



Northern
California

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Vice President Nick Josefowitz
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Bay Area Rapid Transit District Board of Directors
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Dear BART Board of Directors,

The ACLU of Northern California writes regarding the District Surveillance Technology Policy/Ordinance legislation listed as item 5E on the September 13, 2018 agenda. This legislation is a strong step in the right direction, but in order to fully protect BART riders from unaccountable and secretive surveillance, the Board needs to a) adopt this legislation as an enforceable ordinance, and b) eliminate or substantially narrow an exception that allows BART agencies to secretly test new surveillance systems without adequate oversight or rules to prevent harm.

We would like to thank the Board, Chief Rojas, and BART staff for hearing the concerns of riders and the civil rights community. Public safety and racially motivated violence against BART riders of color are critical concerns that need to be discussed, and these conversations require transparency and space. We appreciate BART's recognition that rushed, secretive, and unaccountable surveillance technology acquisitions are not the answer to these concerns, particularly because such systems pose a unique threat to people of color, immigrants, and activists. We also appreciate BART's public commitment "that any boosts to system safety will not include the implementation of facial-recognition technology."¹

The ACLU of Northern California has been involved with the process leading to this legislation for over two years. The surveillance legislation before you is a strong step in the right direction, empowering BART riders to participate in conversations around public safety, but its success hinges on its passage as an ordinance and without the overbroad trial exception mentioned above. What follows is a brief summary of the legislation and our two remaining points of concern.

¹ BART News Articles, *Riders invited to Sept 27th evening BART Board meeting on system safety*, Aug. 28, 2018, <http://www.bart.gov/news/articles/2018/news20180829>.

1. The BART community deserves a strong ordinance requiring transparency, oversight, and accountability for all proposals and use of surveillance technology.

Modern surveillance systems allow for the wholesale collection of information about BART riders and people near BART stations, including information about their location, identity, speech, and race, with newer systems even touting the ability to analyze emotional state.² The suspicionless monitoring of riders chills the very freedom of movement at the core of BART's service. Particularly in today's political climate and in the wake of protests of Nia Wilson's murder, the community needs assurance that BART will not operate technologies that needlessly track and police riders or infringe their First Amendment right to protest, associate, or speak freely within the system.

The deployment of surveillance without public input and strict safeguards can exacerbate discrimination and police bias, as this technology is often weaponized against people of color. For example, in 2016 we discovered police across California had purchased software advertised as a way to track the social media speech of Black Lives Matter activists.³ Transparency and accountability are needed to ensure that people are not targeted on impermissible grounds, including on the basis of race or because of their speech.

Surveillance systems often act as a magnifying glass that amplify bias and inappropriately draw attention to information about riders' race, location, and religion – just last week we learned that NYPD has had access to software with skin tone detection features developed by IBM.⁴ Predictive policing systems, video analytics, and face surveillance software that are less accurate for, or even biased against, people of color, invite discrimination against those already marginalized.⁵ The risk of discrimination and bias underscores why ample public scrutiny of surveillance technology, particularly opaque software-based systems, is essential.

When acquired without careful public debate and clear use safeguards, these technologies can also undermine public safety goals. Unchecked surveillance system can unnecessarily entangle BART riders with the police, which we can know can lead to violence and excessive use of force, especially against Black and brown people. Furthermore, riders who feel watched may be less likely to report crimes and other public safety concerns. Systems that collect massive amounts of irrelevant information divert valuable officer time and

² For example, Amazon states that its Rekognition face surveillance product is capable of identifying “the emotions detected on the face” of people featured in images and video. <https://aws.amazon.com/rekognition/>; https://docs.aws.amazon.com/rekognition/latest/dg/API_Emotion.html.

³ Nicole Ozer, *Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the Digital Crosshairs*, ACLU Free Future Blog, Sept. 22, 2016, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/police-use-social-media-surveillance-software>.

⁴ George Joseph, Kenneth Lipp, *IBM Used NYPD Footage to Develop Technology That Lets Police Search by Skin Color*, The Intercept, Sept. 6, 2018, <https://theintercept.com/2018/09/06/nypd-surveillance-camera-skin-tone-search/>.

⁵ Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU Free Future blog, July 26, 2018, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>.

effort away from clear safety needs. For example, a study of a single six-month snapshot of Bay Area license plate reader data showed that only .02% of the nearly 4 million license plates tracked resulted in matches to any police “hot list” databases.⁶ And false alarms generated by software-based surveillance distract public safety resources from legitimate concerns, and can result in unnecessary detention or use of force.⁷ Public safety in the digital age requires asking and answering questions about the real public safety costs of surveillance technology.

The surveillance technology legislation before the Board helps prevent these harms. It does this by giving the Board and the public a seat at the table when new surveillance technologies are proposed. First, the ordinance requires transparent and public debate about any surveillance technology proposal and a decision about whether the benefits of the proposal outweigh the costs to taxpayers and civil rights. If the Board approves a technology acquisition, the ordinance requires a set of strict written rules to give BART operators guidance and prevent misuse of the technology. Finally, the ordinance requires an annual review that enables the community to reject technologies that are not delivering on their promised public safety benefits.

While the proposed legislation generally accomplishes these goals, two key issues must be resolved so that BART riders can fully benefit from its protections. What follows is a brief summary of these issues.

2. This legislation should be passed as an ordinance with the force of law.

The Board has before it two versions of this legislation: first, an ordinance that has the force of law and that the public can use to ensure compliance; and second, a policy that is solely enforceable by the BART Board of Directors. The Board should pass this legislation as an ordinance because doing so would give the public the tools to adequately monitor and ensure compliance with the law. As discussed below, this will not invite unnecessary litigation. Rather, it will ensure that members of the public have a clear procedure by which they can raise legitimate concerns and seek a remedy for non-compliance without litigation. We think this is a fair and reasonable approach.

The enforcement mechanism in the proposed ordinance is designed to ensure BART entities comply with this legislation. To that end, the mechanism requires that a member of the public take specific steps to flag non-compliance, giving BART a chance to respond, and allowing for litigation only as a last resort. The provision does not allow a person to sue for noncompliance unless they first provide written notice to the General Manager or the Board of such noncompliance. Nor does it allow a suit for damages. Upon receiving the required notice, BART has 90 days to investigate any allegation and to achieve compliance. A person may sue BART only if the specific alleged violation is not remedied within 90 days. This procedure incentivizes communication between the public and BART as a means to address noncompliance. The prospect of a lawsuit for noncompliance also incentivizes BART

⁶ George Joseph, *What Are License-Plate Readers Good For?*, Citylab, Aug. 5, 2016, <https://www.citylab.com/equity/2016/08/what-are-license-plate-readers-good-for/492083/>.

⁷ Andrew Liptak, *A facial recognition program used by British police yielded thousands of false positives*, The Verge, May 6, 2018, <https://www.theverge.com/2018/5/6/17324496/south-wales-police-automated-facial-recognition-false-positives-privacy-security>.

agencies to be responsive to community concerns. In the unlikely event of litigation, an enforcement provision with attorneys fees' for prevailing plaintiffs would further incentivize compliance. Put another way, though an express right to sue is essential to achieving compliance with this legislation, it will likely be unnecessary to utilize as a practical matter.

The experience of other jurisdictions bears this out. Davis, Berkeley, and Santa Clara County all provide such an express right to sue conditioned on a "right to cure" provision that allows government officials the chance to come into compliance before being subject to suit. We are not aware of any litigation stemming from the enforcement provisions in these ordinances. Rather, these ordinances have proven workable in these varying communities.

Passing this legislation as an ordinance ensures the public will be empowered to assist the Board in its oversight of BART departments and entities. The public's involvement going forward is essential to the success of this legislation. We ask that you adopt this legislation as an ordinance, with attorneys' fees for prevailing plaintiffs.

3. The Board should eliminate or significantly narrow the 90 day trial exception.

The central goal of this legislation is to prevent the secret deployment of new surveillance technology without public debate and written rules to protect riders. Yet the legislation allows BART entities to test new surveillance technology on the system and ridership without first notifying the public, the Board, or adopting rules to prevent harm. This is unacceptable and needlessly undercuts the normal public process in the legislation. While we appreciate BART staff's previous steps to narrow this provision in response to feedback from the ACLU and Oakland Privacy, it remains unnecessary and invites harm to riders.

The trial exception is not needed because the legislation already provides a simple process for seeking approval to acquire new surveillance technology, even if for a temporary period. This process is equally appropriate and important for trials, which should be subject to Board oversight and conducted pursuant to written rules to prevent harm. No other jurisdiction has adopted a trial exception like the one proposed here. Notably, when Santa Clara County reevaluated their surveillance ordinance, County staff did not propose a trial exception like the one here, an additional signal that it is not necessary. We see no justification for allowing BART entities to secretly test surveillance technology on the BART ridership without prior public notice or a set of written rules.

The trial exception also risks putting BART riders in harm's way. Trials conducted in secret and without written rules to prevent abuse are an invitation for harmful mistakes. This is not a hypothetical. The story of Denise Green illustrates why the deployment of inadequately regulated surveillance is such a significant concern. In 2014, Ms. Green was pulled over by San Francisco Police operating an automated license plate reader.⁸ That device scanned Ms. Green's plate and identified her vehicle as stolen. At the time, San Francisco lacked a set of written rules requiring that the officers visually verify whether

⁸ Kade Crockford, *San Francisco Woman Pulled Out of Car at Gunpoint Because of License Plate Reader Error*, ACLU Free Future Blog, May 13, 2014, <https://www.aclu.org/blog/privacy-technology/location-tracking/san-francisco-woman-pulled-out-car-gunpoint-because>.

the license plate reader's "match" and a driver's actual license plate number were in fact identical. In this case, they were not. Officers demanded that Ms. Green exit her vehicle, after which they held her at gunpoint for a lengthy period of time. Ms. Green later brought a civil rights lawsuit, which resulted in years of costly litigation and a settlement.

The above example illustrates just one harm that can result from the unregulated use of surveillance technology. In reality, the harmful impact of a single misguided BART trial could be much broader, particularly because tens of thousands of riders pass through the busiest BART stations each day.

The trial exception should be deleted because it is unnecessary and risks harm to riders. At a minimum, the exception should be significantly narrowed in the following ways: **first**, the required notice should be provided to the Board and the public prior to the initiation of such trials (not solely upon completion), **second**, the trial period should be substantially shorter than 90 days, and **third**, the BART agency conducting the trial must be required to draft and release a public use policy prior to the trial period that adequately protects the public and guide operators during the trial period. **Finally**, the deployment of face surveillance technology should not be permitted under this exception.

Conclusion

We thank the Board and BART staff for taking these issues seriously and engaging in a good-faith effort to craft legislation that ensures riders are part of important public safety decisions involving surveillance technology. We urge the Board to adopt this legislation as an enforceable ordinance and to eliminate or significantly narrow the trial exception, which is unnecessary, undermines the principles of the legislation, and potentially places BART riders in harm's way.

Please let us know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Cagle". The signature is fluid and cursive, with the first name "Matt" written in a larger, more prominent script than the last name "Cagle".

Matt Cagle
Technology and Civil Liberties Attorney
ACLU of Northern California