

Terms of reference

Office of the Privacy Commissioner inquiry into facial recognition technology trial by Foodstuffs North Island, New Zealand.

The Privacy Commissioner is conducting an Inquiry under section 17(1)(i) of the Privacy Act 2020 into the Facial Recognition Technology (FRT) trial conducted by Foodstuffs North Island (FSNI) in selected supermarkets across their network.

Facial recognition technology uses algorithms to try to identify a person by scanning and creating a digital map of that person's face and comparing it to a database of facial images held by the organisation.

Biometric information, such as the scan of a person's face, is sensitive personal information and is regulated under the Privacy Act 2020.

Inquiry Rationale – Developments in FRT

Where facial recognition is used in New Zealand, it tends to be in situations where an individual is seeking to verify their identity to access a device or a service. The use of live facial recognition technology to scan and identify an individual in real time and compare them against a database of faces is rare in New Zealand.

FSNI is considering using live facial recognition technology as an additional tool to address retail crime in their supermarkets, with a primary focus on violent retail crime and keeping their staff and customers safe.

There is no known other current use of facial recognition technology in retail in New Zealand. Supermarkets are an essential service provider. As such there is high public interest in the operation and outcome of this trial.

FSNI Facial Recognition trial

FSNI is undertaking an independently evaluated trial of FRT in 25 selected franchised supermarkets over six months to provide evidence of effectiveness. The trial stores have been rolled out in four tranches with the final tranche going live on 8 March 2024.

During the trial, FRT will be used to scan and make a biometric face template of each customer as they enter trial supermarkets to see if they match a watchlist of people identified as causing harmful behaviour.

FSNI have defined harmful behaviour as being theft, burglary, robbery, assault (physical or verbal) and other aggressive, violent, and threatening behaviour. FSNI has incorporated several privacy mitigations into their operational protocols, including on the storage and use of images.

Authority

This Inquiry is a Privacy Commissioner initiated Inquiry under section 17(1)(i) of the Privacy Act 2020. The Privacy Commissioner has Inquiry functions under this provision to inquire generally into any matter including any practice or procedure, whether governmental or non-governmental, or technical development, if it appears to the Privacy Commissioner that the privacy of the individual is being, or may be, infringed.

As part of the Inquiry, the Privacy Commissioner may use his powers to summon witnesses and obtain relevant information and documentation under section 203, referencing sections 86 through to 90 of the Privacy Act 2020. Information and documentation collected as part of this Inquiry will be held in confidence under section 206 of the Privacy Act 2020, the Office of the Privacy Commissioners obligation of secrecy, and is privileged under section 90 of the Privacy Act 2020.

Matters for Inquiry

The purpose of this Inquiry is to gather information to monitor the implementation of the FSNI trial to ensure it is compliant with the Privacy Act 2020, and to ensure that privacy risks are identified and appropriately mitigated as set out in FSNI's Privacy Impact Assessment. The Inquiry findings will inform the Commissioner's assessment of the level of any residual privacy risks, and the effectiveness of the use of FRT in reducing harmful behaviour in FSNI supermarkets.

Additionally, OPC is concerned about known bias and accuracy issues when it comes to FRT, particularly for people of colour. In the New Zealand context, our Office is particularly interested in the impact of FRT for Māori, Pasifika, Indian and Asian shoppers.

Scope/Methodology

The Inquiry will consider the following matters during the trial and evaluation period to ensure compliance with the Privacy Act and assess the impact of the trial on personal privacy:

1. Review the operational protocols set out by FSNI, including those in the user manual and Privacy Impact Assessment.
2. Review the on-the-ground implementation of these protocols in selected supermarkets, including:
 - a. The identification of individuals of interest for inclusion on FRT watchlists and processes for appealing inclusion and removal from watchlists, including audits of selected supermarket's watchlists
 - b. Transparency and notification practices
 - c. Information collection, use (including any secondary use), disclosure, retention and deletion
 - d. Staff training, including content and assessing staff understanding of the Privacy Act requirements
 - e. Access and correction and security settings for FRT information

- f. Information flows between relevant parties, for example individual supermarkets and FSNI, and between FSNI and independent evaluator and the FRT software provider
- g. Application and effectiveness of the mitigations to the privacy risks identified in the Privacy Impact Assessment
- h. Number and type of alerts generated (both positive and false positive matches) and subsequent actions taken by supermarkets
- i. Number of instances where human checkers agree/don't agree with FRT match and the characteristics of the individual/context for each instance.

3. Key statistics across the trial where available, for individual trial stores and non-trial stores for comparative purposes. For trial stores this includes total number of faces scanned, total number of facial images deleted, numbers enrolled on watchlists, rationale for enrolment by specific category, action taken in response to identification, referrals to police, subsequent police action. For non-trial stores comparative information includes estimates of total customer numbers, and comparative information from the Auror platform.

4. Review supermarkets watchlist and the number and details of adverse actions taken by staff to review any privacy impact of the trial on Māori, Pasifika, Indian and Asian shoppers given potential bias and accuracy issues associated with FRT.

5. Assess the findings of the trial evaluator at key points during the trial and at the completion of the evaluation report.

6. Seek and review feedback on the trial from customers, members of the public, selected supermarkets' owner operators, security staff, privacy officers, check-out operators.

7. Review complaints received by OPC, by individual FSNI supermarkets and FSNI to understand the nature and number of issues or concerns being raised by the public.

8. Evaluate the trial data and conclusions regarding the effectiveness of FRT in reducing the impact of retail crime and protecting staff and customers against harmful behaviour, including in comparison to other deterrence methods used.

9. Engage with Māori and Pasifika communities in the areas of the trial stores to identify any impacts particular to them.

10. Seek independent expert advice as needed.

At the completion of the Inquiry, the Commissioner will use the information and evidence obtained to produce a report which may include findings.

Any breaches of the Privacy Act identified during the trial will be raised immediately with FSNI. At the completion of the trial, the Commissioner will consider the findings and determine any appropriate actions as set out in our Compliance and Regulatory Action framework .

¹ <https://privacy.org.nz/about-us/what-we-do/caraf/>

Exclusions

individual complaints

The Inquiry will not investigate any individual's complaint. However, the fact that the OPC is undertaking this Inquiry does not preclude an investigation under Part 5 of the Privacy Act at the request of an affected individual. Individuals who believe their privacy may have been interfered with and wishing to consider a complaint to the Office of the Privacy Commissioner can find more information on this process at **www.privacy.org.nz**.

Call for information

People or organisations who believe that they have information that is relevant to this Inquiry should contact the Office of the Privacy Commissioner at **FRTinquiry@privacy.org.nz**

Commencement of work

The final tranche of FSNI FRT trial stores was rolled out on 8 March 2024. The Inquiry will commence on 4 April 2024.

At the completion of the trial, a draft report will be provided to FSNI. The Commissioner will release his findings once any comments made by FSNI have been considered.