Cybersecurity, Privacy & Data Protection Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Washington Passes Landmark Facial Recognition Law Seeking to Pave Way for Similar Laws Throughout the Country

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In what is being called a breakthrough in the use of facial recognition technology, the state of Washington enacted a new law establishing parameters for the technology's use by state and local governments on Tuesday, March 31, 2020. The law will take effect July 1, 2021.

Washington's law, one of the first of its kind in the United States, attempts to balance the potential upsides of advanced facial recognition technology (including the ability to aid law enforcement) against privacy concerns related to its use. The law is expected to become a model for other states—California, Maryland, South Dakota and Idaho are considering similar bills—including those states and municipalities that have considered or enacted full bans on government use of the technology out of concern that unfettered use could lead to misuse, broad surveillance and unfair prosecution of minority groups.

Washington's law strives to meet the delicate balance for state and local government agencies to use facial recognition technology "in a manner that benefits society while prohibiting uses that threaten our democratic freedoms and put our civil liberties at risk." To that end, the law contains a variety of measures aimed at ensuring that the public is well-informed of the technology's use both before and after an agency adopts and implements facial recognition technology.

Accountability

Specifically, under the new law, before a government agency may develop, procure or use facial recognition technology, it must provide an accountability report, subject to public comment, containing information about several aspects of the proposed technology, including:[1]

- The name of the service, vendor or version.

- A description of its general capabilities and limitations.

- The type of data used and how that data is generated, collected and processed.

- The purpose and proposed use.

Contact Information

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- Information on how data will be stored and accessed.

In addition to the initial accountability report, a facial recognition provider must submit to independent testing to test its technology for accuracy and unfair performance outcomes against various subpopulations such as race, age and gender. If a technology fails to perform fairly, the provider must develop a mitigation plan to remedy the performance deficiencies within 90 days of the reported failure. However, the law does not provide any enforcement mechanism for a government agency's inadequate response to public comment or independent testing.

Washington's law also attempts to keep citizens informed about the extent to which the government is using facial recognition by requiring yearly reports of facial recognition warrants. These reports must include the number of warrants applied for, granted and denied, as well as the agency applying for the warrant, the period of surveillance authorized and the nature of the public spaces where surveillance was conducted.

Permitted Uses and Protection of Civil Liberties

The Washington law also has several measures to protect individual privacy interests and to curb potentially discriminatory results in its application. For instance, an agency cannot conduct ongoing surveillance or persistent tracking without first obtaining a warrant or court order, or in the absence of exigent circumstances. Ongoing surveillance and persistent tracking generally refer to an agency's use of facial recognition to track the movements of an individual over time, whether in real time or through application of a facial recognition service to historical records, to create a timeline of where a person has been.

Further, Washington's law requires "meaningful human review" of any use of facial recognition that results in a legally significant decision, such as the provision or denial of financial and lending services, housing, insurance, education enrollment, criminal justice, employment, health care services or access to basic necessities. For review to be "meaningful," the reviewer must have adequate training on the technology's capabilities and limitations and have the authority to change any decision made by the technology.

Scope of Application

The new law only applies to state and local government agencies' use, not to private enterprises. Both chambers of the state of Washington's legislature have proposed similar bills, which address the use of facial recognition technology by private corporations. For more on these bills, see Akin Gump's previous alert and follow our ongoing coverage. Akin Gump is continuing to monitor how issues related to this new law play out in Washington and other states considering similar bills.

[1] The law exempts from this requirement facial recognition services under contract as of the effective date of the law, used in partnership with the federal government or as used by the Washington Department of Licensing.

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