



**BERKELEY CITY COUNCIL PUBLIC SAFETY COMMITTEE
SPECIAL MEETING**

**Monday, September 16, 2019
10:00 AM**

2180 Milvia Street, 6th Floor - Redwood Room

Committee Members:

Councilmembers Ben Bartlett, Susan Wengraf, and Rigel Robinson

AGENDA

Roll Call

Announcement: Brown Act Participation Rules

Public Comment on Non-Agenda Matters

Discussion and Possible Revision of Regular Meeting Schedule

Minutes for Approval

Draft minutes for the Committee's consideration and approval.

1. Minutes - July 17, 2019

Committee Action Items

The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.

Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.

Committee Action Items

2. **Adopt an Ordinance Amending Berkeley Municipal Code Chapter 2.99 to Prohibit City Use of Face Recognition Technology** (*Item Contains Revised Material*)
From: Councilmember Harrison
Referred: May 28, 2019
Due: October 29, 2019
Recommendation: Adopt an ordinance amending Berkeley Municipal Code Chapter 2.99 to prohibit the City from acquiring, retaining, requesting, accessing, or using: (1) any face recognition technology, or (2) any information obtained from face recognition technology.
Financial Implications: The Ordinance will prevent investment in expensive face recognition technology.
Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Unscheduled Items

These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.

Items for Future Agendas

- **Discussion of items to be added to future agendas**

Adjournment

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*Written communications addressed to the Public Safety Committee and submitted to the City Clerk Department will be distributed to the Committee prior to the meeting.*

*This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Members of the City Council who are not members of the standing committee may attend a standing committee meeting even if it results in a quorum being present, provided that the non-members only act as observers and do not participate in the meeting. If only one member of the Council who is not a member of the committee is present for the meeting, the member may participate in the meeting because less than a quorum of the full Council is present. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.*



**COMMUNICATION ACCESS INFORMATION:**  
This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Attendees at public meetings are reminded that other attendees may be sensitive to various scents, whether natural or manufactured, in products and materials. Please help the City respect these needs.

~~~~~  
I hereby certify that the agenda for this special meeting of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on September 12, 2019.

Mark Numainville, City Clerk

Communications

Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.

**BERKELEY CITY COUNCIL PUBLIC SAFETY COMMITTEE
SPECIAL MEETING MINUTES**

BERKELEY CITY COUNCIL SPECIAL MEETING MINUTES

**Wednesday, July 17, 2019
12:00 PM**

1947 Center Street, Basement - Multi-Purpose Room

Committee Members:

Councilmembers Ben Bartlett, Susan Wengraf, and Rigel Robinson

Roll Call: 12:09 a.m.

Present: Wengraf, Robinson, Bartlett

Public Comment on Non-Agenda Matters: 1 speaker.

Minutes for Approval

Draft minutes for the Committee's consideration and approval.

1. Minutes - June 3, 2019

Action: M/S/C (Robinson/Wengraf) to approve the minutes as presented.

Vote: All Ayes.

Committee Action Items

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Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.

Committee Action Items

2. **Adopt an Ordinance Amending Berkeley Municipal Code Chapter 2.99 to Prohibit City Use of Face Recognition Technology** (*Item Contains Revised Material*)

From: Councilmember Harrison

Referred: May 28, 2019

Due: October 29, 2019

Recommendation: Adopt an ordinance amending Berkeley Municipal Code Chapter 2.99 to prohibit the City from acquiring, retaining, requesting, accessing, or using: (1) any face recognition technology, or (2) any information obtained from face recognition technology.

Financial Implications: See report

Contact: Kate Harrison, Councilmember, District 4, 981-7140

Action: 10 Speakers. Discussion held. The committee requested that the City Attorney, Police Department, and IT staff return with more information, including:

- Analysis of proposed loop holes.
- Current contract analysis on San Pablo Park cameras.
- Legal memo regarding the constitutionality.
- Background information regarding receipt from other agencies.
- How the proposed Ordinance aligns with the existing Acquisition and Use of Surveillance Technology Ordinance.

The item was continued to the next scheduled meeting.

3. **Alternative Compliance Measures to Achieve Fire Safety in Existing Live/Work Spaces**

From: Councilmembers Robinson and Harrison

Referred: May 13, 2019

Due: October 28, 2019

Recommendation: Refer to the City Manager to develop alternative code compliance measures for nontraditional live/work spaces, in order to improve residential safety without displacing existing communities. Given the current shortage of affordable housing, Staff should consider how to enact a policy of leniency towards existing structures which may not be in complete compliance with city permits. Staff should seek methods to incentivize incremental safety renovations without exposing communities to eviction concerns.

Financial Implications: Staff time

Contact: Rigel Robinson, Councilmember, District 7, 981-7170

Action: The item was withdrawn by the author, Councilmember Rigel Robinson.

Committee Action Items

4. Decriminalizing Entheogenic Plants

From: Councilmembers Robinson and Davila

Referred: July 1, 2019

Due: December 16, 2019

Recommendation: Adopt a Resolution decriminalizing Entheogenic Plants and Fungi such as mushrooms, cacti, iboga containing plants, and/or extracted combinations of plants similar to Ayahuasca; and limited to those containing the following types of compounds: indole amines, tryptamines, phenethylamines, by restricting any city funds or resources to assist in the enforcement of laws imposing criminal penalties for the use and possession of Entheogenic Plants by adults age 21 and over.

Financial Implications: See report

Contact: Rigel Robinson, Councilmember, District 7, 981-7170

Action: 8 Speakers. Revised material submitted by the author. M/S/C (Robinson/Wengraf) to send the item back to the City Council with a qualified positive recommendation that the author revise the report to refer the item to the Community Health Commission for further discussion.

Vote: All Ayes.

Unscheduled Items

These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.

- None

Items for Future Agendas

- None

Adjournment

Action: M/S/C (Bartlett/Wengraf) to adjourn the meeting.

Vote: All Ayes

Adjourned at 1:32 p.m.

I hereby certify that this is a true and correct record of the Public Safety Committee meeting held on July 17, 2019.

Michael MacDonald, Assistant City Clerk



Kate Harrison
Councilmember District 4

ACTION CALENDAR
June 11, 2019

To: Honorable Mayor and Members of the City Council
 From: Councilmember Harrison
 Subject: Adopt an Ordinance Amending Berkeley Municipal Code Chapter 2.99 to Prohibit City Use of Face Recognition Technology

RECOMMENDATION

Adopt an ordinance amending Berkeley Municipal Code Chapter 2.99 to prohibit the City from acquiring, retaining, requesting, accessing, or using: (1) any face recognition technology, or (2) any information obtained from face recognition technology.

BACKGROUND

The City of Berkeley was the first City in California to adopt a comprehensive Ordinance regulating City Departments' acquisition of surveillance technology (Ord. 7592-NS, 2018). The legislation, adopted unanimously, recognizes that surveillance technology is inherently dangerous to civil liberties, and establishes a requirement that the City proactively establish why proposed surveillance technology is in the public interest and request Council permission to acquire it.

In adopting its own Acquisition of Surveillance Technology Ordinance modeled upon Berkeley's, the San Francisco Board of Supervisors recently became the first city in the United States to also prohibit city departments' from acquiring, retaining, requesting, accessing, or using of face recognition technology, except at the federally regulated San Francisco Airport and Port. Face recognition technology means "an automated or semi-automated process that assists in identifying or verifying an individual based on an individual's face."¹

It is in the public interest for the City of Berkeley to amend its existing Surveillance Technology Ordinance to include a ban of City use of face recognition technology. There are a number of essential constitutional reasons why government use of this specific technology is incompatible with the people's civil liberties:

¹ City and County of San Francisco, Board of Supervisors, "Administrative Code - Acquisition of Surveillance Technology," May 21, 2019, <https://sfgov.legistar.com/LegislationDetail.aspx?ID=3850006&GUID=12FC5DF6-AAC9-4F4E-8553-8F0CD0EBD3F6>.

1. Government use of face recognition technology for identifying or tracking individuals or groups *en masse* for criminal and civil purposes flies in the face of the fundamental principle underlying the Fourth Amendment to the United States Constitution. The amendment clearly prohibits federal, state and local governments from engaging in mass surveillance of their citizens.²

Facial recognition technology differs from stationary surveillance cameras in that it eliminates the human and judicial element behind the existing warrant system by which governments must prove that planned surveillance is both constitutional and sufficiently narrow to protect targets' and bystanders' fundamental rights to privacy while also simultaneously providing the government with the ability to exercise its duties.

Facial recognition technology automates the search, seizure and analysis process that was heretofore pursued on a narrow basis through stringent constitutionally-established and human-centered oversight in the judiciary branch. Due to the inherent dragnet nature of facial recognition technology, governments cannot reasonably support by oath or affirmation the *particular* persons or things to be seized. The programmatic automation of surveillance fundamentally undermines the community's liberty.

With respect to the Fourth Amendment, in practice, facial recognition technology's sweeping nature has already proven extremely ineffective at applying narrowly tailored surveillance. For example, according to the American Civil Liberties Union, in 2018 Amazon's technology "incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime...[t]he false matches were disproportionately of people of color, including six members of the Congressional Black Caucus, among them civil rights legend Rep. John Lewis (D-Ga.)."³

² The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

See Fourth Amendment to the United States Constitution, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/constitution/fourth_amendment.

³ Jacob Snow, "Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots," American Civil Liberties Union, July 26, 2018, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>.

While it is easy to write off the Amazon example, along with other examples of the grave issues of facial recognition technology by looking at the technology's shortcomings as merely an engineering or temporary problem, in fact, the technology poses a fundamental Fourth Amendment constitutional problem.

2. Government acquisition and use of mass surveillance presents a fundamental threat to the community's First Amendment right to exercise their freedom of speech, including through assembly, and petitions to the government for a redress of grievances.⁴

Brian Hofer, the Executive Director of Secure Justice, and Matt Cagle, a Technology and Civil Liberties Attorney at the ACLU of Northern California, point out in a recent editorial that there is evidence from the 1970s of local Bay Area governmental entities, such as the San Francisco Police Department, amassing "intelligence files on over 100,000 people, including civil rights demonstrators, union members, and anti-war activists." They note that while these intelligence files took decades to collect, authorities using face recognition technology today, "can stockpile information on 100,000 residents in a few hours."⁵

Government face recognition surveillance will likely have a chilling effect on public engagement. The City of Berkeley can ill-afford to acquire and use technology that has the potential to circumscribe citizens' essential First Amendment rights.

These fundamental constitutional deficiencies with regard to government acquisition and use of face recognition technology necessitates that the Council move proactively to prohibit use of such technology by the City of Berkeley.

FINANCIAL IMPLICATIONS

The Ordinance will prevent investment in expensive face recognition technology.

ENVIRONMENTAL SUSTAINABILITY

The Ordinance is in line with the City's Climate goals by preventing the use of carbon-intensive computing resources for processing bulk facial data.

⁴ See Fourth Amendment to the United States Constitution, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/constitution/first_amendment.

⁵ Matt Cagle and Brian Hofer, "New surveillance oversight law keeps communities safe and redefines tech leadership," San Francisco Examiner, May 8, 2019, <https://www.sfexaminer.com/opinion/new-surveillance-oversight-law-keeps-communities-safe-and-redefines-tech-leadership/>.

CONTACT PERSON

Councilmember Kate Harrison, Council District 4, 510-981-7140

ATTACHMENTS

1. Proposed Ordinance Amending Berkeley Municipal Code Chapter 2.99 to Prohibit City
Use of Face Recognition Technology

ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 2.99 TO PROHIBIT CITY USE
OF FACE RECOGNITION TECHNOLOGY

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That the Berkeley Municipal Code is amended to read as follows:

2.99.020 Definitions

The following definitions apply to this Chapter:

1. "Surveillance Technology" means an electronic device, system utilizing an electronic device, or similar technological tool used, designed, or primarily intended to collect audio, electronic, visual, location, thermal, olfactory, biometric, or similar information specifically associated with, or capable of being associated with, any individual or group. Examples of covered Surveillance Technology include, but are not limited to: cell site simulators (Stingrays); automatic license plate readers; body worn cameras; gunshot detectors (ShotSpotter); facial recognition software; thermal imaging systems, except as allowed under Section 1(d); social media analytics software; gait analysis software; and video cameras that record audio or video and can remotely transmit or can be remotely accessed.

"Surveillance Technology" does not include the following devices or hardware, unless they have been equipped with, or are modified to become or include, a Surveillance Technology as defined in Section 1 (above):

- a. Routine office hardware, such as televisions, computers, mobile devices, and printers, that is in widespread public use and will not be used for any surveillance functions;
- b. Handheld Parking Citation Devices, that do not automatically read license plates;
- c. Manually-operated, portable digital cameras, audio recorders, and video recorders that are not to be used remotely and whose functionality is limited to manually capturing, viewing, editing and downloading video and/or audio recordings, but not including body worn cameras;
- d. Devices that cannot record or transmit audio or video or be remotely accessed, such as image stabilizing binoculars or night vision goggles or thermal imaging cameras used for fire operations, search and rescue operations and missing person searches, and equipment used in active searches for wanted suspects;

e. Manually-operated technological devices that are not designed and will not be used to surreptitiously collect surveillance data, such as two-way radios, email systems and city-issued cell phones;

f. Municipal agency databases;

g. Medical equipment used to diagnose, treat, or prevent disease or injury, including electrocardiogram machines;

h. Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer based activity;

i. Stationary security cameras affixed to City property or facilities.

2. "Surveillance Technology Report" means an annual written report by the City Manager covering all of the City of Berkeley's Surveillance Technologies that includes all of the following information with regard to each type of Surveillance Technology:

a. Description: A description of all non-privileged and non-confidential information about use of the Surveillance Technology, including but not limited to the quantity of data gathered and sharing of data, if any, with outside entities. If sharing has occurred, the report shall include general, non-privileged and non-confidential information about recipient entities, including the names of the entities and purposes for such sharing;

b. Geographic Deployment: Where applicable, non-privileged and non-confidential information about where the surveillance technology was deployed geographically;

c. Complaints: A summary of each complaint, if any, received by the City about the Surveillance Technology;

d. Audits and Violations: The results of any non-privileged internal audits, any information about violations or potential violations of the Surveillance Use Policy, and any actions taken in response;

e. Data Breaches: Non-privileged and non-confidential information about any data breaches or other unauthorized access to the data collected by the surveillance technology, including information about the scope of the breach and the actions taken in response;

f. Effectiveness: Information that helps the community assess whether the Surveillance Technology has been effective in achieving its identified outcomes;

g. Costs: Total annual costs for the Surveillance Technology, including personnel and other ongoing costs.

3. "Surveillance Acquisition Report" means a publicly-released written report produced prior to acquisition or to proposed permanent use after use in Exigent Circumstances pursuant to Section 2.99.040 (2), of a type of Surveillance Technology that includes the following:

a. Description: Information describing the Surveillance Technology and how it works, including product descriptions from manufacturers;

b. Purpose: Information on the proposed purpose(s) for the Surveillance Technology;

c. Location: The general location(s) it may be deployed and reasons for deployment;

d. Impact: An assessment identifying potential impacts on civil liberties and civil rights including but not limited to potential disparate or adverse impacts on any communities or groups;

e. Mitigation: Information regarding technical and procedural measures that can be implemented to appropriately safeguard the public from any impacts identified in subsection (d);

f. Data Types and Sources: A list of the sources of data proposed to be collected, analyzed, or processed by the Surveillance Technology, including "open source" data;

g. Data Security: Information about the steps that can be taken to ensure adequate security measures to safeguard the data collected or generated from unauthorized access or disclosure;

h. Fiscal Cost: The fiscal costs for the Surveillance Technology, including initial purchase, personnel and other ongoing costs, including to the extent practicable costs associated with compliance with this and other reporting and oversight requirements, as well as any current or potential sources of funding;

i. Third Party Dependence and Access: Whether use or maintenance of the technology will require data gathered by the technology to be handled or stored by a third-party vendor on an ongoing basis, and whether a third party may have access to such data or may have the right to sell or otherwise share the data in aggregated, disaggregated, raw or any other formats;

j. Alternatives: A summary and general assessment of potentially viable alternative methods (whether involving the use of a new technology or not), if any, considered before deciding to propose acquiring the Surveillance Technology; and

k. Experience of Other Entities: To the extent such information is available, a summary of the experience of comparable government entities with the proposed technology, including any unanticipated financial or community costs and benefits, experienced by such other entities.

4. "Surveillance Use Policy" means a publicly-released and legally-enforceable policy for use of each type of the Surveillance Technology that shall reflect the Surveillance Acquisition Report produced for that Surveillance Technology and that at a minimum specifies the following:

a. Purpose: The specific purpose(s) that the Surveillance Technology is intended to advance;

b. Authorized Use: The uses that are authorized, the rules and processes required prior to such use, and the uses that are prohibited;

c. Data Collection: Information collection that is allowed and prohibited. Where applicable, list any data sources the technology will rely upon, including "open source" data;

d. Data Access: A general description of the title and position of the employees and entities authorized to access or use the collected information, and the rules and processes required prior to access or use of the information, and a description of any and all of the vendor's rights to access and use, sell or otherwise share information for any purpose;

e. Data Protection: A general description of the safeguards that protect information from unauthorized access, including encryption and access control mechanisms, and safeguards that exist to protect data at the vendor level;

f. Civil Liberties and Rights Protection: A general description of the safeguards that protect against the use of the Surveillance Technology and any data resulting from its use in a way that violates or infringes on civil rights and liberties, including but not limited to potential disparate or adverse impacts on any communities or groups;

g. Data Retention: The time period, if any, for which information collected by the surveillance technology will be routinely retained, the reason such retention period is appropriate to further the purpose(s), the process by which the information is regularly deleted after that period lapses, and the specific conditions that must be met to retain information beyond such period;

h. Public Access: How collected information may be accessed or used by members of the public;

i. Third Party Data Sharing: If and how other City or non-City Entities can access or use the information, including any required justification or legal standard necessary to do so and any obligations imposed on the recipient of the information;

j. Training: Training required for any employee authorized to use the Surveillance Technology or to access information collected;

k. Auditing and Oversight: Mechanisms to ensure that the Surveillance Use Policy is followed, technical measures to monitor for misuse, and the legally enforceable sanctions for intentional violations of the policy; and

l. Maintenance: The mechanisms and procedures to ensure maintenance of the security and integrity of the Surveillance Technology and collected information.

5. "Exigent Circumstances" means the City Manager's good faith belief that an emergency involving imminent danger of death or serious physical injury to any person, or imminent danger of significant property damage, requires use of the Surveillance Technology or the information it provides.

6. "Face Recognition Technology" means an automated or semi-automated process that assists in identifying or verifying an individual based on an individual's face.

Section 2. That the Berkeley Municipal Code is amended to read as follows:

2.99.030 City Council Approval Requirement

1. The City Manager must obtain City Council approval, except in Exigent Circumstances, by placing an item on the Action Calendar at a duly noticed meeting of the City Council prior to any of the following:

a. Seeking, soliciting, or accepting grant funds for the purchase of, or in-kind or other donations of, Surveillance Technology;

b. Acquiring new Surveillance Technology, including but not limited to procuring such technology without the exchange of monies or consideration;

c. Using new Surveillance Technology, or using Surveillance Technology previously approved by the City Council for a purpose, or in a manner not previously approved by the City Council; or

d. Entering into an agreement with a non-City entity to acquire, share or otherwise use Surveillance Technology or the information it provides, or expanding a vendor's permission to share or otherwise use Surveillance Technology or the information it provides.

2. The City Manager must present a Surveillance Use Policy for each Surveillance Technology to the Police Review Commission, prior to adoption by the City Council. The Police Review Commission shall also be provided with the corresponding Surveillance Acquisition Report that had been presented to council for that Surveillance Technology. No later than 30 days after receiving a Surveillance Use Policy for review, the Police Review Commission must vote to recommend approval of the policy, object to the proposal, recommend modifications, or take no action. Neither opposition to approval of such a policy, nor failure by the Police Review Commission to act, shall prohibit the City Manager from proceeding with its own review and potential adoption.

3. The City Manager must submit for review a Surveillance Acquisition Report and obtain City Council approval of a Surveillance Use Policy prior to engaging in any of the activities described in subsections (1) (a)-(d).

4. Notwithstanding any other provision of this Chapter, it shall be unlawful for any City staff to obtain, retain, request, access, or use: i) any Face Recognition Technology; or ii) any information obtained from Face Recognition Technology. City staff's inadvertent or unintentional receipt, access to, or use of any information obtained from Face Recognition Technology shall not be a violation of this subsection 4., provided that:

a. City staff does not request or solicit its receipt, access to, or use of such information; and

b. City staff logs such receipt, access to, or use in its Annual Surveillance Report.

c. City staff receives evidence that utilizes Facial Recognition Technology during the investigation of a crime, provided that it is obtained without solicitation.

2.99.040 Temporary Acquisition and Use of Surveillance Equipment

Notwithstanding the provisions of this Chapter, the City Manager may borrow, acquire and/or temporarily use Surveillance Technology in Exigent Circumstances without following the requirements in Sections [2.99.030](#) and [2.99.040](#). However, if the City Manager borrows, acquires or temporarily uses Surveillance Technology in Exigent Circumstances he or she must take all of the following actions:

1. Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;
2. If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Surveillance Acquisition Report and Surveillance Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Sections [2.99.030](#) and [2.99.040](#); and
3. Include the Surveillance Technology in the City Manager's next annual Surveillance Technology Report.

2.99.050 Compliance for Existing Surveillance Technology

The City Manager shall submit to the Action Calendar for the first City Council meeting in November of 2018 a Surveillance Acquisition Report and a proposed Surveillance

Use Policy for each Surveillance Technology possessed or used prior to the effective date of the ordinance codified in this Chapter.

2.99.060 Determination by City Council that Benefits Outweigh Costs and Concerns

The City Council shall only approve any action described in Section [2.99.030](#), [2.99.040](#), or Section [2.99.050](#) of this Chapter after making a determination that the benefits to the community of the Surveillance Technology, used according to its Surveillance Use Policy, outweigh the costs; that the proposal will appropriately safeguard civil liberties and civil rights to the maximum extent possible while serving its intended purposes; and that, in the City Council's judgment, no feasible alternative with similar utility and a lesser impact on civil rights or civil liberties could be implemented.

2.99.070 Oversight Following City Council Approval

The City Manager must submit to the Council Action Calendar a written Surveillance Technology Report, covering all of the City's Surveillance Technologies, annually at the first regular Council meeting in November. After review of the Surveillance Technology Report, Council may make modifications to Surveillance Use Policies.

2.99.080 Public Access to Surveillance Technology Contracts

To the extent permitted by law, the City shall continue to make available to the public all of its surveillance-related contracts, including related non-disclosure agreements, if any.

2.99.090 Enforcement

This Chapter does not confer any rights upon any person or entity other than the City Council to cancel or suspend a contract for a Surveillance Technology. The Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if he or she is personally obligated to pay such fees.

2.99.100 Whistleblower Protections

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016 and including any updates or replacements thereto, shall apply.

2.99.110 Severability

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance, is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ORDINANCE NO. -N.S.

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OF FACE RECOGNITION TECHNOLOGY

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- c. Manually-operated, portable digital cameras, audio recorders, and video recorders that are not to be used remotely and whose functionality is limited to manually capturing, viewing, editing and downloading video and/or audio recordings, but not including body worn cameras;
- d. Devices that cannot record or transmit audio or video or be remotely accessed, such as image stabilizing binoculars or night vision goggles or thermal imaging cameras used for fire operations, search and rescue operations and missing person searches, and equipment used in active searches for wanted suspects;
- e. Manually-operated technological devices that are not designed and will not be used to surreptitiously collect surveillance data, such as two-way radios, email systems and city-issued cell phones;

f. Municipal agency databases;

g. Medical equipment used to diagnose, treat, or prevent disease or injury, including electrocardiogram machines;

h. Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer based activity;

i. Stationary security cameras affixed to City property or facilities.

2 "Surveillance Technology Report" means an annual written report by the City Manager covering all of the City of Berkeley's Surveillance Technologies that includes all of the following information with regard to each type of Surveillance Technology:

a. Description: A description of all non-privileged and non-confidential information about use of the Surveillance Technology, including but not limited to the quantity of data gathered and sharing of data, if any, with outside entities. If sharing has occurred, the report shall include general, non-privileged and non-confidential information about recipient entities, including the names of the entities and purposes for such sharing;

b. Geographic Deployment: Where applicable, non-privileged and non-confidential information about where the surveillance technology was deployed geographically;

c. Complaints: A summary of each complaint, if any, received by the City about the Surveillance Technology;

d. Audits and Violations: The results of any non-privileged internal audits, any information about violations or potential violations of the Surveillance Use Policy, and any actions taken in response;

e. Data Breaches: Non-privileged and non-confidential information about any data breaches or other unauthorized access to the data collected by the surveillance technology, including information about the scope of the breach and the actions taken in response;

f. Effectiveness: Information that helps the community assess whether the Surveillance Technology has been effective in achieving its identified outcomes;

g. Costs: Total annual costs for the Surveillance Technology, including personnel and other ongoing costs.

3 "Surveillance Acquisition Report" means a publicly-released written report produced prior to acquisition or to proposed permanent use after use in Exigent

Circumstances pursuant to Section 2.99.040 (2), of a type of Surveillance Technology that includes the following:

- a. Description: Information describing the Surveillance Technology and how it works, including product descriptions from manufacturers;
- b. Purpose: Information on the proposed purpose(s) for the Surveillance Technology;
- c. Location: The general location(s) it may be deployed and reasons for deployment;
- d. Impact: An assessment identifying potential impacts on civil liberties and civil rights including but not limited to potential disparate or adverse impacts on any communities or groups;
- e. Mitigation: Information regarding technical and procedural measures that can be implemented to appropriately safeguard the public from any impacts identified in subsection (d);
- f. Data Types and Sources: A list of the sources of data proposed to be collected, analyzed, or processed by the Surveillance Technology, including "open source" data;
- g. Data Security: Information about the steps that can be taken to ensure adequate security measures to safeguard the data collected or generated from unauthorized access or disclosure;
- h. Fiscal Cost: The fiscal costs for the Surveillance Technology, including initial purchase, personnel and other ongoing costs, including to the extent practicable costs associated with compliance with this and other reporting and oversight requirements, as well as any current or potential sources of funding;
- i. Third Party Dependence and Access: Whether use or maintenance of the technology will require data gathered by the technology to be handled or stored by a third-party vendor on an ongoing basis, and whether a third party may have access to such data or may have the right to sell or otherwise share the data in aggregated, disaggregated, raw or any other formats;
- j. Alternatives: A summary and general assessment of potentially viable alternative methods (whether involving the use of a new technology or not), if any, considered before deciding to propose acquiring the Surveillance Technology; and
- k. Experience of Other Entities: To the extent such information is available, a summary of the experience of comparable government entities with the proposed technology, including any unanticipated financial or community costs and benefits, experienced by such other entities.

4. "Surveillance Use Policy" means a publicly-released and legally-enforceable policy for use of each type of the Surveillance Technology that shall reflect the Surveillance Acquisition Report produced for that Surveillance Technology and that at a minimum specifies the following:

a. Purpose: The specific purpose(s) that the Surveillance Technology is intended to advance;

b. Authorized Use: The uses that are authorized, the rules and processes required prior to such use, and the uses that are prohibited;

c. Data Collection: Information collection that is allowed and prohibited. Where applicable, list any data sources the technology will rely upon, including "open source" data;

d. Data Access: A general description of the title and position of the employees and entities authorized to access or use the collected information, and the rules and processes required prior to access or use of the information, and a description of any and all of the vendor's rights to access and use, sell or otherwise share information for any purpose;

e. Data Protection: A general description of the safeguards that protect information from unauthorized access, including encryption and access control mechanisms, and safeguards that exist to protect data at the vendor level;

f. Civil Liberties and Rights Protection: A general description of the safeguards that protect against the use of the Surveillance Technology and any data resulting from its use in a way that violates or infringes on civil rights and liberties, including but not limited to potential disparate or adverse impacts on any communities or groups;

g. Data Retention: The time period, if any, for which information collected by the surveillance technology will be routinely retained, the reason such retention period is appropriate to further the purpose(s), the process by which the information is regularly deleted after that period lapses, and the specific conditions that must be met to retain information beyond such period;

h. Public Access: How collected information may be accessed or used by members of the public;

i. Third Party Data Sharing: If and how other City or non-City Entities can access or use the information, including any required justification or legal standard necessary to do so and any obligations imposed on the recipient of the information;

j. Training: Training required for any employee authorized to use the Surveillance Technology or to access information collected;

k. Auditing and Oversight: Mechanisms to ensure that the Surveillance Use Policy is followed, technical measures to monitor for misuse, and the legally enforceable sanctions for intentional violations of the policy; and

l. Maintenance: The mechanisms and procedures to ensure maintenance of the security and integrity of the Surveillance Technology and collected information.

5. "Exigent Circumstances" means the City Manager's good faith belief that an emergency involving imminent danger of death or serious physical injury to any person, or imminent danger of significant property damage, requires use of the Surveillance Technology or the information it provides.

6. "Face Recognition Technology" means an automated or semi-automated process that assists in identifying or verifying an individual based on an individual's face.

Section 2. That the Berkeley Municipal Code is amended to read as follows:

2.99.030 City Council Approval Requirement

1. The City Manager must obtain City Council approval, except in Exigent Circumstances, by placing an item on the Action Calendar at a duly noticed meeting of the City Council prior to any of the following:

a. Seeking, soliciting, or accepting grant funds for the purchase of, or in-kind or other donations of, Surveillance Technology;

b. Acquiring new Surveillance Technology, including but not limited to procuring such technology without the exchange of monies or consideration;

c. Using new Surveillance Technology, or using Surveillance Technology previously approved by the City Council for a purpose, or in a manner not previously approved by the City Council; or

d. Entering into an agreement with a non-City entity to acquire, share or otherwise use Surveillance Technology or the information it provides, or expanding a vendor's permission to share or otherwise use Surveillance Technology or the information it provides.

2. The City Manager must present a Surveillance Use Policy for each Surveillance Technology to the Police Review Commission, prior to adoption by the City Council. The Police Review Commission shall also be provided with the corresponding Surveillance Acquisition Report that had been presented to council for that Surveillance Technology. No later than 30 days after receiving a Surveillance Use Policy for review, the Police Review Commission must vote to recommend approval of the policy, object to the proposal, recommend modifications, or take no action. Neither opposition to approval of

such a policy, nor failure by the Police Review Commission to act, shall prohibit the City Manager from proceeding with its own review and potential adoption.

3. The City Manager must submit for review a Surveillance Acquisition Report and obtain City Council approval of a Surveillance Use Policy prior to engaging in any of the activities described in subsections (1) (a)-(d).

4. Notwithstanding any other provision of this Chapter, it shall be unlawful for any City staff to obtain, retain, request, access, or use: i) any Face Recognition Technology; or ii) any information obtained from Face Recognition Technology. City staff's inadvertent or unintentional receipt, access to, or use of any information obtained from Face Recognition Technology shall not be a violation of this subsection 4., provided that:

a. City staff does not request or solicit its receipt, access to, or use of such information; and

b. City staff logs such receipt, access to, or use in its Annual Surveillance Report.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.