



Fire and Police Commission

Michael G. Tobin
Executive Director

Sarah W. Morgan
Chair

Kathryn A. Hein
Vice-Chair

Paoi X. Lor
Michael M. O'Hear
Ann Wilson
Marisabel Cabrera
Commissioners

Informational Memorandum: Videorecording

Executive Summary

In a digital age, in which any individual could be carrying an electronic device with recording functionality, police should assume that they are being recorded at all times. In such an environment, it is reasonable that the Milwaukee Police Department adopt a formal policy addressing the video recording of police activity.

The Milwaukee Police Department currently has no formal policy about the rights of citizens to video record police activity. With the federal courts, as well as the United States government, recognizing a constitutional right for citizens to video record the police, it is essential that the Milwaukee Police Department adopt a policy that also recognizes the importance of this right, and informs officers how to properly handle pertinent situations.

Background

The federal courts have recognized the constitutional right of citizens to both record and share images and video of police in the commission of their work.¹ Recently, in response to pending litigation involving videorecording of police in *Christopher Sharp v. Baltimore City Police Department*,² the United States Department of Justice (DOJ) issued a letter of recommendation and guidance. The guidance states that "constitutionally adequate policies must be designed to effectively guide officer conduct, accurately reflect the contours of individuals' rights under the First, Fourth, and Fourteenth Amendments, and diminish the likelihood of future constitutional violations."³ Most importantly, the Department of Justice indicates that a policy should be established that explicitly recognizes the "First Amendment right to observe and record police officers engaged in the public discharge of their duties."⁴

No uniform policy exists to address the issue of video recording police activity. As such, different municipalities have addressed video recording in different ways. Some police departments have pursued prosecution under the guise of state wiretapping, loitering, and obstruction laws, while others have adopted a policy of allowing video recording of police activity, so long as the act does not interfere with official police business. This has led to

¹ See, e.g., *Glik v. Cunniffe* 655 F.3d 78 (1st Cir. 2011); *Smith v. Cummings* 445 F.3d 1254 (11th Cir. 2000); *Fordyce v. City of Seattle* 55 F.3d 436 (9th Cir. 1995)

² *Christopher Sharp v. Baltimore City Police Department et al.*, No. 1:2011cv02888 (D. Md. Jan. 10, 2012)

³ See letter from U.S. Department of Justice, Civil Rights Division to Baltimore Police Department dated May 14, 2012, at p. 2

⁴ *Id.*, at p. 2



disparity of treatment across municipalities and created confusion as to the rights of citizens and police officers. Consequently, this ambiguity has given rise to numerous lawsuits that have resulted in the arrest of citizens in some states and large monetary settlements in others.

The United States Department of Justice recommendation and guidance letter can be used as a template for all police departments in the development of policies aimed at addressing video recording of police activity. The letter “reflects the United States’ position on the basic elements of a constitutionally adequate policy on individuals’ rights to record police activity”⁵ and has aided numerous police departments in the development of relevant policies.⁶ Relevant federal court cases and the DOJ letter strongly suggest that all police departments develop their own formal policy related to video recording of police activity. This correspondence will provide the Milwaukee Police Department with some practical guidance as to the development and implementation of such a policy.

Policy

The Milwaukee Police Department should develop and adopt a policy related to video recording of police activity, in accordance with federal and state laws. The Department of Justice, Civil Rights Division, provides clear guidelines as to the development of a videorecording policy. Implementation of such a policy will direct officers as to the appropriate response to any video recording of their activities and mitigate the infringement of citizens’ constitutional rights. The policy should include the following principles:

1: The policy should explicitly recognize citizens’ rights to record police activity under the First Amendment. This right to free speech is not limited to public spaces. The right to record police activity is also protected in any areas that citizens have a legal right to be present. This includes homes, businesses, and the common areas of public and private facilities and buildings.

2: The policy should address the impact of the Fourth Amendment on citizens’ rights to record police activity. The Fourth Amendment protects against unwarranted searches and seizures without probable cause. When an officer confiscates a camera that is being used to film police activity, the officer may be violating a constitutional protection. Additionally, interfering with a citizen’s ability to record may also constitute a violation of the First and Fourth Amendments, so the policy should make clear that to “threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices”⁷ is a constitutional violation of citizen rights.

This policy should also recognize that the Fourth Amendment does allow officers to confiscate and collect video recording material under limited circumstances (i.e. probable cause or existence of a warrant). Case law establishes that warrantless seizures of property are permitted only if probable cause leads an officer to believe that the property “holds contraband or evidence of a crime” and “the exigencies of the circumstances demand it or

⁵ *Id.*

⁶ See, e.g., policies developed by municipalities comparable to Milwaukee: Seattle, Baltimore, District of Columbia, Boston, and Miami Beach

⁷ *Id.*, at p. 5

some other recognized exception to the warrant requirement is present.”⁸ As such, it is important that any policy clearly outline the circumstances in which probable cause may exist and property may be confiscated. Officers may seek owner consent to review recordings without seizure of property; however, this must be done with care to avoid violating First Amendment rights. The policy should provide guidance as to how consent can be acquired without coercion.

The policy should outline the proper handling procedures for lawfully seized property. Video files or recordings should not be destroyed or deleted, as this may constitute a violation of the First, Fourth, and Fourteenth Amendments.

3: The right to record police activity is not absolute; however it should only be limited by “reasonable time, place, and manner restrictions.”⁹ As a result, it is imperative that the policy outline what types of behavior constitute interference. Specific examples could be provided in order to mitigate confusion and First Amendment infringement. The Milwaukee Police Department should develop a policy that clearly states how officers should handle citizen interference with police activity. Additionally, the policy should instruct officers to recommend a less-intrusive location for citizens to record police activity if their conduct approaches criminality. In essence, the policy should highlight deference to protecting constitutional rights over citing or arresting citizens for minor infractions.

4: The policy should detail if/when supervisors are called to a scene and what their responsibilities are at the scene. At minimum, the policy should make clear that a supervisory presence is required “before an officer takes any significant action involving citizen-recorders or recording devices, including a warrantless search or seizure of a camera or recording device or an arrest.”¹⁰ It is strongly recommended by DOJ that supervisors be tasked with the approval of all arrests and significant actions taken by officers that include constitutional considerations. The policy should outline, in specific language, exactly when an officer should contact a supervisor and what the supervisor’s responsibilities are on the scene.

5: The policy should place no higher burden on an individual’s right to record police activity than is placed on members of the press. Per the Supreme Court of the United States, “the press does not have a monopoly on either the First Amendment or the ability to enlighten.”¹¹ The policy should make it clear that “members of the press and members of the general public enjoy the same rights in any area accessible to the general public.”¹² As such, officers should not require that any individual show press credentials as a prerequisite to observe and/or record any police activity taking place in, or within view of, a publicly accessible area.

Conclusion

In light of the current legal, social, and technological environment, police departments are faced with challenges related to video recording of their activities by the general public.

⁸ *United States v. Place*, 462 U.S. 696 (1983), at p. 701

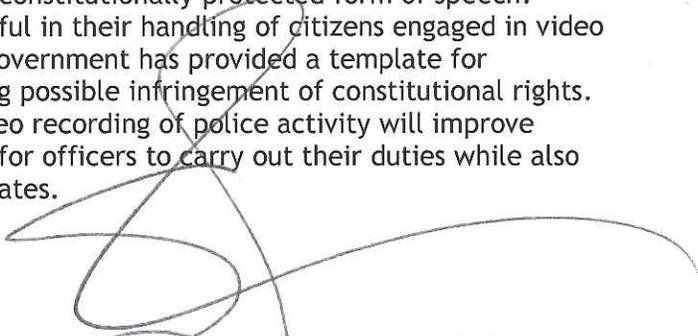
⁹ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), at p. 8

¹⁰ See letter from U.S. Department of Justice, Civil Rights Division to Baltimore Police Department dated May 14, 2012, at p. 7.

¹¹ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), at p. 782.

¹² *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), at p. 4

Such activity has been deemed a legal and constitutionally protected form of speech. Therefore, officers must be especially careful in their handling of citizens engaged in video recording of their activities. The federal government has provided a template for development of policies aimed at mitigating possible infringement of constitutional rights. The development of a policy related to video recording of police activity will improve community relations and provide guidance for officers to carry out their duties while also upholding the Constitution of the United States.



Shawn C. Fettig
Research Intern



Michael G. Tobin
Executive Director

MGT:sf

(8/28/13)