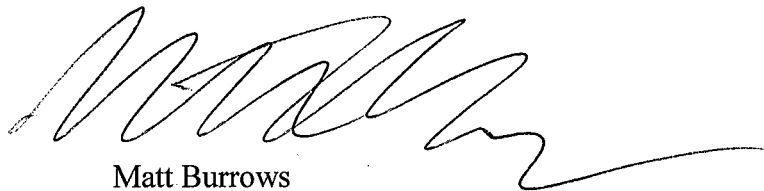


SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: Board of Directors **DATE:** September 21, 2018
FROM: General Counsel
SUBJECT: Surveillance Technology Ordinance (2nd Reading)

Attached please find the Surveillance Technology Ordinance in the form unanimously approved by the Board at its September 13th meeting. As directed at that meeting, it is now being brought forward for its second reading and proposed adoption.



Matt Burrows

ORDINANCE NO. 2018-1

AN ORDINANCE OF THE SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
CODIFYING ITS SURVEILLANCE TECHNOLOGY POLICY

WHEREAS, the San Francisco Bay Area Rapid Transit District (BART) Board of Directors has invested heavily in maintaining a safe and secure transportation system hardened against terrorist sabotage, vandalism and theft; and

WHEREAS, the Board of Directors has and continues to believe that the safety and security of the BART system requires the maintenance and support of every technology available to maintain public safety and system security; and

WHEREAS, the Board recognizes that there is a point at which technological resources may be viewed to restrict or limit the reasonable expectation of privacy of the riding public; and

WHEREAS, the Board wishes to harmonize these compelling interests in a manner that permits public discourse and discussion about the decision-making process of adding new technologies for safety and security into the BART transit system; and

WHEREAS, the Board of Directors recognizes that surveillance technology in public areas should be judiciously balanced with the need to reasonably protect recognized civil liberties, including privacy, free expression and public assembly; and

WHEREAS, the Board of Directors finds that proper transparency, oversight and accountability are fundamental to minimizing risks to the afore-mentioned civil liberties posed by surveillance technologies; and

WHEREAS, the Board of Directors finds it essential to have an informed public discourse about whether to adopt additional surveillance technology to that already utilized within the District; and

WHEREAS, the existing infrastructure of surveillance technology already employed within the BART transportation system is extensive, it shall be grandfathered in as a "baseline"; and

WHEREAS, the Board of Directors finds it desirable that safeguards be in place to protect reasonable expectations of privacy and freedom of speech and assembly, duly balanced against a need to preserve public peace and safety, and to address exigent circumstances before any new surveillance technology is deployed; and

WHEREAS, the Board of Directors finds that if either new surveillance technology is approved for use or existing technology is used in a materially different manner or for a materially different purpose in places where the public enjoys a reasonable expectation of privacy or a right to expressive activities and public assembly, there must be clear internal policies and procedures to ensure that reasonable safeguards are being followed and that the surveillance technology's benefits outweigh its costs; and

WHEREAS, Public Utilities Code Section 28793 authorizes the Board to pass ordinances; and
WHEREAS, Public Utilities Code Section 28763 authorizes the Board to do any and all things necessary to carry out the purposes of the District; and

WHEREAS, the Board has determined that the adoption of this policy by ordinance is necessary to preserve the safety, comfort and well-being of BART riders;

NOW, THEREFORE, BE IT ENACTED by the Board of Directors of the San Francisco Bay Area Rapid Transit District:

Section 1. Title

This Ordinance shall be known as the Surveillance Technology Policy.

Section 2. Definitions

The following definitions apply to this ordinance:

- 1) "Surveillance Annual Report" means an annual written report concerning a specific surveillance technology in active use by the District that includes all of the following:
 - a) A reasonably specific description of how the surveillance technology was used;
 - b) Whether and how often data acquired through the use of the surveillance technology was shared with outside entities, the name of any recipient entity, the type(s) of data disclosed, under what legal standard(s) the information was disclosed, and the justification for the disclosure(s);
 - c) A summary of community complaints or concerns received by the BART District related to the surveillance technology,
 - d) The results of any internal audits, any information about violations of the Surveillance Use Policy, and any actions taken in response
 - e) Information, including crime statistics, if the equipment is used to deter or detect criminal activity, that help the community assess whether the surveillance technology has been effective at achieving its identified purposes;
 - f) Statistics and information about public records act requests related to surveillance technology; and
 - g) Total annual costs for the new surveillance technology, including personnel and other ongoing cost.

- 2) "BART District entity" means any department, bureau, division, or unit of the San Francisco Bay Area Rapid Transit District. The BART Police Department is considered to be a BART District entity, but may also be referenced directly when the BART Police Department is subject to additional requirements of this policy that are specific to the BART Police Department and do not apply to other BART District entities.

- 3) "Surveillance technology" means any electronic device or system with the capacity to monitor and collect audio, visual, locational, thermal, or similar information on any individual or group. This includes, but is not limited to, drones with cameras or monitoring capabilities, automated license plate recognition systems, closed-circuit cameras/televisions, International Mobile Subscriber Identity (IMSI) trackers, global positioning system (GPS) technology, software designed to monitor social media services or forecast criminal activity or criminality, radio frequency identification (RFID) technology, body-worn cameras, biometric identification hardware or software, and facial recognition hardware or software.
 - a) "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 2(3):

1. routine office hardware, such as televisions, computers, and printers, that is in widespread public use and will not be used for any surveillance or law enforcement functions;
2. Parking Ticket Devices (PTDs);
3. manually -operated, non-wearable, handheld digital cameras, audio recorders, and video recorders that are not designated to be used surreptitiously and whose functionality is limited to manually capturing and manually downloading video and/or audio recordings;
4. surveillance devices that cannot record or transmit audio or video or be remotely accessed, such as image stabilizing binoculars or night vision goggles;
5. manually-operated technological devices used primarily for internal municipal entity communications and are not designated to surreptitiously collect surveillance data, such as radios and email systems;
6. municipal agency databases that do not contain any data or other information collected, captured, recorded, retained, processed, intercepted, or analyzed by surveillance technology;
7. equipment designed to detect the presence of and/or identify the source of chemical, biological, radiological, nuclear or explosive materials;
8. portable or fixed observations towers designed to provide an elevated viewing platform for facility security;
9. the BART Watch app or similar successor apps for making reports to the District;
10. the BART.gov web site and platform;
11. BART databases and enterprise systems that contain information kept in the ordinary course of BART business, including, but not limited to, human resource, permit, license and business records;
12. BART Police Department computer aided dispatch (CAD), records / case management, Live Scan, booking, Department of Motor Vehicles, California Law Enforcement Telecommunications System (CLETS), 9-1-1 and related dispatch and operation or emergency services systems;
13. BART Police Department early warning systems;
14. Infrastructure and mechanical control systems (SCADA), including those that control or manage lights, utilities, train control, or fare collection;
15. Physical access control systems, employee identification management systems, and other physical control systems;
16. Information technology security systems, including firewalls and other internal-facing cyber security systems;
17. Computers, software, hardware or devices used in monitoring the work and work-related activities involving District buildings, employees, contractors and volunteers or used in conducting internal investigations involving District employees, contractors or volunteers.

- 4) "Surveillance Impact Report" means a publicly-released written report including at a minimum the following:
- a) information describing the proposed surveillance technology and how it generally works;
 - b) information on the proposed purpose(s) for the surveillance technology;

- c) if applicable, the general location(s) it may be deployed;
- d) crime statistics for any location(s), if the equipment is used to deter or detect crime;
- e) an assessment identifying any potential impact on privacy rights and discussing any plans to safeguard the rights of the public;
- f) the fiscal costs for the surveillance technology, including initial purchase, personnel and other ongoing costs, and any current or potential sources of funding;
- g) 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;
- h) a summary of alternative methods (whether involving the use of a new technology or not) considered before deciding to use the proposed surveillance technology, including the costs and benefits associated with each alternative and an explanation of the reasons why each alternative is inadequate or undesirable; and
- i) a summary of the experience, if any is known, other law enforcement entities have had with the proposed technology, including information about the effectiveness, any known adverse information about the technology such as unanticipated costs, failures, civil rights or civil liberties issues.

5) "Surveillance Use Policy" means a publicly-released policy for use of the surveillance technology that at a minimum specifies the following:

- a) Purpose: The 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: The information that can be collected by the surveillance technology.
- d) Data Access: The individuals (as a category) who can access or use the collected information, and the rules and processes required prior to access or use of the information.
- e) Data Protection: The safeguards that protect information from unauthorized access, including encryption and access control mechanisms.
- f) 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 that period.
- g) Public Access: How collected information can be requested by members of the public, including criminal defendants.
- h) Third Party Data Sharing: If and how other BART District or non-BART District 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.
- i) Training: A summary of the training required for any individual authorized to use the surveillance technology or to access information collected by the surveillance technology.
- j) Auditing and Oversight: The mechanisms to ensure that the Surveillance Use Policy is followed, including internal personnel assigned to ensure compliance with the policy, internal recordkeeping of the use of the technology or access to information collected by

the technology, technical measures to monitor for misuse, any independent person or entity with oversight authority.

The District must seek approval from the Board before implementing any changes to any Surveillance Use Policy.

- 6) "Exigent circumstances" means the BART Police Department's good faith belief that an emergency involving danger, death, or serious physical injury to any person requires the immediate use of a surveillance technology, or the information it provides, without pre-approval.

Section 3. Board of Directors Review

- 1) A BART District entity will obtain Board of Directors approval at a properly-noticed public meeting prior to any of the following:

a) Accepting funds for new surveillance technology, applying for a grant, or soliciting or accepting state or federal funds or in-kind or other donations;

(1) If it is determined that the timetable for applying for surveillance technology funding is not compatible with the notice requirements of Section 4(a), the General Manager is authorized to apply for grants after providing a written justification to the Board of Directors at least five calendar days prior to the deadline for applying for or accepting the relevant funding. Any such notices shall be agendized for public discussion at the next regular meeting of the Board of Directors if that meeting is at least 10 days from the date the notice is sent. If the notice is sent less than 10 days from the next regular meeting, it shall be agendized for public discussion at the following regular meeting. Any funding awarded to a BART District entity following such an application remains subject to the regular review, approval, and oversight requirements of Sections 3, 4, and 5.

b) Acquiring surveillance technology, with or without consideration, except for those occasions when a BART District entity conducts a limited scope trial of technology to assess its viability. Such trial shall not include facial recognition hardware or software. Such trial shall (i) be limited to a single station or facility, (ii) last no longer than 60 days, and (iii) shall be agendized for public discussion at a Board meeting that occurs at least fifteen (15) days prior to implementation, under the report of the General Manager.

1) The BART District will not disclose to any third party information acquired during use of this exception unless disclosure is, similar to the Section 11 exigent circumstances provision (A) for purposes of responding to an emergency and the third party agrees to be bound by the restrictions in this Section or is (B) otherwise required by law enforcement or response agencies that identify the information as pertaining to an active investigation, or is (C) otherwise required by law.

(2) Following conclusion of the testing, the BART District will only keep and maintain data related to the results of the testing and will immediately dispose of any data not relevant to the evaluation of the fitness of the technology unless retention is (i) authorized by a court order or (ii) otherwise required by law.

- c) Using new surveillance technology, or using existing surveillance technology for a purpose, in a manner or in a materially different type of location not previously approved by the Board of Directors; or
 - d) Entering into a written agreement or memorandum of understanding with a non-BART District entity to acquire, share or otherwise use surveillance technology or the information it provides unless such information is provided by way of BART Watch or any successor smart phone application associated with that specific software.
- 2) Any BART District entity will obtain Board of Directors approval of a Surveillance Use Policy applicable for newly acquired technologies in any of the activities described in subsection (1)(b)-(d).

Section 4. Information Required

- 1) The BART District entity seeking approval under Section 3 shall submit to the Board of Directors a Surveillance Impact Report and a draft Surveillance Use Policy at least twenty-one (21) days prior to the public meeting where approval will be requested.
- 2) The Board of Directors shall publicly release, in print and online, the Surveillance Equipment Request and draft Surveillance Use Policy at least fifteen (15) days prior to the public meeting.

Section 5. Determination by Board of Directors that Benefits Outweigh Costs and Concerns

- 1) The Board of Directors shall approve any action described in Section 3, subsection (1) or Section 6 of this Policy only after making a determination that the benefits to the community of the surveillance technology outweigh the costs, and the proposed use policy will reasonably safeguard civil liberties and civil rights.

Section 6. Compliance for Existing Surveillance Technology

- 1) Each BART District entity possessing or using surveillance technology prior to the effective date of this ordinance shall submit a draft Surveillance Use Policy and Surveillance Impact Report no later than one hundred eighty (180) days following the effective date of this for review and approval by Board of Directors. The Board of Directors may grant extensions to this requirement. If such an extension is granted, a status report must be prepared and submitted to the Board of Directors at a public meeting no later than ninety (90) days from the date of said extension. The draft Surveillance Use Policy shall be made in a manner that is informative, but that will not undermine the District's legitimate security interests.

Section 7. Continuing Oversight of Surveillance Technology

- 1) Each BART District entity must submit for approval at a public hearing a Surveillance Annual Report for each surveillance technology to the Board of Directors on or before August 1.
- 2) The Board of Directors may grant extensions to this requirement. Commencing on the date 2 years from the effective date of this ordinance, no further extensions by the Board of Directors to this reporting obligation for the BART Police Department can be made. While a

Surveillance Annual Report shall reference and be inclusive of technologies in public places, such references may be made in a manner that will not undermine the District's legitimate security interests.

3) Based upon information provided in the Surveillance Annual Report, the Board of Directors shall determine whether the benefits to the community of the surveillance technology implemented after the effective date of this ordinance outweigh the costs, and that civil liberties and civil rights are safeguarded. If the benefits do not outweigh the costs, or civil rights and civil liberties are not safeguarded, the Board of Directors shall direct that use of the surveillance technology cease and/or require modifications to the Surveillance Use Policy that will resolve the above concerns.

Section 8. Enforcement

1) This ordinance does not confer a private right of action upon any person or entity to seek injunctive relief against the BART District unless that person or entity has first provided written notice to the General Manager and the District's Board of Directors by serving the District Secretary, regarding the specific alleged violation of this ordinance and has provided the General Manager and the Board of Directors with at least ninety (90) days to investigate and achieve compliance regarding any alleged violation. If the specified alleged violation is not remedied within ninety (90) calendar days of receipt of that written notice, a person or entity may seek injunctive relief against the District in a court of competent jurisdiction.

Section 9. Categorical Exemptions from this Policy

1) Any surveillance technologies in place before this policy was established may be replaced with technology with materially the same capacities and capabilities and shall be exempt from this policy except (i) as to the annual reporting requirement, and (ii) surveillance technologies used exclusively by the BART Police Department.

a) Any replacement of surveillance technologies that enhances or otherwise reasonably appears to upgrade (i.e. enhance, improve, or expand) the capabilities of existing technologies shall NOT be exempt from this policy. Storage capacity increases to CCTV and independent lighting improvements (e.g. LED street lighting or improved stairway lighting) at a facility shall not be regarded to be an improvement or enhancement in surveillance technologies.

2) Any surveillance technologies owned and/or operated by third parties on BART facilities and not used by a BART District entity shall be exempt from this policy unless Section 3(1)(d) applies.

3) Any surveillance technologies within the secure perimeter of BART's administrative/maintenance/law enforcement facilities and offices shall be exempt from this policy.

4) Any surveillance technologies used to protect or monitor areas outside of publicly accessible locations including areas within fenced areas (such as, but not limited to, areas where train cars are parked during non-revenue hours or where the District maintains high voltage equipment) or areas prohibited to the public by signage (such as tunnels, or stairwells leading to the trackway) shall be exempt from this policy.

Section 10. Severability

1) The provisions in this ordinance are severable. If any part or provision of this ordinance, or the application of this Policy to any person or circumstance, is held invalid, the remainder of this Policy, including the application of such part or provisions to other persons or circumstances, shall not be affected by such holding and shall continue to have force and effect.

Section 11. Use of Unapproved Technology During Exigent Circumstances

1) The BART Police Department may temporarily acquire or temporarily use surveillance technology in exigent circumstances without following the provisions of the Policy before that acquisition or use. If the BART Police Department acquires or uses a surveillance technology pursuant to this Section, it shall do all of the following:

- (a) Use the surveillance technology to solely respond to the exigent circumstances;
- (b) Cease using the surveillance technology within seven days or when the exigent circumstances end, whichever is sooner;
- (c) Only keep and maintain data related to the exigent circumstances and dispose of any data that is not relevant to an ongoing investigation unless retention is (i) authorized by a court or (ii) otherwise required by law;
- (d) Not disclose to any third party any information acquired during exigent circumstances, unless disclosure is (i) for purposes of responding to the emergency and the third party agrees to be bound by the restrictions in this Section or is (ii) otherwise required by law enforcement or response agencies that identify the material is needed to prevent, deter, respond to and or document significant criminal action such as a terrorist attack, homegrown violent extremist attack or other activity or threats that endanger public safety or transportation infrastructures, or is (iii) otherwise required by law;
- (e) Within 30 days following the end of the exigent circumstances report the acquisition or use to the Board of Directors at a regular meeting of the Board of Directors for discussion and/or possible recommendation for approval to acquire or use the surveillance technology; and
- (f) Any technology temporarily acquired in exigent circumstances shall be returned when the exigent circumstances end unless the technology is submitted to the Board of Directors for approval pursuant to this policy and is approved.

Section 12. Effective Date

1) This ordinance shall be and the same is hereby declared to be in full force and effect from and after thirty (30) days after the date of its passage and shall be published once before the expiration of fifteen (15) days after said passage, with the names of the Directors voting for or against the same, in a newspaper of general circulation published in the Counties of the District. (Public Utilities Code Sections 28794)

In regular session of the Board of Directors of the San Francisco Bay Area Rapid Transit District introduced on the 13th day of September, 2018 and finally passed and adopted this __ day of September, 2018, on regular roll call of the members of said Board by the following vote:

Ayes:

Noes:

Abstentions:

WHEREUPON, the President declared the above and foregoing ordinance duly adopted and SO ORDERED.

President, Board of Directors
ATTEST:

Patricia Williams, District Secretary