



Cite as: 2009 (5) AELE Mo. L. J. 201

ISSN 1935-0007

Employment Law Section - May 2009

Officer Privacy and a Citizen's Right to Video-Record Police Activity

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❖ Introduction

Hand-held videocameras are not new. What has changed in thirty years is their cost, size, weight, quality, storage system (film; analog tape; digital media), magnification capability and external application enhancements, e.g., biometric recognition, facial hair added or removed, etc.

But it was George Holliday, a citizen who taped police officers pummeling Rodney King in 1991 that forever changed the landscape.

Thousands of stationary cameras have been installed at intersections to monitor traffic or deter criminal behavior. Even more surveillance systems operate in tiny convenience stores, supermarkets, banks, specialty shops, department stores, parking lots and garages.

This article focuses on officer privacy and a citizen's right to video-record police activity. The privacy debate about routine video-recording in public places (and private locations where the public is invited) is beyond the scope of this article. [1]

It should be remembered that law enforcement and intelligence agencies used hand-held movie cameras to film antiwar demonstrators in Times Square and

speakers in a Chicago park during the 1968 Democratic National Convention. The recording occurred in public where an officer and citizens could lawfully view the activities or events. The cameras saw little more than what was observed by the photographer. [2]

When challenged, officers have responded that they share the same rights as citizens to visually record events. They do! In fact, the Supreme Court has said that professional journalists do not enjoy special privileges to take photographs, beyond the rights of ordinary citizens. [3]

It should be noted that the U.S. Constitution does not expressly confer a right to privacy, although the Supreme Court has inferred the existence of privacy rights through the guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments. [4]

❖ Privacy concerns of police officers

In some countries it is illegal to photograph police officers and stations – out of a concern that activists might take an officer’s picture to target him for a reprisal.

In America, some newspapers have sensationalized claims of widespread police brutality with a front-page photo array of the city’s “Meanest Officers.” The text explains that the depicted officers either used force more frequently than others, or accrued more citizen complaints.

Video-recordings can be edited, so that they only show the police response, omitting the conduct that an officer was responding to. The redacted version can be uploaded to Google’s YouTube™ and similar sites, resulting in hateful remarks to an officer’s spouse and children.

One website [5] addresses the question of photos and taping:

Q: Can I be arrested for videotaping or photographing police?

A: Videotaping or photographing police in public places is usually legal, so long as you don’t interfere with their activities. Nonetheless, doing so will often get you arrested. Police don’t like to be watched or documented in any way, so they’ll sometimes bend the rules to stop you. We’ve heard many stories about people who got arrested for taping police, and the charges are usually dropped.

Is it a violation of an officer’s privacy to record or photograph him or her while on duty, in uniform and engaged in an encounter with a citizen?

It has been argued that uniformed police officers lack a reasonable expectation of privacy when on duty because:

1. They wear uniforms, which makes them noticeable.
2. Most wear numbered badges and nameplates to make them identifiable.
3. They collaborate with the news media to publicize their activities.

❖ **General litigation**

Surprisingly, there are almost no officially reported decisions regarding a citizen's right to video-record or photograph police activities. There are a few cases involving other public sector activities, such as city or town council meetings or hearings.

A New Jersey man was arrested for videotaping a municipal council meeting. He was acquitted and sued in federal court. The District Court rejected his federal claims and declined to review his state law claims. A three-judge appellate panel affirmed. [Tarus v. Borough of Pine Hill](#), #03-3100, 105 Fed. Appx. 357, 2004 U.S. App. Lexis 14597 (Unpub. 3rd Cir. 2004).

They concluded that a police chief could reasonably believe that he had probable cause to arrest a man for disorderly conduct when he refused requests to cease videotaping a borough council meeting or move his video equipment, and thereby "disrupting" the meeting.

After the District Court decision, the plaintiff filed a parallel complaint in state court, raising his state law claims of false arrest, false imprisonment, and malicious prosecution. He lost again in the trial court and in the intermediate appellate court.

He ultimately prevailed. The New Jersey Supreme Court wrote:

"Openness is a hallmark of democracy--a sacred maxim of our government--and video is but a modern instrument in that evolving pursuit. The Mayor and Borough ran afoul of that principle and violated the common law right to videotape by imposing unreasonable ad hoc restrictions. The use of modern technology to record and review the activities of public bodies should marshal pride in our open system of government, not muster suspicion against citizens who conduct the recording."

[Tarus v. Borough of Pine Hill](#), 189 N.J. 497, 916 A.2d 1036 (2007).

❖ Police litigation

In Georgia, a married couple filed a civil rights suit against the tiny city of Cumming (pop. 4,220) and its police chief, alleging that the police prevented them from videotaping police actions in violation of the plaintiffs' First Amendment rights. The District Court rejected that claim, but the 11th Circuit reversed. The three-judge panel wrote:

“As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”

[Smith v. City of Cumming](#), #99-8199, 212 F.3d 1332 (2000).

- Cases will succeed or fail on the facts unique to the event.

❖ Police policy statements and directives

Only a few agencies have adopted a formal policy on citizen observations and recording. Seattle has issued a directive, which states:

“It is the policy of the Seattle Police Department that people not involved in an incident may be allowed to remain in proximity of any stop, detention or arrest, or any other incident occurring in public so long as their presence is lawful and the activities, including verbal comments, do not obstruct, hinder, delay, or threaten the safety or compromise the outcome of legitimate police actions and/or rescue efforts. Officers should assume that a member of the general public is observing, and possibly recording, their activities at all times.”

Seattle Police Dept. Directive, Section 17.070, [Citizen Observation of Officers](#) (2008).

Bystander arrests for obstruction of Seattle officers were troublesome. Of 76 obstruction arrests reviewed by the SPD's Office of Professional Accountability during a two-year period, the charges were dismissed in more than half of the cases. Almost a third of the arrests involved bystanders.

The OPA advised that “Officers may tell people to step out of the way but not order them to ‘leave the area’ or ‘go home’ or seize their cameras if they are not actively interfering.” [6]

Another section of the SPD's Citizen Observation policy makes it clear that officers do not have a right to seize a citizen's camera to preserve evidence of a crime.

Bystander activity is not confined to major cities. In central Pennsylvania, a township police department adopted this policy:

“It is the policy of the Manheim Township Police Department to recognize the legal standing of members of the public to make video/audio recordings of police officers and civilian employees who are carrying out their official police duties in an area open to the public, and by citizens who have a legal right to be in an area where police are operating, such as a person's home or business.”

Manheim Township Police Dept., Lancaster, PA. Policy 7.1.3, [Persons Recording Police Employees](#) (2007).

The directive explains that if a citizen is located in a position that “impedes or interferes with the safety of police personnel or the ability of police personnel to perform their law enforcement function,” the officer should direct the person to a location “safely away from the scene but still in a position to use the device.”

- One chief recommends including an officer reporting requirement, via the chain-of-command, if he or she observes a person with video or other devices recording an event. This minimizes the chance that the command staff will be “blindsided” by either the media or citizens.

❖ **Audio recording**

Federal law allows one-party consent to voice recordings. [7] Several states require the consent of all parties who are audio-recorded. Pennsylvania is such a state, and the MTPD policy states that an “officer may inform such person that he or she does not consent to the audio portion of the taping and request that the audio be shut off.” In a few cases, a prosecution ensued.

❖ **Activist groups**

Not everyone who uses a video camera is an “inadvertent bystander.” In some communities there is an organized group that deliberately seeks out police-citizen interaction.

[Copwatch](#) presents itself as a nonviolent, non-confrontational citizen’s advocacy network of local organizations that videotape and observe police activity in the streets.



The Berkeley (CA) Copwatch group has published a [handbook](#). It advises, “Don’t film criminal conduct if you see any. Focus on the police.”

Some young men enjoy touting officers. Taggers spray *Fuck the Police* on walls all over the world. A *contempt of cop* overreaction to a “copwatcher” will only fuel demands for independent police monitors or auditors, and the creation of oversight boards with members that will push their own reformist agendas.

If an activist or group targets specific officers, lawyers for the police agency should consider seeking injunctive relief. [8]

❖ Conclusion

While no citizen has a right to impede police actions or to expose an officer to danger, the First Amendment generally protects the right to photograph or video-record the activities of law enforcement personnel while engaged in their duties.

As the Seattle OPA Report wisely recommends, an officer may instruct an intrusive cameraman “to step out of the way but not order them to ‘leave the area.’” Both the Seattle and Manheim Twp. Policy directives respect a citizen’s right to record police activities, but also are consistent with officer efficiency and safety.

Although First Amendment rights are always subject to reasonable time, manner and place restrictions, a uniformed police officer does not have a right to privacy while performing his duties. [9]

Notes:

1. See, "Police Technology in Cities: Changes and Challenges," 23 (1) *Technology in Society* (Elsevier) 11-27 (Jan. 2001), "[Video Surveillance: Information on Law Enforcement's Use of Closed Circuit Television to Monitor Selected Federal Property in Washington, D.C.](#)," Gen. Accounting Office #03-748 (2003) and "[Video Surveillance Cameras](#)," *Privacy International Doc. PHR2006* (2007).
2. Activists filed suits in federal court challenging intelligence-gathering activities of the Chicago Police, the NYPD, and other agencies. Chicago signed a consent decree in 1981 and New York signed a decree in 1985. See, [Protectors of Privilege: Red Squads and Police Repression in Urban America](#), by Frank Donner, Univ. of Calif. Press (1990). Both decrees have since been modified.
3. "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." [Pell v. Procunier](#), #73-918, 417 U.S. 817 at 834 (1974).
4. "Specific guarantees in the Bill of Rights have penumbras... [that] create zones of privacy," [Griswold v. Connecticut](#), #496, 381 U.S. 479 at 484 (1965). Nine state constitutions recognize privacy rights.
5. Flex Your Rights Foundation's [FAQs](#).
6. [Auditor's Report on Obstruction Arrests](#), Jan. 2006 - Jul. 2008, Seattle Police Office of Professional Accountability.
7. 18 U.S. Code §2511(2)(c), *Interception and disclosure of wire, oral, or electronic communications prohibited*: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968.
8. A reputed mobster sued J. Edgar Hoover and the SAC of the Chicago Office, challenging the legality of constant surveillance teams. The district court, on the "sworn amended complaint, affidavits and evidence of the plaintiff," found that plaintiff's constitutional rights to privacy, personal liberty and freedom were violated by the surveillances -- and that unless the defendants were restrained, the plaintiff would suffer irreparable injury. The district court granted a preliminary injunction.

The injunction did not prohibit surveillance of the alleged *Mafia capo*. It required agents to increase the distance when tailing him and limited the

number of vehicles in front of his home. [Giancana v. Hoover](#), #63-C-1145 (N.D. Ill. 1963); *injunction stayed* at [322 F. 2d 789](#) (7th Cir. 1963).

A divided appellate panel, with a strongly worded dissenting opinion, overturned the injunction on jurisdictional grounds. [Giancana v. Johnson](#), 335 F.2d 366 (7th Cir. 1964); cert. den. 379 U.S. 1001 (1965).

9. An investigator's use of a 20x zoom lens did not violate a person's reasonable expectation of privacy. [Ryan v. Kelmar & Associates](#), #08-50670, 2009 U.S. App. Lexis 2821 (5th Cir.).

References: (*Chronological*)

1. The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age, 65 Ohio St. L.J. 249 (2004).
2. [Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity](#), 82 Tex. L. Rev. 1349 (2004).
3. [Photographers' Guide to Privacy](#), The Reporters Committee for Freedom of the Press (1999).
4. Criminal Law: Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches, 80 J. Crim. L. & Criminology 1 (1989).
5. Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 Hastings L.J. 645 (1985).

AELE Monthly Law Journal

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