Seattle
Office of Police
Accountability

CLOSED CASE SUMMARY

ISSUED DATE: APRIL 27, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0731

Allegations of Misconduct and the Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Management Action)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained

Imposed Discipline

Suspension Without Pay – 1 day

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

EXECUTIVE SUMMARY:

It was alleged that the Named Employee acted contrary to law and policy when he used a facial recognition program.

SUMMARY OF INVESTIGATION:

On November 5, 2020, OPA received a complaint concerning the alleged use of Clearview AI – a facial recognition program – by an SPD officer – Named Employee #1 (NE#1). The Complainant alleged that NE#1's conduct violated the City's Surveillance Ordinance and violated public trust. As a result of this complaint, OPA initiated an investigation.

As part of its investigation, OPA researched Clearview AI, analyzed the provisions of the Surveillance Ordinance, reviewed Department emails referencing Clearview AI, and interviewed NE#1.

Clearview AI identifies individuals by accessing publicly available photographs and using an algorithm to reach a match to an uploaded photograph. Clearview AI asserts that it is used by law enforcement agencies across the country. The company also contends that its program is accurate and legal, citing the following: (1) it is a search engine not a surveillance program; (2) it uses publicly available information; (3) it has been "reviewed and certified" for "accuracy and reliability" by an "independent panel of experts"; and (4) it was "designed and independently verified to comply with all federal, state, and local laws."

Despite Clearview AI's positive descriptions of its program, others have criticized it based on privacy concerns and a potential lack of accuracy. In order to assuage legal concerns, Clearview AI sought an opinion from a former United States solicitor general who posited that the program was constitutional. Clearview AI made this opinion public, providing it to potential clients.

The Surveillance Ordinance took effect on November 4, 2018. Included under the purview of the Surveillance Ordinance are any technologies that "observe or analyze the movements, behavior, or actions of identifiable individuals in a manner that is reasonably likely to raise concerns about civil liberties, freedom of speech or association, racial equity or social justice." The Surveillance Ordinance further explains that: "It is not surveillance if an individual knowingly and voluntarily consented to provide the information, or had a clear and conspicuous opportunity to opt out of providing the information."

Based on a review of Department emails, OPA verified that NE#1 received multiple emails from Clearview AI, which included login links. A number of other SPD employees also reviewed emails from Clearview AI; however, all of these emails were promotional in nature and OPA could locate no emails indicating that other SPD employees received login links or opened accounts with the company.

During his OPA interview, NE#1 acknowledged that he created an account with Clearview AI using his SPD email address. He stated that he learned about Clearview AI while a student at the National Computer Forensic Institute in October of 2019. He said that another student told him about it, and he went onto the website and signed up for a free trial. Sometime thereafter he spoke with one of the co-founders of Clearview AI who provided NE#1 with a copy of the memorandum written by the former solicitor general. NE#1 stated that the memorandum characterized Clearview AI as constitutional. NE#1 found this reassuring and it informed his belief that his use of Clearview AI would not violate any federal or state laws.

NE#1 told OPA that he used the program to conduct searches approximately 30 times. Ten of those occasions were for SPD cases and the other 20 were for cases from other jurisdictions. NE#1 described how he used the program. He said that he would enter a photograph of an individual and the program would analyze it and then show potential matches. The program would include a URL for the photographic matches. NE#1 said that the photographic matches were publicly available images taken off of the internet and, at times, included mug shots from other agencies.

With regard to the searches he conducted, NE#1 said that he did not find any matches for the SPD cases and found a match for one of the outside jurisdiction cases. NE#1 notified the outside agency of the match and disclosed that he used Clearview AI. He recalled having the following conversation with the other agency:

> I told them exactly how I got it. I said—and I think it was a—it was a King County, almost positive it was a King County agency, and I said, or somebody that would file their case with the King County Prosecuting Attorney's Office. And I told 'em, here's how I got it, I believe this is your suspect, but here's the tool I used. I said this is a gray area, it's new technology, controversial, but that's not to say it's not lawful, but that's gonna be up to a Deputy Prosecuting Attorney, whether they're comfortable using that in a case. And so if you wanna talk to them about that, do so, but that's how I got. I never heard back, he appreciated the information and I don't know what happened after that.

NE#1 said that, had he gotten a match on a SPD case, he would have notified the prosecutor that he used Clearview AI and would have deferred to the prosecutor on how and whether to proceed with the case.

NE#1 did not document his use of Clearview AI for any of the 30 cases and did not have records of the case numbers. He further did not inform any supervisors that he was using the program.

NE#1 noted that he did not believe that Clearview AI was a "surveillance" tool as defined in the Surveillance Ordinance. NE#1 pointed to the fact that Clearview AI was a database and "it doesn't provide you movements, it doesn't provide you behavior, and it doesn't observe or analyze actions of identifiable individuals."

NE#1 told OPA that he had not received any training prior to this incident on the elements and requirements of the Surveillance Ordinance. He said that he reviewed the Surveillance Ordinance when he first learned about Clearview AI but did not seek guidance on whether the program fell under its purview. He further stated that he was given a copy of the Surveillance Ordinance as part of the OPA investigation into an earlier incident (*see* 2020OPA-0305).

With regard to that earlier investigation, which involved NE#1 using a drone and resulted in a Training Referral, NE#1 said that he was counseled by his supervisor. His supervisor told him to screen any investigative alternatives with her first prior to using them, as well as to screen any "out of the box" ideas with a prosecutor before proceeding. NE#1 told OPA that the conversation with his supervisor occurred shortly after he received notification of this case.

Ultimately, NE#1 did not believe that his use of Clearview AI violated the terms of the Surveillance Ordinance. He further did not believe that it was unprofessional and that it undermined public trust and confidence. He provided the following explanation:

> I think it raises concern, um, and that's legitimate concern that I think can be discussed openly, because I think it is a tool that does—again it raises concern, but those are things that if—if people are concerned about those things, then raise that up, and you know, let's make sure there are things in place that prohibit specific, you know, if—if the area, the people of Seattle decide they don't want facial recognition technology being used, then absolutely let that be a discussion, and make sure that it's made very clear, we aren't going to use this technology. But that hasn't happened to date, it's a new—it's a new technology, I respect the concerns, I think it is something that should be talked about, but I operate in what is out, you know, what is laid out in laws, in policies, and I did my best, and I'm a firm believer that I didn't violate any of those. Um, so no I don't think it should violate public trust in that, I'm doing my job, I'm here to solve crimes. I'm here to identify suspects, and hold suspects accountable, um, you know, it wasn't being used unprofessionally, it wasn't being used improperly. I was just doing my job in an unconventional way that was lawfully allowed. So, I would certainly hope it doesn't do that.

He opined that he did not engage in a "deliberate" use of Clearview AI for illegal or unprofessional reasons. He recognized the need to vet legitimate surveillance tools but stated that this was not what Clearview AI was.

OPA verified with the Training Unit that no specific training on the Surveillance Ordinance had been provided to officers prior to this complaint being filed. OPA identified, however, that, on November 24, 2020, an email was sent by the Audit Policy and Research Section to all SPD employees. This email included the following:

As a reminder, SMC Chapter 14.18 prohibits the use of personal technology, administrative privileges, or any other means to bypass City processes on acquisition and use of surveillance technology.

Please review SMC Chapter 14.18 definitions of surveillance technology and the Chapter requirements concerning the acquisition of any new surveillance technology.

The email did not specifically reference or preclude the use of facial recognition programs. Lastly, OPA verified that SPD had no current or past policy concerning the Surveillance Ordinance.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1
5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. It was alleged that NE#1 may have violated this policy when he used Clearview AI in possible contravention of the Surveillance Ordinance.

When reviewing the plain language of the Surveillance Ordinance, OPA concludes that it does not prohibit the use of Clearview AI. As indicated by NE#1, Clearview AI gives individuals access to a database that utilizes publicly available information and is not a technology that allows officers to "observe or analyze the movements, behavior, or actions of identifiable individuals." In reaching this finding, OPA does not endorse the use of Clearview AI. Indeed, based on OPA's research and analysis, there are a number of privacy and accuracy concerns with the program, not to mention – as discussed more fully below – impacts to public trust and confidence.

Ultimately, if the City believes that such programs should be prohibited, SPD should internally bar the use of this technology and/or the Surveillance Ordinance should be modified to more explicitly bring facial recognition programs, such as Clearview AI, under its ambit. Moreover, as articulated in a Management Action Recommendation issued in 2020OPA-0305, OPA strongly suggests that the Department develop a policy surrounding the Surveillance Ordinance and its implications for SPD and its officers and provide training to officers as soon as practicable.

Accordingly, OPA recommends that this allegation be Not Sustained – Management Action and refers to the above policy and training recommendations.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #1 - Allegation #2
5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.)

Even if Clearview AI and facial recognition software was not expressly barred by the Surveillance Ordinance, NE#1 should have known that using such technology without authorization was inappropriate. In this respect, OPA finds NE#1's own words to be relevant. At his OPA interview, NE#1 referred to the use of Clearview AI as being in a "grey area" and "controversial." However, NE#1 availed himself of it regardless. Indeed, a quick internet search for "facial recognition Seattle" would have revealed that there were community concerns with this technology in Seattle well before NE#1 started using it, as well as that SPD publicly stated that they had stopped using facial recognition in 2018. It was improper for NE#1 to unilaterally and without notifying let alone seeking approval from a supervisor restart a program expressly ended by the Department.

OPA further finds it concerning that NE#1 did not document his use of Clearview AI at all. As such, there is no record of how prevalent his use was and no paper trail to allow SPD and Seattle's oversight agencies to assess the extent of what occurred. Moreover, while perhaps not his intent, the lack of documentation gives the appearance of seeking to keep the use surreptitious. Even if Clearview AI was not prohibited by the letter of the Surveillance Ordinance, this is exactly what the spirit of the law sought to prevent.

Lastly, in the aftermath of OPA receiving this complaint, there was substantial concern expressed in the community concerning NE#1's use of Clearview AI and the potential that it was more widespread in the Department. While this latter concern did not come to fruition, the overall hit to public trust and confidence caused by NE#1's actions further informs OPA's conclusion that he violated the Department's professionalism policy.

For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 - Allegation #1
5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

As discussed above, OPA found no evidence that SPD officers other than NE#1 signed up for and/or used Clearview AI. Accordingly, OPA recommends that this allegation and Allegation #2 be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #2 - Allegation #2
5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

For the same reasons as stated above (*see* Named Employee #2 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**