

**INQUIRY INTO ROAD TRANSPORT AMENDMENT
(NATIONAL FACIAL BIOMETRIC MATCHING
CAPABILITY) BILL 2018**

Organisation: Information and Privacy Commission NSW
Date Received: 1 November 2018



information
and privacy
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The Director
Standing Committee on Law and Justice
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Dear Committee,

Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

The purpose of this correspondence is to provide a submission to the Standing Committee on Law and Justice (the Committee) in respect of its inquiry into the provisions of the *Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018* (the Bill).

The enabling legislation proposed recognises the extant jurisdiction and regulatory framework operative in each state and territory together with the relevant Commonwealth regime.

In this context, the submissions made for the Committee's consideration by the NSW Privacy Commissioner and the NSW Information Commissioner reflects our responsibilities under NSW law.

The Bill

We note that the object of the Bill is to amend the *Road Transport Act 2013* (NSW) (RT Act) to authorise NSW Roads & Maritime Services (RMS) and certain other NSW government agencies:

- a) to release photographs and associated personal information to the National Facial Biometric Matching Capability (the Capability)
- b) to collect photographs and associated personal information from the Capability and to keep and use those photographs or that information for any lawful purpose in connection with the exercise of the agency's functions

In October 2017, the Premier signed an intergovernmental agreement to establish the Capability, which is an IT platform that enables facial matching of biometric data held by government agencies. State and territory road agencies will provide a copy of driver licence images to a database which is partitioned by jurisdiction.

We understand that this process involves creation of individual biometric profiles which can be used for facial matching and verification. Participating agencies will be able to access the services via a desktop web portal supported by an 'interoperability hub'. The hub serves as a router to facilitate requests for matching and transmits matching requests received from user agencies to facial image databases. These databases conduct the matching using facial recognition software and return a response back via the hub. The hub does not store any personal information, but retains certain data about transactions for auditing and oversight purposes.¹

We consider that the Capability has been designed to include robust privacy safeguards and has been subject to consultation with Australian Privacy Commissioners. As noted below, Privacy Impact Assessments (PIAs) have been developed in the process and the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) will continue to apply to agencies using the Capability.

Part 3.5 of the RT Act provides for the protection of stored photographs taken or provided to RMS for the issue or renewal of licences or other purposes described in section 55 of that Act. Section 56 of the RT Act sets out the specific purposes for which photographs may be kept and used and section 57 prohibits the release of photographs except in certain circumstances.

The Bill creates an exemption and authorises release of the images and associated personal information.

The Bill is part of broader national reforms and sits alongside the Commonwealth's *Identity-matching Services Bill 2018* (the Commonwealth Bill). We note the second reading speech for the Commonwealth Bill refers to privacy protections. The Minister says:

'Rather than enabling the use of any type of personal information, the bill defines, and therefore limits, the identification information that may be used in the services. In doing so, the bill excludes certain types of personal information from being used in the services, such as information about a person's political opinions or religious beliefs. This is to ensure that the department may collect, use and disclose only those types of information that are reasonably necessary in order to provide the identity-matching services.'²

IPC's involvement in the development of the Capability

The Information and Privacy Commission (IPC) has been consulted by the Commonwealth and NSW governments about the development of the Capability, as well as, the National Driver Licence Facial Recognition System (the System), and the development of legislation.

Briefly, the IPC's involvement (including that of the former and current Privacy Commissioners) in this area has included:

¹ *Minister's Second Reading Speech – Identity-matching Services Bill 2018*
<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6031>

² Ibid.

- Being consulted in 2017 by the Commonwealth Attorney-General's Department (CAGD) about a draft PIA for the System. The PIA examined the design, operating model and governance arrangements for the System.
- Being informed/ consulted by RMS in 2016 about approaches by the CAGD to engage in technical piloting of the System.
- Participating in NSW consultation with the Commonwealth in 2016 about the proposed intergovernmental agreement for the System.
- Attending the 2015 National Privacy Commissioners' Forum in Canberra to inform the development of a PIA for the Capability.
- Participating in consultations in 2015 with NSW agencies, including the Department of Justice (DoJ), NSW Police Force, Transport for NSW, Ministry for Police and Emergency Services and the Department of Premier and Cabinet.
- Participating in a working group established by DoJ in 2014 to consider the Capability. DoJ also advised the IPC of commencement of an inter-jurisdictional working group to implement the Commonwealth-driven 'interoperability hub' to share facial images. The IPC was not part of the working group, but provided assistance to NSW agencies in respect of their participation on the working group.

Comments on the Bill

We note the policy context of the Bill is to improve the ability of government agencies to share and match facial images to prevent the creation and use of fraudulent identities, which, in turn, supports law enforcement, border management, national security and service delivery outcomes. We support, in-principle, these objectives, subject to appropriate privacy and security controls.

Overall, we consider that the Bill operates within the framework of relevant legislation and the State's privacy regime, including the requirement for legislative authority to collect, use and disclose facial images and other personal information.

Collecting photographs and associated personal information from the Capability

The Bill proposes a new section 271A. Subsections 2 and 3 are:

(2) Collection of photographs and associated personal information

An authorised government agency may collect photographs and associated personal information from the National Facial Biometric Matching Capability.

(3) Sections 9 and 10 of the *Privacy and Personal Information Protection Act 1998* do not apply in relation to photographs and personal information collected by an authorised government agency from the Capability.

The proposed section excludes the requirements under the PPIP Act of collection of personal information directly from the individual and notice requirements when personal information is collected. We note that this exclusion is provided because collection of such information under the Capability is not from the individual, but between agencies.

Such exemption is supported to the extent necessary to enable NSW participation in the Capability. We note that RMS will need to comply with the PPIP Act when collecting information for licencing purposes, including complying with notice requirements.

Keeping and using photographs or information for any lawful purpose in connection with the exercise of the agency's functions

The Bill proposes a new section 271A. Subsection 4 is:

(4) Keeping and use of photographs and associated personal information

An authorised government agency may, for any lawful purpose in connection with the exercise of its functions, keep and use photographs and associated personal information obtained from, or disclosed to the agency under, the National Facial Biometric Matching Capability.

'Lawful purpose' operates as a basis for keeping personal information under the PPIP Act and it is submitted that use of information on this basis accords with the existing legislative framework. Such use has been found by the NSW Civil and Administrative Tribunal (in considering an analogous provision – section 12 PPIP Act) to be supported where there are legitimate or genuine reasons for an agency to keep the information: *FH v Department of Corrective Services* (NSW) [2003] NSWADT 72; *CGG v Commissioner of Police, NSW Police Force* [2017] NSWCATAD 29.

Release photographs and associated personal information to NFBMC

The Bill proposes a new section 271A. Subsection 5 is:

(5) Release of photographs and associated personal information

An authorised government agency may release to the National Facial Biometric Matching Capability any photographs and personal information held by the agency.

This amendment overcomes the prohibition noted above in the RT Act. It provides an exemption to the operation of the restrictions against disclosure in that Act and also the PPIP Act (section 18 PPIP Act).

We note that the Capability appears to satisfy the exemption under section 19(2)(a) of the PPIP Act as it is subject to the *Commonwealth Privacy Act 1988*, and the legislative amendments to the RT Act also appear to satisfy the exemption under section 19(2)(h) of the PPIP Act.

Information sharing and the public interest

In NSW under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) there is a general public interest in favour of the disclosure of government information. The GIPA Act provides for a balancing of considerations in favour of and against disclosure, having regard to the public interest. This is known as the 'public interest test'. The test requires consideration of:

1. The presumption in favour of release of government information;
2. Identification of factors in favour of disclosure;

3. Identification of factors against disclosure; and
4. Balancing of factors to determine where the public interest lies.

There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. The balancing of public interest considerations may necessitate consideration of privacy protection principles and the interaction between the GIPA Act and the PPIP Act is well established within both statutes. The GIPA Act facilitates privacy protection through mechanisms including creation of a new record and redaction of information. The PPIP Act does not affect the operation of the GIPA Act. The combined effect of sections 5 and 20(5) of the PPIP Act means that the GIPA Act is not limited by the PPIP Act and information may be released (either proactively or in response to an application) under the GIPA Act.

Whilst the GIPA Act recognises in clause 2 of the Table in section 14 'law enforcement and security' factors against disclosure, this clause operates in the context of the object of the GIPA Act. That is to provide members of the public with an enforceable right to access government information. The GIPA Act also recognises that access to information cannot be curtailed by the application of conditions: section 73.

The object of the Bill (as noted above) is to improve the ability of government agencies to share and match facial images to prevent the creation and use of fraudulent identities, and to support law enforcement and protect national security, amongst other things. Under such regime, the public interest may favour information release to another government agency for the purposes of law enforcement and security.

We submit that the policy objectives proposed in the Bill, which involve information sharing between agencies of facial images for the purposes of law enforcement and national security (among other things) is consistent with the object of the GIPA Act and the public interest.

I hope these comments will be of assistance. Please do not hesitate to contact us if you have any queries. Alternatively, your officers may contact Sarah Wyatt, Assistant Director, Legal Counsel and Regulatory Advice on 1800 472 679 or by email at sarah.wyatt@ipc.nsw.gov.au.

Yours sincerely

Elizabeth Tydd
Information Commissioner

31 October 2018

Samantha Gavel
Privacy Commissioner