

# MEMORANDUM

**TO:** Mayor Snyder and Members of the Portland City Council  
**CC:** Jon Jennings, City Manager  
**FROM:** Danielle P. West-Chuhta, Corporation Counsel  
**DATE:** July 10, 2020  
**RE:** **Proposed Facial Recognition Ordinance**

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A newly proposed Facial Recognition ordinance has been proposed by Councilor Ali at the City Council's last meeting in June 2020. After reviewing the proposed ordinance, I have identified the enforcement section as an area of significant concern. The following memorandum provides a summary of those concerns.

The enforcement section of the proposed ordinance specifically provides as follows:

(a) Suppression. No data or information that is obtained, retained, stored, possessed, accessed, used, collected, or derived from any face surveillance system or other use of face surveillance in violation of this article, and no evidence derived therefrom, may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority. Any data or information that is obtained, retained, stored, possessed, accessed, used, collected, or derived in violation of this article shall be considered unlawfully obtained, and shall be deleted upon discovery.

(b) Private cause of action.

1. Any violation of this article constitutes an injury and any person so injured may institute proceedings in the Maine Superior Court in a civil action seeking injunctive relief, declaratory relief, damages, and attorney's fees. Any action instituted under this paragraph shall be brought against the City of Portland. If applicable, such action may also be brought against any third party with whom the City of Portland contracted or entered into an agreement, or to whom the City of Portland issued a permit, in violation of subsections (b) or (c) of Section 17-131 of this article.

2. Any person who has instituted proceedings under the previous paragraph and is found to have been subjected to face surveillance in violation of this article, or about whom data or information is found to have been obtained, retained, stored, possessed, accessed, used, or collected in violation of this article, shall be entitled to recover actual damages not less than the

greater of:

a. \$100 for each violation of this article; or

b. \$1,000.

3. Any prevailing plaintiff in any action brought under this subsection shall be entitled to the award of costs and reasonable attorney's fees.

(c) Violation of this ordinance by any official or employee of the City of Portland is grounds for suspension or termination. The violator may also be required to participate in retraining.

## **I. Suppression of Evidence**

First, with regard to subsection (a), the proposed language seeks to suppress any data or evidence that is collected in violation of this ordinance. Such decisions, however, regarding the admissibility of data/evidence would be a determination for a court to make through the application of the Maine Rules of Evidence. This is not a process the City Council has jurisdiction or authority to address, and so it is recommended that this language not be included in a proposed ordinance.

## **II. Private Right of Action**

Next, the proposed ordinance allows for a private right of action to be instituted against either the City or a third party.

With respect to a claim against the City, there are certain statutory protections for municipalities and their employees, specifically the Maine Tort Claims Act. There are also a very specific set of circumstances under which the City could be held liable for an employee's unauthorized actions. Although the City may be able to waive its own protections, I would strongly recommend against such a waiver. Providing liability for the civil penalties stated could open the door to additional liability, and waive certain City defenses to related litigation, including those relating to an unauthorized act by an employee.

With respect to a private right of action against either the City or a third party, Maine law is not favorable that a municipality can create such a private right of action in this circumstance. A private right of action specifically allows an individual to sue to enforce their rights under a statute or ordinance. Not all laws are enforceable privately, and the courts generally hold that a private right is only available if it is explicitly spelled out in the enabling statute seeking to be

enforced, or if it is implied by the entire statutory scheme. A few examples of laws that are not enforceable by individuals include laws setting out criminal and civil violations, OSHA, HIPAA, veterans preference statutes, and others.

It is also important to note that Maine case law makes it clear that there is no private right of action available under local land use ordinances. In fact, only municipalities are authorized to enforce this type of ordinance, and they cannot delegate that authority. *E.g. Herrle v. Town of Waterboro*, 2001 ME 1; *Charlton v. Town of Oxford*, 2001 ME 104. Whether that prohibition extends to other types of municipal ordinances (outside of the land use context), is not clear in Maine case law. However, 30-A M.R.S. § 3001, which establishes the City's right to enact ordinances, strongly suggests that the municipality is solely responsible for enforcing its own ordinances. For example, penalties available under an ordinance must only accrue to the municipality. *Id.*

The case for a private right of action in this context might be strengthened if the City was simply expanding an existing right provided for in state law, such as in the case of the minimum wage ordinance that was passed previously by the City Council. Here, however, the City is creating an entirely new right – the right to pursue a claim for violations of the proposed facial recognition ordinance – which does not currently exist in the state or federal law. As such, I recommend that the language establishing this right not be included in the proposed ordinance.

### **III. Disciplinary Action**

With respect to the section providing that a violation of the ordinance is grounds for suspension or termination, that is the type of provision that cannot be implemented unilaterally. Generally, policies that would impose new grounds for discipline need to be posted, and the City's unions given the opportunity to object, request to bargain if the policy impacts working conditions, or provide feedback on the proposal. Implementing this requirement in an ordinance does not allow the City to follow that necessary and required procedure. Additionally, to the extent that this proposed ordinance purports to remove supervisor discretion to impose lesser discipline, or no discipline at all, for a violation, that is also problematic from both a bargaining standpoint and an employee due process standpoint.

I would recommend that this provision be removed from the proposed ordinance. To give the City Council comfort around this issue and not including this language in the proposed ordinance, any employee who violates a law, rule, or order, would already be subject to discipline following the City's existing discipline and workplace conduct policies.