

ORDINANCE NO. NS-300.897

**AN ORDINANCE OF THE BOARD OF SUPERVISORS
OF THE COUNTY OF SANTA CLARA
ADDING DIVISION A40 OF THE COUNTY OF SANTA CLARA ORDINANCE
CODE RELATING TO SURVEILLANCE-TECHNOLOGY AND COMMUNITY-
SAFETY**

Summary

This Ordinance adds Division A40 relating to the Board-approval requirement for the acquisition and operation of surveillance equipment, and for a related surveillance use policy.

**THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA
ORDAINS AS FOLLOWS:**

Title A of the Ordinance Code of the County of Santa Clara is hereby amended by adding a new Division to be numbered and titled and to read as follows:

**DIVISION A40
SURVEILLANCE-TECHNOLOGY AND COMMUNITY-SAFETY**

Sec. A40-1. Findings.

The California Constitution provides that all people have an inalienable right to privacy, which is just as explicitly described in the California Constitution as the right to enjoy and defend life and liberty; the right to acquire, possess, and protect property; and the right to pursue and obtain safety and happiness. State and federal courts, including both the California Supreme Court and the United States Supreme Court, have affirmed individuals' fundamental right to privacy, and the Board finds that protecting and safeguarding this right is a vital part of its duties. Acknowledging the significance of protecting the privacy of County citizens, the Board finds that surveillance technology may also be a valuable tool to bolster community safety and aid in the investigation and prosecution of crimes. To balance the public's right to privacy with the need to promote and ensure community safety, the Board finds that any decision to use surveillance technology must be judiciously balanced with an assessment of the costs to the County and the protection of privacy, civil liberties and civil rights. The Board finds that proper transparency, oversight, and accountability are fundamental to minimizing the risks posed by surveillance technologies. The Board finds it essential to have an informed public

discussion before deploying surveillance technology, and that safeguards should be in place to address potential privacy, civil liberties, and civil rights issues before any new surveillance technology is deployed. The Board finds that if surveillance technology is acquired and deployed, there must be continued oversight and regular evaluation to ensure that safeguards are being followed and that the Board is assessing the surveillance technology's benefits and potential benefits in addition to its costs and potential costs.

Sec. A40-2. Board Approval Requirement for Acquisition and Operation of Surveillance Equipment, and for Related Surveillance Use Policy

- (A) County Departments Other than the Sheriff's Office and District Attorney's Office. Each County department other than the Sheriff's Office and District Attorney's Office must obtain Board approval at a properly-noticed public meeting, on the regular (non-consent) calendar, before any of the following:
- (1) Seeking funds for surveillance technology, including but not limited to, applying for a grant, or accepting state or federal funds, or in-kind or other donations;
 - (2) Acquiring new surveillance technology, including but not limited to procuring that technology without the exchange of monies or other consideration;
 - (3) Using surveillance technology for a purpose, in a manner, or in a location not previously approved by the Board; or
 - (4) Entering into an agreement with a non-County entity to acquire, share, or otherwise use surveillance technology or the information it provides.

Those County departments must also obtain Board approval of a Surveillance Use Policy at a properly-noticed public meeting, on the regular (non-consent) calendar, before engaging in any of the activities described in subsections (A)(2), (A)(3), and (A)(4).

- (B) Sheriff's Office and District Attorney's Office. Other than with respect to surveillance technology limited to use in law enforcement investigations and prosecutions as specifically defined in Sec. A40-9 of this Division, and subject to Sec. A40-2(C) below, the Sheriff's Office and District Attorney's Office must notify the Board, and obtain Board approval, at a properly-noticed public meeting, on the regular (non-consent) calendar, before any of the following:
- (1) Seeking funds for surveillance technology, including but not limited to, applying for a grant, or accepting state or federal funds, or in-kind or other donations;

- (2) Acquiring new surveillance technology, including but not limited to procuring that technology without the exchange of monies or other consideration;
- (3) Using surveillance technology for a purpose, in a manner, or in a location not previously approved by the Board; or
- (4) Entering into an agreement with a non-County entity to acquire, share, or otherwise use surveillance technology.

The Sheriff's Office and the District Attorney's Office must also notify the Board, and obtain Board approval, of a Surveillance Use Policy at a properly-noticed public meeting, on the regular (non-consent) calendar, before engaging in any of the activities described in subsections (B)(2), (B)(3), and (B)(4).

- (C) In enacting this Division, the Board is not limiting its rights under Government Code section 25303, including without limitation, its right to supervise the official conduct of all county officers, to require reports, or to exercise budgetary authority over the district attorney and sheriff.
- (D) Consistent with California Government Code section 25303, however, in receiving notification and approving or denying the actions in subsections (B)(1), (B)(2), (B)(3), and (B)(4), and approving, and/or denying any Surveillance Use Policy, the Board shall not "obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney."
- (E) To the extent the Board or a court of law determines that approving or denying the actions in subsections (B)(1), (B)(2), (B)(3), or (B)(4), or approving or denying the Surveillance Use Policy would unlawfully "obstruct" the applicable function of the sheriff or district attorney under Government Code section 25303, the Board shall simply receive and discuss notification from the Sheriff's Office or District Attorney's Office regarding subsections (B)(1), (B)(2), (B)(3), or B(4) and receive and discuss the applicable Surveillance Use Policy at a properly-noticed public meeting, on the regular (non-consent) calendar.

Sec. A40-3. Information Required

Unless it is not reasonably possible or feasible to do so (e.g., exigent circumstances, a natural disaster, or technological problems prevent it, etc.), the County department seeking approval under Section A40-2 of this Division must submit to the Board an Anticipated Surveillance Impact Report and a proposed Surveillance Use Policy before the public meeting. The County shall publicly release printed and online copies of

the Anticipated Surveillance Impact Report and proposed Surveillance Use Policy before the public meeting.

Sec. A40-4. Determination by Board that Benefits Outweigh Costs and Concerns

Before approving any action described in Section A40-2(A) and A40-2(B) of this Division, the Board shall assess whether the benefits to the impacted County department(s) and the community of the surveillance technology outweigh the costs—including both the financial costs and reasonable concerns about the impact on and safeguards for privacy, civil liberties, and civil rights.

Sec. A40-5. Compliance for Existing Surveillance Technologies

Each County department possessing or using surveillance technology before the effective date of this Ordinance shall submit a proposed Surveillance Use Policy for that surveillance technology no later than one-hundred eighty (180) days following the effective date of this Ordinance, for review and approval by the Board at a properly-noticed public meeting, on the regular (non-consent) calendar. If a County department is unable to meet this 180-day timeline, the Department may notify the Board in writing of the department's request to extend this period and the reasons for that request. The Board may grant County departments extensions of up to 90 days beyond the 180-day timeline to submit a proposed Surveillance Use Policy.

Consistent with California Government Code section 25303, in approving or denying a Surveillance Use Policy from the Sheriff's Office or the District Attorney's Office, the Board shall not "obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney." To the extent the Board or a court of law determines that approving or denying the Surveillance Use Policy would unlawfully "obstruct" under Government Code section 25303, the Board shall simply receive and discuss the applicable Surveillance Use Policy at a properly-noticed public meeting, on the regular (non-consent) calendar.

Sec. A40-6. Oversight Following Board Approval

- (A) A County department that obtained approval for the use of surveillance technology or the information it provides under Section A40-2(A)(3) or A40-2(A)(4), A40-2(B)(3), A40-2(B)(4), or A40-5 of this Division, must submit an Annual Surveillance Report within twelve (12) months of Board approval, and annually thereafter on or before November 1. Similarly, if the Board received but did not approve a Surveillance Use Policy from the Sheriff's Office or District Attorney's office because of limitations of the Board's authority under Government Code

section 25303, the Sheriff's Office or District Attorney's Office, as applicable, must still submit an Annual Surveillance Use Report within twelve (12) months of the Board's receipt of the Surveillance Use Policy, and annually thereafter on or before November 1.

- (B) Based upon information provided in the Annual Surveillance Report, the Board shall determine whether the benefits to the impacted County department(s) and the community of the surveillance technology outweigh the costs and whether reasonable safeguards exist to address reasonable concerns regarding privacy, civil liberties, and civil rights impacted by deployment of the surveillance technology. If the benefits or reasonably anticipated benefits do not outweigh the costs or civil liberties or civil rights are not reasonably safeguarded, the Board shall consider (1) directing that the use of the surveillance technology cease; (2) requiring modifications to the Surveillance Use Policy that are designed to address the Board's concerns; and/or (3) directing a report-back from the department regarding steps taken to address the Board's concerns.
- (C) No later than January 15 of each fiscal year, the Board shall hold a public meeting, with Annual Surveillance Reports agendaized on the regular (non-consent) calendar, and publicly release a report that includes the following information for the prior year:
 - (1) A summary of all requests for Board approval and all notifications and Surveillance Use Policies received by the Board pursuant to Section A40-2 or Section A40-5 of this Division, including whether the Board approved, rejected, or received the proposal or notification, and/or required changes to a proposed Surveillance Use Policy before approval; and,
 - (2) All Annual Surveillance Reports submitted.

Sec. A40-7. Definitions

The following definitions apply to this Division:

- (A) **"Annual Surveillance Report"** means a written report concerning specific surveillance technology that includes all of the following:
 - (1) A description of how the surveillance technology was used, including whether it captured images, sound, or information regarding members of the public who are not suspected of engaging in unlawful conduct;

- (2) 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;
 - (3) A summary of community complaints or concerns about the surveillance technology;
 - (4) The results of any non-privileged internal audits, any information about violations of the Surveillance Use Policy, and any actions taken in response;
 - (5) Whether the surveillance technology has been effective at achieving its identified purpose;
 - (6) Statistics and information about public records act requests;
 - (7) Total annual costs for the surveillance technology, including personnel and other ongoing costs, and what source of funding will fund the technology in the coming year.
- (B) **“County department”** means any County department with a recognized County budget unit.
- (C) **“Surveillance technology”** means any electronic device, system using an electronic device, or similar technological tool used, designed, or primarily intended to collect, retain, process, or share audio, electronic, visual, location, thermal, olfactory or similar information specifically associated with, or capable of being associated with, any individual or group. Examples of surveillance technology include, but are not limited to, drones with cameras or monitoring capabilities, automated license plate readers, closed-circuit cameras/televisions, cell-site simulators, International Mobile Subscriber Identity (IMSI) trackers, Global Positioning System (GPS) technology, radio-frequency identification (RFID) technology, biometrics-identification technology, and facial-recognition technology.

For purposes of this Division, surveillance technology does not include standard word-processing software; information-technology-protection tools such as web-filtering; medical equipment used to diagnose, treat, or prevent disease or injury; Public Defender or District Attorney case-management databases; publicly available databases; or standard telephone-message equipment that stores the author of a document or the time a phone message was left on a County voicemail, for example.

For purposes of the acquisition and annual reporting requirements in this Division, surveillance technology also does not include County-owned cell phones with the

capacity to capture audio or video footage; or recording devices used exclusively with the express consent of everyone captured on the recording devices; but use of a County-owned cell phone or recording device for an illegal or unauthorized surveillance purpose violates this Division.

(D) “**Anticipated Surveillance Impact Report**” means a publicly-released written report including at a minimum the following:

- (1) Information describing the surveillance technology and how it works;
- (2) Information on the proposed purpose(s) for the surveillance technology;
- (3) The location(s) it may be deployed;
- (4) The potential impact(s) on civil liberties and privacy, and a description of whether there is a plan to address the impact(s); and,
- (5) The fiscal costs for the surveillance technology, including initial purchase, personnel and other ongoing costs, and any current or potential sources of funding.

(E) “**Surveillance Use Policy**” means a publicly-released policy for use of the surveillance technology, vetted through County Counsel and submitted to and approved by the Board at a properly-noticed public meeting on the regular (non-consent) calendar. The Surveillance Use Policy shall at a minimum specify the following:

- (1) Purpose: The specific purpose(s) for the surveillance technology.
- (2) Authorized Use: The uses that are authorized, the rules and processes required before that use, and the uses that are prohibited.
- (3) Data Collection: The information that can be collected by the surveillance technology.
- (4) Data Access: The individuals who can access or use the collected information, and the rules and processes required before access or use of the information.
- (5) Data Protection: The safeguards that protect information from unauthorized access, including, but not limited to, encryption, access-control, and access-oversight mechanisms.
- (6) Data Retention: The time period, if any, for which information collected by the surveillance technology will be routinely retained, the reason that retention period is appropriate to further the purpose(s), the process by which the information is regularly deleted after that period lapses, and the conditions that must be met to retain information beyond that period.
- (7) Public Access: If and how collected information can be accessed by members of the public, including criminal defendants.

- (8) Third-Party Data-Sharing: If and how other County or non-County entities can access or use the information, including any required justification and legal standard necessary to do so, and any obligation(s) imposed on the recipient of the information.
 - (9) Training: The training, if any, required for any individual authorized to use the surveillance technology or to access information collected by the surveillance technology, including whether there are training materials.
 - (10) Oversight: The mechanisms to ensure that the Surveillance Use Policy is followed, including, but not limited to, identifying 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, and the sanctions for violations of the policy.
- (F) **“Exigent circumstances”** means the County Sheriff’s Office or District Attorney’s Office’s good faith belief that an emergency involving danger of death or serious physical injury to any person requires use of the surveillance technology or the information it provides.

Sec. A40-8. Severability

The provisions of this Division are severable. If any section, subsection, paragraph, sentence, clause or phrase of this Division is for any reason held unconstitutional or invalid, the remaining parts of this Division shall remain fully effective. If the application of any part of this Division to any person or circumstance is held invalid, the application of that part of this Division shall not be affected regarding other persons or circumstances.

Sec. A40-9. Temporary Acquisition and Use of Surveillance Equipment Related to Law Enforcement Investigations and Prosecutions

Notwithstanding the provisions of this Division, the County Sheriff’s Office and District Attorney’s Office may temporarily acquire or temporarily use surveillance technology in exigent circumstances without following the provisions of this ordinance before that acquisition or use unless a State law or federal law preempts or conflicts with this exigent-circumstances exception in any manner (e.g., Civil Code sections 1798.90.5, et seq.; and Government Code section 53166). However, if the Sheriff’s Office or District Attorney’s Office acquires or uses surveillance technology in exigent circumstances under this subdivision, that Office must (1) report that acquisition or use to the Board of Supervisors in writing within 90 days following the end of those circumstances; (2) submit a proposed Surveillance Use Policy to the Board regarding that

surveillance technology within 90 days following the end of those circumstances; and (3) include that surveillance technology in the department's next Annual Surveillance Report to the Board following the end of those circumstances. If the Sheriff's Office or District Attorney's Office is unable to meet the 90-day timeline to submit a proposed Surveillance Use Policy to the Board, that Office may notify the Board in writing of the Office's request to extend this period and the reasons for that request. The Board may grant extensions of up to 90 days beyond the original 90-day timeline to submit a proposed Surveillance Use Policy.

Sec. A40-10. Enforcement

This Division does not confer any rights upon any person or entity other than the Board of Supervisors or its designee to seek the cancellation or suspension of a County contract. This Division does not confer a private right of action upon any person or entity to seek injunctive relief against the County or any individual unless that person or entity has first provided written notice to the County Executive and the Board of Supervisors, by serving the Clerk of the Board, regarding the specific alleged violation of this Division; and has provided the County Executive and the Board with at least 90 days to investigate and achieve compliance regarding any alleged violation. If the specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If it is shown that the violation is the result of arbitrary or capricious action or conduct by the County or an officer thereof in his or her official capacity, the prevailing complainant in an action for injunctive relief may collect from the County reasonable attorney's fees—computed at one hundred dollars (\$100) per hour, but not to exceed seven thousand five hundred dollars (\$7,500)—if he or she is personally obligated to pay the fees. However, a prevailing complainant may not recover attorney's fees under this section and under Government Code section 800 for the same arbitrary or capricious action or conduct.

Sec. A40-11. Retaliation is a Ground for Discipline

It shall be a ground for disciplinary action for a County employee to retaliate against any individual who makes a good-faith complaint to the County Executive's Office that there has been a failure to comply with any part of this Division.

Sec. A40-12. Intentional Misuse of Surveillance Equipment is a Misdemeanor

It shall be a misdemeanor to intentionally use County-owned surveillance technology (1) for a purpose or in a manner that is specifically prohibited in a Board-approved Surveillance Use Policy, or (2) without complying with the terms of this Division with respect to that County-owned surveillance technology. Unless otherwise

prohibited by law, either the District Attorney or County Counsel may prosecute a violation of this Division.

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on **JUN 21 2016** by the following vote:

AYES: **CHAVEZ, CORTESE, SIMITIAN, WASSERMAN, YEAGER**

NOES: **NONE**


ABSENT: **NONE**

ABSTAIN: **NONE**



DAVE CORTESE, President
Board of Supervisors

ATTEST:



MEGAN DOYLE
Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGALITY:



ROBERT M. COELHO
Assistant County Counsel

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