

Brookline's Face Surveillance Technology Ban

Summary

The use of face surveillance technology by any Brookline department, agency, bureau, and/or subordinate division of the Town of Brookline, and any person or entity acting on behalf of Brookline, including any officer, employee, agent, contractor, subcontractor, or vendor, is prohibited by law.

Background

In the fall of 2019, Brookline Town Meeting considered a citizen's petition proposing a by-law to ban the use of face surveillance technology by the Town of Brookline and its agents (warrant article 25).

The proposed by-law was supported by a unanimous Select Board, the Brookline Commission for Women; the School Committee; the Commission for Diversity, Inclusion and Community Relations, and the Advisory Committee, all of which held at least one public hearing on the article.

The Surveillance Technology and Military Type Equipment Study Committee (STMTESC) did not support the warrant article, citing law enforcement concerns. Instead, the committee voted to support an amendment written by three committee members which would have allowed police use.

Warrant Article Documents and STMTESC Amendment

The language of the face surveillance by-law, the language of the STMTESC amendment, as well as commission and committee letters, reports and explanations provided to Town Meeting, appear in the [Fall 2019 Special Town Meeting Combined Reports](#) (the language Town Meeting voted appears on page 25-11); the warrant article 25 materials begin on page 289 of 447 of the Combined Reports. The STMTESC amendment appears on page 304.

On December 11, 2019, Town Meeting passed the by-law to ban face surveillance by a vote of 179 in favor – 9 opposed – 12 abstentions; it rejected the STMTESC amendment by a vote of 13 in favor – 170 opposed – 13 abstentions.

Town Meeting deliberations regarding the face surveillance warrant article and amendment are available [here](#), beginning approximately 26 minutes into the evening on December 11, 2019.

The STMTESC timeline

- On **June 25, 2019**, the committee heard that the petitioner was preparing to file a warrant article banning face surveillance in Brookline;
- **August 27, 2019**, the warrant article was filed in the Select Board's office on; the committee did not meet in August;
- **September 12, 2019**, the petitioner introduced the warrant article to the committee, explaining the sections; the committee did not discuss the article in detail;
- **October 10** the Chief of Police presented his concerns regarding the warrant article;
- **October 18** the committee met again to discuss the warrant article during which a few members of the committee determined that they were going to present their own amendment to the warrant article;
- **October 23**, the committee held a public hearing, a requirement for making a recommendation to Town Meeting. No members of the public, with the exception of ACLU representatives, were in attendance.
- **October 23**, upon concluding their own hearing, members of the STMTESC attended the Advisory Committee's [Public Safety subcommittee hearing](#) on the warrant article, which was televised. That hearing lasted for more than three hours, and the petitioner, the chief of police, members of the public as well as members of the STMTESC were able to speak and be heard.
- **October 30**, the STMTESC first reviewed and voted on a proposed amendment crafted by a few committee members; the committee voted 4 – 1 – 1 in favor of that amendment. The petitioner of the by-law, also a

member of the STMTESC, was the sole vote against the committee's proposed amendment.

By-law Banning Face Surveillance as passed by Town Meeting

On December 11, 2020, Brookline Town Meeting passed the following language (found on page 25-11 of the Combined Reports), and banned the use of face surveillance by a vote of 179 – 9 – 12 in support of the following language:

ARTICLE 8.39 BAN ON TOWN USE OF FACE SURVEILLANCE

SECTION 8.39.1 DEFINITIONS

1. "Face surveillance" shall mean an automated or semi-automated process that assists in identifying an individual, or in capturing information about an individual, based on the physical characteristics of an individual's face.
2. "Face surveillance system" shall mean any computer software or application that performs face surveillance.
3. "Brookline" shall mean any department, agency, bureau, and/or subordinate division of the Town of Brookline.
4. "Brookline official" shall mean any person or entity acting on behalf of Brookline, including any officer, employee, agent, contractor, subcontractor, or vendor.

SECTION 8.39.2 BAN ON TOWN USE OF FACE SURVEILLANCE

1. It shall be unlawful for Brookline or any Brookline official to:
 - a. obtain, possess, access, or use any face surveillance system;
 - b. enter into a contract or other agreement with any third party for the purpose of obtaining, possessing, accessing, or using, by or on behalf of Brookline or any Brookline official any face surveillance system; or
 - c. issue any permit or enter into a contract or other agreement that authorizes any third party to obtain, possess, access, or use (i) any face surveillance system, or (ii) information derived from a face surveillance system based on photographic, video or other images originally captured within the Town of Brookline.
2. Nothing in Section 8.39.2(1) shall prohibit Brookline or any Brookline official from:
 - a. using evidence relating to the investigation of a specific crime that may have been generated from a face surveillance system; or
 - b. obtaining or possessing (i) an electronic device, such as a cell phone or computer, for evidentiary purposes, or (ii) an electronic device, such as a cell phone or tablet, that performs face surveillance for the sole purpose of user authentication;

- c. using face recognition on an electronic device, such as a cell phone or tablet, owned by Brookline or by such official, for the sole purpose of user authentication;
- d. using social media or communications software or application for communicating with the public, provided such use does not include the affirmative use of any face surveillance;
- e. using automated redaction software, provided such software does not have the capability of performing face surveillance; or
- f. complying with the National Child Search Assistance Act.

SECTION 8.39.3 ENFORCEMENT

1. Face surveillance data collected or derived in violation of this By-Law shall be considered unlawfully obtained and shall be deleted upon discovery, subject to applicable law.
2. No data collected or derived from any use of face surveillance in violation of this By-Law and no evidence derived therefrom may be received in evidence in any Town proceeding.
3. Any violation of this By-Law constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce this By-Law. An action instituted under this paragraph shall be brought against the respective Town department, and the Town and, if necessary to effectuate compliance with this By-Law, any other governmental agency with possession, custody, or control of data subject to this By-Law.
4. Violations of this By-Law by a Town employee shall result in consequences that may include retraining, suspension, or termination, subject to due process requirements and provisions of collective bargaining agreements.
5. Nothing in this Article shall be construed to limit any individual's rights under state or federal law.

SECTION 8.39.4 SEVERABILITY

1. If any portion or provision of this By-Law is declared invalid or unenforceable by a court of competent jurisdiction or by the Office of the Attorney General, the remaining provisions shall continue in full force and effect.

Petitioner's Amendments to the by-law

Through the Town Meeting process the petitioner amended the warrant article as originally submitted on August 27th, 2019 (available in the aforementioned Fall 2019 Combined Reports). Notable additions include:

- the addition of a severability clause
- the addition of section 8.39.2(2) clarifying what is and is not permissible under the by-law.

The Section 8.39.2(2) clarifying language crafted in Brookline has subsequently been included in bans passed in other Massachusetts cities and towns, including the City of Boston. Boston City Council unanimously passed a ban on June 24, 2019 which was signed by Mayor Walsh on June 30, 2019.

Surveillance Technology and Military Type Equipment Study Committee Amendment

The majority of members of the Surveillance Technology and Military Type Equipment Study Committee did not support warrant article 25 and initially discussed recommending a vote of NO ACTION to Town Meeting; however, on October 30, by a vote of 4-1-1, the committee voted instead to amend the language of the warrant article as follows:

Add as subsection (3) under SECTION 8.39.2 BAN ON TOWN USE OF FACE SURVEILLANCE:

3) Notwithstanding section 8.39.2(1), the Brookline Police Department may use (but not acquire or deploy) face surveillance technology for specific and narrow purposes approved by the Select Board. (a) The Select Board may attach conditions to such uses. (b) In the absence of an approved list of authorized purposes, use is permitted before Jan 1, 2021 provided notice of the nature of the use is provided within 30 days to the Select Board, with quarterly reporting to the Surveillance Technology and Military-Type Equipment Study Committee.

The effect of the committee's amendment would be to ban the use of face surveillance technology by all Brookline departments and officials except the police department, and would have allowed unspecified police use be reported to the Select Board within 30 days of such use; additionally the language called for creation of a list of to be determined authorized uses by January 1, 2021. The committee also designated itself as the committee which would have reviewed quarterly face surveillance technology reporting.

The STMTESC expressed concerns regarding the ban as originally proposed as well as the ban after it had been amended by the petitioner. Their concerns

were primarily related to the impact the proposed by-law would have on the police department.

The STMTESC held a public hearing on October 23, 2019 to hear testimony regarding the amendment. No members of the Brookline public were in attendance. STMTESC members then attended the Advisory Committee Public Safety Subcommittee hearing on the 23rd in which there was considerable discussion and testimony by all. That [hearing](#) was well attended, included public testimony as well as a statement from the Police Chief and STMTESC members. The Public Safety subcommittee of the Advisory Committee did not vote that evening.

The committee's motion to amend failed at Town Meeting by a vote of 13 in favor, 170 opposed and 13 abstentions.

The only other board, commission or committee who chose to consider support for the STMTESC amendment, aside from the Surveillance Technology and Military Type Study Committee itself, was the Advisory Committee, which, on December 11, 2019 voted to recommend Town Meeting vote against the amendment with 0 in favor, 20 opposed and 4 abstentions.

Proposed Next Steps

Next steps include outreach to Brookline Officials, department heads and employees, in order to ensure that all are aware of the new law and its implications. Appropriate education will ensure that as the Town goes about its business such as entering into contracts, downloading software upgrades, using social media platforms and the like, without purchasing, enabling, permitting or using face surveillance as defined by the by-law, in order to ensure compliance.