Introduction
The Public Safety Subcommittee held a public hearing on Warrant Article 25 in the Fifth Floor School Committee Room of Town Hall from 6:00 pm to 9:00 pm on Tuesday, October 23, 2019. Present at the hearing were the petitioner, Amy Hummel (AC, TMM-12); Andrew Lipson (Chief of Police); Patricia Correa (First Assistant Town Counsel); Kade Crockford (ACLU); Emiliano Flacon (ACLU); Surveillance Technology and Military-Type Equipment Study Committee members Bernard Greene (chair of Committee and chair of Select Board), C. Scott Ananian (TMM-10), Paul Campbell (Lt., BPD), Kevin Stokes (IT Dept), Casey Hatchett (TMM-12, Sgt. BPD), Susan Howards, and Igor Muravyov; Jesse Mermell (Winthrop Road); Kim Smith (TMM-6); George Abbott White (TMM-9); Linda Olson Pehlke (TMM-2); Neil Gordon (TMM-1; PAX); John Aron (Chapel St.); Meghan Convey (BU); Christopher Post (Centre St.); Erica Woloszynski (Centre St.); Marissa Bennett (Thorndike St.); Carol Steinman (Salisbury Rd.); Livia Imada (Longwood Ave.); Irving Allen (34 Orchard Rd.); Leo Lee (Devotion class of 1961); Alex Mathews (Digital Fourth, Belmont MA); and the Subcommittee members Janice Kahn (chair, TMM-15), David-Marc Goldstein (TMM-8), Susan Granoff (TMM-7), and Alisa Jonas (TMM-16).

Summary
WA 25 establishes a new Article 8.39 of the Town’s By-Laws to prohibit the use of facial recognition technology by all municipal departments and Town officials other than for certain permitted uses as listed in section 2. It also prohibits the Town from entering into agreements with third parties to use such technology on the Town’s behalf.

Several modifications were made prior to the October 23 subcommittee hearing. The modified article prohibits the Town from making agreements with other parties that would authorize such third parties to use photographic or other images originating in Brookline in their application of facial recognition software, but it would allow the Town to use information derived from the application of face recognition software by a third party (e.g., individuals or other jurisdictions’ governmental entities) if no prior agreement has been made with that third party for the use of FRT to obtain the information. It also adds several other exceptions, including allowing its use to comply with the National Child Search Assistance Act, which deals with the locating of missing children.

The Article provides an enforcement provision for violations of the By-Law, including 1) the deletion of data collected by the Town and the prohibition of its use in evidence, and 2) a cause of action against the Town for violations, and disciplinary measures for employees violating the By-Law, such as suspension and termination.

Background
Description of Facial Recognition Technology (FRT)
Facial Recognition Technology (FRT) is a type of pattern recognition technology that uses software to analyze patterns of a person's face from their image either on a photograph or video frame to develop a template of the face, which can then be compared with other images to see whether they match. The technology uses “machine learning,” whereby training data of facial images are analyzed by the software. The accuracy of the software increases as more and more samples of facial images are provided to be analyzed, and will vary for different types of faces, depending on the volume of faces that have been provided in the training data.
Uses of FRT

FRT is used to identify or verify the identity of an individual by comparing the template created by the pattern analysis of a photo (or other image) with other photos of persons in a particular database. It is used for a variety of purposes and by a variety of users. Individuals might use the software when they have Google Photos or iPhoto to locate all the photos of a specific friend or family member in their photo collections or, like a fingerprint, to authenticate their identity on their cellphone. The State’s Registry of Motor Vehicles uses FRT when an individual applies for a replacement driver’s license. Their photo is compared with the photo on the original license to verify their identity and thereby curb identity fraud. Police Departments use FRT to compare a photo of a suspect with photos of persons in a mugshot database to obtain leads for investigations. FRT is also being used for surveillance purposes. It may be installed in cameras in public places, such as public ways, stadiums, and shopping centers to scan faces in real time and compare those with faces in a database to make identifications. For example, it was used during the 2001 Super Bowl to identify possible terrorists. Law enforcement agencies that have identified a particular suspect may track their movements using FRT. The most extreme example of using FRT for surveillance purposes is in China, where FRT installed in cameras is ubiquitous, allowing the government to monitor the movements, locations, and associations of persons in public spaces.

Issues with the Use of FRT

While there has been increasing use of this relatively new area of technology and for more and more purposes - commercial, personal, and governmental - it also is largely an unregulated area of technology. There are no requirements regarding either levels of accuracy required for the selection of an FRT system or for use in identifying persons. Racial and gender biases have been identified in the systems, though the most recent evaluation of certain FRT systems by the federal National Institute of Standardization and Technology, published this year, suggests that at least for some systems, theses biases have become negligible or non-existent. (For those of you with statistical savvy and time on your hands, see https://www.nist.gov/sites/default/files/documents/2019/10/16/frvt_report_2019_10_16.pdf). There also are no guidelines or penalties in place for inappropriate use of FRT in law enforcement. First and Fourth amendment threats are of special concern when FRT is used in public spheres for surveillance purposes, since persons can be identified and tracked with or without any suspicion of wrongdoing, while 5th and 14th amendment due process concerns are implicated when FRT is used in criminal proceedings.

Brookline and FRT

Brookline does not possess a FRT system, either for photo matching or for surveillance purposes. The Police Department, however, obtains information from a variety of sources derived with FRT, for example, social media apps and websites, such as Facebook, databases of missing persons, the Registry of Motor Vehicles database, and data obtained from other jurisdictions that may have been obtained with the use of FRT. The information is used for numerous purposes, including criminal investigations, locating missing persons, human trafficking, and death identifications.

Massachusetts Legislation

With no federal, state, or municipal framework to regulate its use in Massachusetts, Senator Cynthia Creem has filed Senate Bill 1385 (an Act Establishing A Moratorium On Face Recognition and Other Remote Biometric Surveillance Systems), which provides for a moratorium on the use of FRT until a statutory framework is implemented that establishes allowable and prohibited uses; standards for use and management of the collected data, including retention, sharing, and access; auditing requirements; standards for minimum accuracy rates, and accuracy rates by gender, skin color, and age; and protections for due process, privacy, free speech and association, and racial, gender, and religious equity; and mechanisms to ensure compliance.

Summary of Public Comments
Comments were provided by the Petitioner, Assistant Town Counsel, the Police Chief, ACLU counsel, members of the Surveillance Technology and Military-type Equipment Study Committee, and members of the public.

The Petitioner emphasized the threat to civil liberties, such as the right to free speech and assembly and a person’s right to privacy. She notes that corporations that seek profits are pushing facial recognition software, even though the software is defective, misclassifying minorities, women and children and having high rates of false positives, with the consequence that innocent people are identified, which can be a traumatizing experience. The use of surveillance with this technology in the public realm threatens the collective psyche, as people are aware that they are being watched. This type of surveillance will discourage people from attending rallies, and can also dissuade persons from participating in other activities that are more private in nature and that they would not want to publicize. Essentially, the Petitioner notes, by tracking persons in the public sphere, one’s face becomes a trackable ID badge.

The Petitioner explained why she filed WA 25 at this time: Currently there are no laws regulating the use of facial surveillance; there is a bill in the Senate that is similar to this bill; and we are understanding the technology better now and so have become more aware of the dangers. And although the Town has not abused the technology, we should do something now to prevent its use before it becomes more damaging to our civil liberties, and before it becomes more entrenched.

The Petitioner was asked under what conditions the police might be able to use FRT for public safety purposes; for example, if a person were to collapse on a street, could the police provide the person’s photo to other towns to search their databases for identification purposes? The Petitioner explained that she wants this to be a broad ban, with the result that some ancillary functions may not be possible. She also noted that the technology is flawed, and so may not be able to accurately identify persons in any case.

When asked why she did not bring this proposal to the Surveillance Technology and Military-Type Equipment Study Committee to work on as part of their charge, she noted that the Committee did not meet over the summer and she had to file the warrant article by August. Since that time the Committee has had meetings during which they discussed the ban. But the Petitioner wants to get the ban passed as soon as possible, and the process for getting a by-law passed is to file a warrant article and to let Town Meeting decide whether it should become law.

The Petitioner pointed out that she has had several conversations with the Police Chief and made modifications to the ban to address issues of concern. Specifically, the by-law now allows the police to use information obtained from others, even if the information was obtained with the use of facial recognition software.

First Assistant Town Counsel Patty Correa had numerous concerns about the article. She also pointed out that the proposed State legislation is not a ban but rather a moratorium for a period of time until laws to regulate the use of the technology are promulgated.

She noted that the subject of this warrant article is essentially an employment policy, providing guidance about specific law enforcement procedures that are permitted and others that are not — and the Town would be better served if these standards were implemented as a policy rather than as a By-Law. By-Laws are too “clunky,” requiring a town meeting vote to make adjustments. As an example, she cited the exception that the Petitioner carved out for “complying with the National Child Search Assistance Act,” as requested by the Police Chief. Town Counsel believes that the exception is likely too narrow. Making changes such as these would be easier to accomplish as a policy directive.

She emphasized the need to include a “knowing” standard to avoid placing town personnel at risk of
inadvertently violating the By-Law. This became more evident during the hearing when it was unclear whether or not a particular hypothetical scenario would violate the provision of section 1 of the new By-Law.

With regard to the enforcement provisions, Town Counsel stated that the creation of a civil cause of action under a Town By-Law exceeds the Town’s constitutional authority and so would be thrown out of court. She disagrees with the reasoning provided in the ACLU letter on this issue. Whether this provision exceeds the Town’s authority will be determined by the Municipal Law Unit of the Attorney General’s Office and she spoke with the Director of the Unit, who confirmed her analysis. Thus, Town Counsel asserts, this provision will result in frivolous lawsuits, which will only add an extra burden to the Town’s legal staff.

She also noted that the Town has an enforcement scheme incorporated in the By-Laws, under Article 10, with the police as the enforcement officers, with civil remedies provided for in the State’s General Laws, specifically Ch. 40 section 21(d). According to Town Counsel, this By-Law creates an employment policy for the police that is to be enforced by the police.

Police Chief Lipson also expressed concerns. He noted that although the Town does not have its own facial recognition system, the implementation of this warrant article would result in a “massive void of evidence collection,” and that a total ban ignores the valuable uses to which the technology can be applied. He was not consulted in the drafting of the article prior to its submission. Without collaborating with the police and others in town who are knowledgeable about the uses of FRT, the Petitioner’s article does not provide a balanced application of the technology. Some of his concerns have been addressed by amendments to the article, but others have not. He noted that the approach taken in Brookline was similar to that taken in Somerville, whereby a ban was passed without any input from the Police Chief who had knowledge of the circumstances under which FRT is useful, such as in the identification of human trafficking rings and the perpetrators of hate crimes. He also noted that with passage of this article, the police will not be able to obtain evidence in the world that is readily accessible to lay people, such as Facebook. Similarly, the police would not be able to work with the State’s Police Fusion Center to identify and assess unexplained deaths and investigate Brookline homicides, since the Fusion Center uses FRT.

The Chief also expressed concern about the confusion that will arise for law enforcement officers when it is unclear whether evidence that has been collected has been done with the help of FRT. Thus, for instance, an officer who has identified a suspect from Facebook would have to determine whether FRT was used to identify the individual.

He noted that the ACLU points out the 14th Amendment due process issues arising from the use of FRT in gathering evidence. He would like to point out the due process issues arising from the Town’s police force ignoring a broad swath of evidence to solve criminal cases that other law enforcement agencies are able to access. This both denies the victim’s rights and prevents exculpatory evidence from being presented. Erroneous eye witness identifications are the most frequently cited factor for wrongful convictions. All methods should be used to support or refute such evidence.

The Police Chief compared the use of facial recognition software with the use of DNA when it was first being applied. DNA evidence is now widely used and has served as one of the primary tools to exonerate persons incorrectly accused of a particular crime. He believes that there should be a discussion of when the community would want law enforcement to use FRT, and not implement an across-the-board ban without awareness of the many useful purposes for which it is used.

Kade Crawford of the ACLU expressed concern about the ability of FRT for mass surveillance – the
ability to track thousands or even millions of people in public places, whether or not they are suspected of crimes. Given the power of digital technologies to track large numbers of persons over time and from location to location, the Supreme Court expanded its standard for the expectation of privacy to include the right to expect privacy in public places. This new standard was developed in the 2018 Supreme Court case Carpenter v. the United States, which dealt with law enforcement’s tracking of an individual’s cell phone usage for months at a time without obtaining a warrant. And while cellphones can be left at home, one cannot leave one’s face at home, making the need to restrict the ability to track a person with face surveillance technology that much more important.

Crawford also discussed the flaws in current FRT systems – especially the many false positives, and the lack of any oversight of the commercial systems being marketed to law enforcement to assess quality of the systems and the lack of auditing of the application of the systems to make sure they are being used properly. She noted the due process issues involved with the use of such software to obtain evidence that has led to bringing a person to trial, without awareness by defense counsel of its use or the ability of counsel to assess the quality of the data obtained.

Four of the five members of the Surveillance Technology and Military-Type Equipment Study Committee who spoke (excluding the Petitioner), expressed frustration that the Petitioner did not work collaboratively with them to develop a policy, but the fifth member to speak, Scott Ananian, was supportive of the warrant article. One of the members expressed support for a moratorium until the Committee has worked through the issues.

The other members of the public who spoke supported the warrant article, discussing the privacy and first amendment concerns with the use of real time mass surveillance of persons in public spaces, the discriminatory impact of FRT on persons of color, the impact on immigrants of public surveillance, and the extent to which false positives negate the usefulness of the technology.

The Public Safety Committee members had a limited discussion of the article. We noted three options: 1) Place a ban on the use of the technology, with the option of making changes later. 2) Refer the article to the Surveillance Technology and Military-Type Equipment Study Committee to develop regulations to be voted on at a later date. 3) Transform the ban to a moratorium until the Town has developed a regulatory framework that would establish standards for allowable purposes, accuracy measures, auditing systems, etc. This would mirror the proposed legislation at the State level.

One member was ready to approve the article as is, but other members had various concerns, including the need to address the legal issues noted by Assistant Town Counsel, consideration of the manner with which this warrant article will impact the people we ask to enforce our laws, and for that reason, that it is important to include a standard of “knowingly” under section 1 of the By-Law, and a more careful analysis of the different functions that are accomplished with the use of FRT.

The public hearing was continued to 10/29/19 for further discussion and possible vote. The petitioner, Amy Hummel has proposed a new red-lined version which the Subcommittee has not yet reviewed.