Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 223 (Delegate Moon, *et al.*)

Judiciary Judicial Proceedings

Criminal Procedure - Facial Recognition Technology - Requirements, Procedures, and Prohibitions

This bill establishes numerous requirements, procedures, and prohibitions to govern the use of facial recognition technology (FRT) by law enforcement agencies. It requires specified training, audits, and reports related to the use of FRT and, with specified exceptions, prohibits the introduction of results generated by FRT in a criminal proceeding or a juvenile delinquency proceeding. Regarding the use of FRT, the Department of State Police (DSP), in consultation with any other relevant State agency, must adopt and publish a model statewide policy. By June 30, 2025, the Department of Public Safety and Correctional Services (DPSCS) must develop and administer a training program regarding the use of FRT in the course of criminal investigations, as specified. A police officer or other employee or agent of a law enforcement agency authorized to use FRT in the course of a criminal investigation must annually complete training administered by DPSCS.

Fiscal Summary

State Effect: General fund expenditures increase by at least $402,800 in FY 2024, including one-time programming costs; future years reflect annualization, inflation, and ongoing costs. Revenues are not affected.

(in dollars)	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Revenues	$0	$0	$0	$0	$0
GF Expenditure	402,800	449,100	469,000	489,900	515,800
Net Effect	($402,800)	($449,100)	($469,000)	($489,900)	($515,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill has an operational impact on affected local law enforcement agencies; some may incur additional costs. Local revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary:

Use in Court

The State must disclose, in accordance with the Maryland Rules regarding discovery, whether FRT was used in an investigation relevant to a criminal court proceeding or juvenile court proceeding. The name of each facial recognition system used, a description of the databases searched, and all results generated from the use of FRT that led to further investigative action must also be disclosed. Generally, results generated by FRT are prohibited from being introduced as evidence in a criminal proceeding or juvenile court delinquency proceeding. Results generated by FRT (1) may be considered or introduced as evidence in connection with a criminal proceeding only for the purpose of establishing probable cause or positive identification in connection with the issuance of a warrant or at a preliminary hearing and (2) may not serve to establish probable cause or the positive identification of an individual in a criminal investigation or proceeding unless supported by additional, independently obtained evidence.

A result generated by FRT in violation of the bill's provisions, and all other evidence derived from that result, may not be introduced by the State for any purpose in a criminal court proceeding or in specified juvenile court proceedings. Such evidence may be introduced for a purpose as described above if the court finds that the evidence would otherwise be subject to a legally valid exception to the exclusionary rule. However, this provision does not allow the use of a result generated using FRT to be introduced as evidence in a criminal trial or in an adjudicatory hearing held by the juvenile court.

Use by Law Enforcement

Generally, a police officer or other employee or agent of a law enforcement agency, in the furtherance of a criminal investigation, may only use FRT in limited circumstances, including to investigate specified crimes of violence, specified human trafficking offenses, specified child abuse offenses, a specified child pornography offense, specified hate crime offenses, specified weapon crimes, specified animal cruelty offenses, specified drug offenses, a criminal act that presents a substantial and ongoing threat to public safety or national security, or a crime under the laws of another state substantially equivalent to one of the crimes listed that involves a fugitive from justice charged with a crime in that state and sought for extradition under Title 9 of the Criminal Procedure Article. Numerous specific prohibitions regarding the use of FRT are included in the bill. However, the bill's provisions may not be construed to restrict the use of FRT for the purpose of (1) identifying a missing, deceased, or incapacitated person; (2) redacting the image of an individual from an image or video for release to protect the individual's privacy; (3) forensic analysis of

electronic media seized by law enforcement if the person identified in the seized media is not the subject of the criminal charges resulting from the analysis; (4) enhancing security systems to prevent unauthorized access to information, goods, materials, areas, or other properties under the custody or care of a law enforcement agency; or (5) conducting other legitimate activity unrelated to a criminal investigation.

Use of FRT must be in accordance with the model policy adopted by DSP, and law enforcement agencies that use FRT must adopt and maintain a use and data management policy and post the policy on the agency's public website. In addition, a law enforcement agency that contracts for use of a nongovernment facial recognition system must disclose on its public website the name of the system and a description of the databases searched.

A law enforcement agency that uses or contracts for the use of FRT must designate an agency employee to oversee and administer the use of FRT in compliance with the bill as well as applicable local laws, regulations, and policies. Before use, a result generated by FRT must be independently verified by an individual who has completed required training by DPSCS.

Audits

On or before October 1 each year, law enforcement agencies that use (or contract for the use of) FRT must complete an annual audit regarding compliance with the bill's provisions as well as applicable local laws, regulations, and policies. The results of the audit must be maintained for at least three years after completion and, unless destroyed after such time, disclosed upon request to the Attorney General, the Public Defender, a State's Attorney, a U. S. Attorney, or a designee of any of the individuals.

Reports

By February 1 each year, a law enforcement agency using or contracting for the use of FRT must prepare and publish an annual report that discloses specified data about the use of FRT. By May 1 each year, the reports must be submitted to the Governor's Office of Crime Prevention, Youth, and Victim Services (GOCPYVS). By October 1 each year, GOCPYVS must submit to the Governor and the General Assembly a report consisting of the information reported by law enforcement agencies, disaggregated by agency.

Civil Action

A person may bring a civil action against a law enforcement agency to compel compliance with the requirements of the bill.

Current Law: The Maryland Image Repository System (MIRS) is facial recognition software within DPSCS that allows law enforcement to compare images of unidentified individuals to images from Motor Vehicle Administration (MVA) records, inmate case records, and mugshots. People in public places are never scanned by MIRS. MIRS only gives a probable list of potential suspects to be followed up on by law enforcement, not a positive identification. Currently, local law enforcement agencies in the State are responsible for establishing a policy regarding the use of MIRS and decide when, where, and how it is used.

Chapter 18 of the 2021 special session requires, notwithstanding any other provision of the Public Information Act (PIA), an officer, employee, agent, or contractor of the State or a political subdivision to deny inspection of a part of a public record that contains personal information or a photograph of an individual by any federal agency seeking access for the purpose of enforcing federal immigration law unless provided with a valid warrant. In addition, an officer, employee, agent, or contractor of the State or a political subdivision must deny inspection using a facial recognition search of a digital photographic image or actual stored data of a digital photographic image by any federal agency seeking access for the purposes of enforcing federal immigration law unless provided with a valid warrant. "Facial recognition," as defined under Chapter 18, means a biometric software application that identifies or verifies a person by comparing and analyzing patterns based on a person's facial contours.

By June 1, 2023, and annually thereafter, MVA, the Department of State Police (DSP), and DPSCS must submit a report to the General Assembly on PIA requests from federal agencies seeking access to personal information, a photograph of an individual, or a facial recognition search for the purpose of federal immigration enforcement, whether the request was initiated through a State or local law enforcement agency. The report must include specified information relating to the number of requests received, the number of facial recognition searches completed, and the number of individuals whose personal information or photograph was provided to a federal agency.

State Expenditures: General fund expenditures increase by at least $402,823 in fiscal 2024 for DPSCS and GOCPYVS to implement the bill's requirements.

Department of Public Safety and Correctional Services

The bill requires DPSCS to develop and administer a training program regarding the use of FRT in the course of criminal investigations by June 30, 2025. However, effective October 1, 2023, the bill also requires (1) annual training of employees authorized to use FRT and (2) that a result generated by FRT, before being used for any purpose in relation to a criminal investigation, is independently verified by an individual who has completed the training. Thus, this analysis assumes that DPSCS creates the training program in

fiscal 2024. As a result, general fund expenditures for DPSCS increase by $377,823 in fiscal 2024, which accounts for the bill's October 1, 2023 effective date. This estimate reflects the cost of hiring two information technology programmers, one program manager, one researcher, and one instructor to develop and administer the required FRT training program. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	5.0
Salaries and Fringe Benefits	$340,778
Operating Expenses	37,045
Total FY 2024 DPSCS Expenditures	**$377,823**

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Governor's Office of Crime Prevention, Youth, and Victim Services

In order to prepare the required report with information regarding the use of FRT by law enforcement agencies, disaggregated by agency, GOCPYVS likely needs to create an automated reporting system. Based on information received in prior years for similar legislation, it is assumed that programming costs are $25,000 in fiscal 2024 only.

Department of State Police

DSP can adopt and publish the model FRT policy with existing budgeted resources; however, operations are likely affected, as the bill requires training for DSP employees that is conducted by DPSCS and requires annual audits and reports.

Judiciary

The bill may result in a reduction in the number of criminal cases brought to court; however, any such reduction and the bill's authorization for civil actions to compel compliance with the bill's provisions are not expected to materially affect State finances.

Other Law Enforcement Agencies

Other State law enforcement agencies are also likely affected, as the bill requires training for law enforcement agency employees that is conducted by DPSCS and requires annual audits and reports.

Local Expenditures: The impact on local law enforcement agencies depends on a variety of factors, including whether and how frequently the agencies rely on the use of FRT.

Although it is generally assumed that any local law enforcement agencies using FRT can alter and report on their usage with existing resources, there may be operational impacts to do so, and there are likely costs associated with the training requirements of the bill.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 762 and HB 1046 of 2022.

Designated Cross File: SB 192 (Senator Sydnor) - Judicial Proceedings.

Information Source(s): Caroline and Prince George's counties; Maryland Municipal League; Office of the Attorney General; Governor's Office of Crime Prevention, Youth, and Victim Services; Judiciary (Administrative Office of the Courts); Maryland State's Attorneys' Association; Department of General Services; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

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