B: Take no action.

ISSUE: LIMITING OR PROHIBITING USE OF BODY-WORN CAMERAS

Should the Montana Criminal Code include provisions for the use of body-worn cameras?

Explanation:

Title 44, MCA, (Law Enforcement) makes no reference to the use of body-worn cameras by law enforcement officers in Montana. It is unknown if body-worn cameras by law enforcement in Montana currently have the capability of facial recognition or biometric surveillance.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions for biometric data, data collection, facial recognition technology, etc.
- Scope of limitations for use
- Scope of applicable law enforcement (e.g., highway patrol, local law enforcement, etc.)
- Permissive actions
- Penalties for violations

Committee options:

Option A: Committee bill to add provisions to Title 44 for use of body-worn cameras.

Option B: Take no action.

CONSUMER PROTECTION POLICY OPTIONS

BACKGROUND

The Consumer Protection Act provides for the protection of individual privacy to impede identity theft; however, specifics regarding general consumer data privacy, including privacy policies, changes to policies, and consumer consent are absent.

Four states – California, Colorado, Utah, and Virginia – enacted comprehensive data privacy laws, and 24 states are considering legislation to protect consumers in their states. All enacted and proposed laws have several provisions in common, such as the right to access and delete personal information and to opt out of the sale of personal information. Other provisions include requirements for commercial websites to post certain information on privacy policies and how online servicers provide notice of changes to customers.¹

1) **Consumer Rights:**

- a) **The right of access to personal information collected or shared** – The right for a consumer to access from a business/data controller the information or categories of information collected about a consumer, the information or categories of information shared with third parties, or the specific third parties or categories of third parties to which the information was shared; or some combination of similar information.
- b) **The right to rectification** – The right for a consumer to request that incorrect or outdated personal information be corrected but not deleted.
- c) **The right to deletion** – The right for a consumer to request deletion of personal information about the consumer under certain conditions.
- d) **The right to restriction of processing** – The right for a consumer to restrict a business's ability to process personal information about the consumer.
- e) **The right to data portability** – The right for a consumer to request personal information about the consumer be disclosed in a common file format.
- f) **The right to opt out of the sale of personal information** – The right for a consumer to opt out of the sale of personal information about the consumer to third parties.
- g) **The right against automated decision-making** – A prohibition against a business making decisions about a consumer based solely on an automated process without human input.
- h) **A consumer private right of action** – The right for a consumer to seek civil damages from a business for violations of a statute.

¹ <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>

2) **Business Obligations:**

- a) **A strict opt-in for the sale of personal information of a consumer less than a certain age** – A restriction placed on a business to treat consumers under a certain age with an opt-in default for the sale of their personal information.
- b) **Notice/transparency requirements** – An obligation placed on a business to provide notice to consumers about certain data practices, privacy operations, and/or privacy programs.
- c) **Mandated risk assessment** – An obligation placed on a business to conduct formal risk assessments of privacy and/or security projects or procedures.
- d) **A prohibition on discrimination against a consumer for exercising a right** – A prohibition against a business treating a consumer who exercises a consumer right differently than a consumer who does not exercise a right.
- e) **A purpose/processing limitation** – A general data protection regulation that prohibits the collection/processing of personal information except for a specific purpose (Examples: HIPPA, Gramm-Leach-Bliley Act, Fair Credit Reporting Act).

ISSUE: CLARIFICATION ON CONSENT

Explanation:

Title 30, chapter 14, MCA, outlines unfair trade practices and consumer protection for Montana citizens. There is no reference in statute on a consumer's right to opt in or opt out of a business's use of the consumer's personal information.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions
- Types of businesses affected
- Consumer rights of access to personal information, rectification of incorrect information, deletion, etc.
- Consumer right to opt out of the sale of personal information
- Remedies for violation

Committee options:

Option A: Add provisions to the Montana Consumer Protection Act for clarification of consent.

Option B: Take no action.

ISSUE: PRIVACY POLICY NOTICES

Explanation:

Title 30, chapter 14, MCA, outlines unfair trade practices and consumer protection for Montana citizens and includes provisions for notice to consumers regarding service contracts, conditions of sale, and rights of rescission, among others. There is no provision for a business to provide notices of privacy policies, including notices of material changes to privacy policies.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions
- Types of businesses affected
- Manner of disclosure
- Consumer rights

Committee options:

Option A: Include provisions for privacy policy notices in the Montana Consumer Protection Act.

Option B: Take no action.

ISSUE: RETENTION OF BIOMETRIC INFORMATION

Explanation:

Title 30, chapter 14, MCA, outlines unfair trade practices and consumer protection for Montana citizens and includes provisions for notice to consumers regarding service contracts, conditions of sale, and rights of rescission, among others. There is no provision for a business to destroy a consumer's biometric information within a specified timeframe.

Statutes affected:

Not currently in statute. A new section of law could consider provisions for:

- Definitions
- Retention; collection; disclosure; destruction
- Right of action
- Construction

Committee options:

Option A: Include a retention policy for biometric data in the Montana Consumer Protection Act.

Option B: Take no action.

EFFECTIVE DATES

With some exceptions, bills passed during a legislative session generally become effective on October 1² of the year in which the bill was passed, unless the bill provides for all or parts of the bill to go into effect on a different date.

Appropriations generally are effective on July 1 of the year of passage unless the appropriation is delayed for some reason.

Any provisions needing an earlier effective date could be made effective on passage and approval of the legislation.

² Section 1-2-201, MCA.

LEGISLATION RELATING TO GOVERNMENTAL USE

	Notice Requirement	Access to Noncriminal Databases	Thresholds for Law Enforcement	Body-Worn Cameras	General FRT Use by Government
<u>California Assembly Bill 1215 (2019)</u>					
<u>Kentucky Senate Bill 280, Sections 2-4 (2021)</u>					
<u>Louisiana House Bill 611 (2021)</u>					
<u>Maine Chapter 394 (2021)</u>					
<u>Massachusetts General Law – Part I, Title II, Chapter 6, Section 220</u>					
<u>New Hampshire House Bill 1447 (2022)</u>					
<u>New York Senate Bill 1076 (2021)</u>					
<u>Oregon ORS 133.741</u>					
<u>South Carolina H. 3918 (2021)</u>					
<u>Utah Senate Bill 34 (2021)</u>					
<u>Vermont Act 17 (H. 195) (2021)</u>					
<u>Virginia Code 15.2-1723.2</u>					
<u>Washington Engrossed Substitute Senate Bill 6280 (2020)</u>					

LEGISLATION RELATING TO CONSUMER PROTECTION

	Clarification on Consent	Privacy Policy Notices	Retention of Biometric Information	Comprehensive Consumer Privacy
<u>California Consumer Privacy Act (2018)</u>				
<u>California Proposition 24 (2020)</u>				
<u>Colorado Privacy Act (2021)</u>				
<u>Illinois Biometric Information Privacy Act (2008)</u>				
<u>Indiana Senate Bill 358 (2022)</u>				
<u>Oklahoma Engrossed House Bill 1602 (2021)</u>				
<u>Texas Business Commercial Code 503.001</u>				
<u>Utah Consumer Privacy Act (2022)</u>				
<u>Virginia Consumer Data Protection Act (2021)</u>				
<u>Washington Chapter 19.375 RCW</u>				
<u>Washington RCW 19.375.020</u>				
<u>Wisconsin Assembly Bill 957 (2021)</u>				