

The Right to Photograph & Record in Public

By Mickey H. Osterreicher, general counsel

National Press Photographers Association
(NPPA)

lawyer@nppa.org

© 2012

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

- 1st Circuit's ruling is binding only in:
 - Massachusetts
 - New Hampshire
 - Maine
 - Rhode Island
 - Puerto Rico

But its persuasive reasoning has been cited by courts and lawyers nationwide

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Charges

1. Unlawful audio recording in violation of MA wiretap law
2. Disturbing the peace
3. Aiding in the escape of a prisoner

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Charges

1. Aiding in the escape of a prisoner – **Dismissed**
2. Disturbing the peace – **Dismissed**
3. Unlawful audio recording in violation of MA wiretap law – **Dismissed**

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

"officers were unhappy
they were being recorded
during an arrest . . .
does not make a lawful exercise
of a First Amendment right
a crime."

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“Court found no probable cause
supporting the wiretap charge,
because the law requires a secret recording
and the officers admitted
that Glik had used his cell phone
openly and in plain view
to obtain the video and audio recording.”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

SCOTUS Opinions

“The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”

“It is . . . well established that the Constitution protects the right to receive information and ideas.”

“There is an undoubted right to gather news ‘from any source by means within the law.’”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Gathering information about government
officials

in a form that can

readily be disseminated to others

serves a cardinal First Amendment

interest in protecting and promoting

"the free discussion of governmental affairs."

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“Freedom of expression has particular
significance with respect to government
because

‘it is here that the state has a
special incentive to repress opposition
and often wields a more effective power of
suppression.’”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Public's right of access to information is
coextensive with that of the press.

- Almost everyone has a cellphone
- Almost every cellphone has a camera
- Just as we treat every weapon as being loaded
- Treat every camera as if it were recording

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“In our society, police officers
are expected to endure
significant burdens
caused by
citizens’ exercise of
their First Amendment rights”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“The First Amendment
protects a significant amount
of verbal criticism and challenge
directed at police officers.”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“The freedom of individuals
verbally to oppose or challenge
police action without thereby
risking arrest
is one of the principal characteristics
by which we distinguish
a free nation from a police state.”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“the same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

“Such peaceful recording of an arrest in a
public space
that does not interfere
with the police officers’ performance
of their duties
is not reasonably subject to limitation.”

Glik v Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Court also recognized:

“the fundamental and

virtually self-evident nature of

the 1st Amendment’s protections”

of the “right to film government officials
or matters of public interest in public space.”

AMTRAK Police GO 09-02

- Officers may request that an individual consent to release of a recording, film or picture.
- Any consent must be knowing and voluntary.
- **Under no circumstances will officers delete, destroy or alter photographs/videos; nor shall they request that photographs/video be deleted, destroyed or deleted.**

AMTRAK Police GO 09-02

- Any seizure of photographic or video recording equipment, video tape, DVD, or film, etc., related to an arrest, must be reviewed and seizure approved by the duty supervisor and Watch Commander.

Sharp

v.

City of Baltimore Police Department



General Order J-16

| | | |
|--|--|-----------------------|
| Subject VIDEO RECORDING OF POLICE ACTIVITY | | |
| Distribution "A" | Date Published 8 November 2011 | Page 1 of 7 |

By Order of the Police Commissioner

POLICY

It is the policy of the Baltimore Police Department to ensure the protection and preservation of every person's Constitutional rights.

In furtherance of this policy, no member of the Baltimore Police Department may prevent or prohibit any person's ability to observe, photograph, and/or make a video recording (with or without a simultaneous audio recording) of police activity that occurs in the public domain, so long as the person's location, actions, and/or behavior do not create a legitimate, articulable threat to Officer safety, or an unlawful hindrance to successful resolution of the police activity.

DEFINITIONS

Hindering - The common law criminal misdemeanor of obstructing and hindering a Police Officer in the performance of his/her police duties. The elements of this offense are:

1. The Police Officer is engaged in the performance of an official police action or duty;
2. The accused bystander commits an act, or perhaps an omission, which obstructs or hinders the Police Officer in the performance or completion of that official police action or duty;
3. The accused bystander knew, or should have known, of the Officer's identity as a sworn law enforcement officer (i.e., the Officer was in uniform, was wearing some outermost garment on which the word "POLICE" was printed, etc.);
4. The accused bystander knew, or should have known, that the Officer was engaged in an



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER SHARP,

Plaintiff,

v.

Civil No. 1:11-cv-02888-BEL

BALTIMORE CITY POLICE
DEPARTMENT, *et al.*,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES

This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence

Sharp v Baltimore City Police Department

This litigation presents constitutional questions
of great moment in this digital age:

whether private citizens have a First Amendment right
to record police officers in the public discharge of
their duties,

and whether officers violate citizens' Fourth and
Fourteenth Amendment rights

when they seize and destroy such recordings
without a warrant or due process.

Sharp v Baltimore City Police Department

The United States urges this Court
to answer both of those questions
in the affirmative.

Sharp v Baltimore City Police Department

The right to record police officers
while performing duties in a public place,
as well as the right to be protected from
the warrantless seizure
and destruction of those recordings,
are not only required by the Constitution . . .

Sharp v Baltimore City Police Department

. . . They are consistent with
our fundamental notions of liberty,
promote the accountability
of our governmental officers,
and instill public confidence
in the police officers
who serve us daily.



U.S. Department of Justice
Civil Rights Division

JMS:TDM:RJO
DJ 207-35-10

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

May 14, 2012

Mark H. Grimes
Baltimore Police Department
Office of Legal Affairs
601 E Fayette St
Baltimore, MD 21202

Mary E. Borja
Wiley Rein LLP
1776 K St NW
Washington, DC 20006

Re: *Christopher Sharp v. Baltimore City Police Department, et. al.*

Dear Counsel:

Judge Paul W. Grimm scheduled a settlement conference in *Christopher Sharp v. Baltimore City Police Department, et. al.* for May 30, 2012. While we take no position on Mr. Sharp's claim for damages against the individual defendants, it is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.

The guidance in this letter is designed to assist the parties during the upcoming settlement conference. It specifically addresses the circumstances in this case and Baltimore City Police Department's General Order J-16 ("Video Recording of Police Activity"), but also reflects the United States' position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity.

1. Background

In his complaint, Mr. Sharp alleged that on May 15, 2010, Baltimore City Police Department ("BPD") officers seized, searched and deleted the contents of his cell phone after he used it to record officers forcibly arresting his friend. Compl. at 9-12, ECF. No. 2. Mr. Sharp further alleged that BPD maintains a policy, practice or custom of advising officers to detain

DOJ Letter

- Policies should affirmatively set forth the First Amendment right to record police activity
- Policies should describe the range of prohibited responses to individuals observing or recording the police.
- Under the First Amendment, **there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed.**
- General Orders should include clear language prohibiting the deletion or destruction of recordings under any circumstances.

DOJ Letter

- Policies should clearly describe when an individual's actions amount to interference with police duties.
- Policies should provide clear guidance on supervisory review.
- Policies should describe when it is permissible to seize recordings and recording devices.

DOJ Letter

- Comprehensive policies and effective training are critical to ensuring that individuals' First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties.

ACLU v Alvarez

- US Court of Appeals for the 7th Circuit
- Decided May 8, 2012
- The Eavesdropping Statute Burdens Individual Speech and Press Rights
- Content Based or Content Neutral?
- The Eavesdropping Statute Likely Fails Intermediate Scrutiny

ACLU v Alvarez

- We conclude that the ACLU has a strong likelihood of success on the merits of its First Amendment claim.
- The Illinois eavesdropping statute restricts an expressive medium used for the preservation and dissemination of information and ideas.
- On the factual premises of this case, the statute does not serve the important governmental interest of protecting conversational privacy;
- Applying the statute in the circumstances alleged here is likely unconstitutional.

GENERAL ORDER



DISTRICT OF COLUMBIA

| | | |
|---|--------|--------|
| Title | | |
| Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public | | |
| Topic | Series | Number |
| OPS | 304 | 19 |
| Effective Date | | |
| July 19, 2012 | | |
| Related to: | | |
| GO-PER-201.26 (Duties, Responsibilities and Conduct of Members of the Department) | | |
| GO-SPT-204.01 (Media) | | |
| GO-OPS-304.10 (Police-Citizen Contacts, Stops and Frisks) | | |

| | | | |
|------|------------------|------|---|
| I. | Policy | Page | 1 |
| II. | Regulations | Page | 1 |
| III. | Cross References | Page | 6 |

I. POLICY

The Metropolitan Police Department (MPD) recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.

II. REGULATIONS

A. Members are reminded that photography, including videotaping, of places, buildings, structures and events are common and lawful activities in Washington, D.C.

1. If a person is taking photographs or recording from a place where he or she has a right to be, members are reminded that this activity by itself does not constitute suspicious conduct.

2. Members shall refer to GO-HRC-802.06 (Suspicious Activity Reporting

MPD GO 304 7/19/12

**Video Recording, Photographing, and Audio
Recording of Metropolitan Police Department
Members by the Public**

POLICY

The Metropolitan Police Department (MPD) recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.

REGULATIONS

- Members are reminded that photography, including videotaping, of places, buildings, structures and events are common and lawful activities in Washington, D.C.
- If a person is taking photographs or recording from a place where he or she has a right to be, members are reminded that this activity by itself does not constitute suspicious conduct.

REGULATIONS

In areas open to the public, members shall allow bystanders the same access for photography as is given to members of the news media

REGULATIONS

Members shall be aware that:

- A bystander has the same right to take photographs or make recordings as a member of the media, as long as the bystander has a legal right to be present where he or she is located.
- A bystander has the right under the First Amendment to observe and record members in the public discharge of their duties.

REGULATIONS

Members shall be aware that:

- Public settings include, e.g., parks, sidewalks, streets, and locations of public protests; but that protection extends also to an individual's home or business, common areas of public and private facilities and buildings, and any other public or private facility at which the individual has a legal right to be present.

REGULATIONS

Members shall be aware that:

- The fact that a bystander has a camera or other recording device does not, however, entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any area designated as a crime scene.

REGULATIONS

- As long as the photographing or recording takes place in a setting at which the individual has a legal right to be present and does not interfere with a member's safety, members **shall not** inform or instruct people that photographing or recording of police officers, police activity or individuals who are the subject of police action (such as a *Terry* stop or an arrest) is not allowed; requires a permit; or requires the member's consent.

REGULATIONS

Additionally, members **shall not**:

- Order that person to cease such activity;
- Demand that person's identification;
- Demand that the person state a reason why he or she is taking photographs or recording;
- Detain that person;

REGULATIONS

Additionally, members **shall not**:

- Intentionally block or obstruct cameras or recording devices; or
- In any way threaten, intimidate or otherwise discourage an individual from recording members' enforcement activities.

REGULATIONS

Members are reminded that the public does not have a right to interfere with police activity.

Interference consists of: conduct, threats, actions or activities that prevent or hinder, or purport to prevent or hinder, members from doing their job.

REGULATIONS

- If a person is photographing or recording police activity from a position that impedes or interferes with the safety of members or their ability to perform their duties, a member may direct the person to move to a position that will not interfere. However, a member shall not order the person to stop photographing or recording.

REGULATIONS

- A person's recording of members' activity from a safe distance, and absent any attendant action that obstructs the activity or threatens the safety of the member(s), does not constitute interference.

REGULATIONS

- A person has the right to express criticism of the police activity being observed. So long as that expression does not jeopardize the safety of any member, suspect or bystander; and so long as that expression does not violate the law or incite others to violate the law, the expression does not constitute interference.

Evidence on a Camera or Recording Device; Probable Cause

- Probable cause exists where the known facts and circumstances are such that a reasonable member in the same situation would believe that evidence of a crime will be found.

Evidence on a Camera or Recording Device; Probable Cause

If a member has probable cause to believe that a camera or other recording device contains images or sounds that are evidence of criminal acts, the member shall request that the person either:

- Voluntarily provide the device or recording medium (e.g., the memory chip) to the member; or

Evidence on a Camera or Recording Device; Probable Cause

- Where possible and practicable, and in the presence of the member, voluntarily transmit the images or sound via text message or electronic mail to the member's official government electronic mail account.

Evidence on a Camera or Recording Device; Probable Cause

- Consent to take possession of a recording device or medium must be given voluntarily. A member shall not, implicitly or explicitly, coerce consent to take possession of any recording device or any information thereon.

Evidence on a Camera or Recording Device; Probable Cause

If the person provides the device or recording medium to the member, the member shall:

- Exercise due care and caution with any of the individual's property or electronic device(s);
- Obtain CCN numbers for the evidence obtained, and provide the CCN numbers to the individual;

Evidence on a Camera or Recording Device; Probable Cause

If the person provides the device or recording medium to the member, the member shall:

- In the “Property listing/Evidence Recovered” section of any applicable field report(s), Document the item(s) surrendered by the individual in the PD-81 in accordance with MPD procedures;

Evidence on a Camera or Recording Device; Probable Cause

If the person provides the device or recording medium to the member, the member shall:

- Document the member's request and the individual's response in the narrative of applicable field reports and other documents; and

Evidence on a Camera or Recording Device; Probable Cause

If the person provides the device or recording medium to the member, the member shall:

- Submit the device(s) to the Electronic Surveillance Unit to access any relevant material as quickly as practicable. Members shall not attempt to view, download, or otherwise access any material contained on the device.

Evidence on a Camera or Recording Device; Probable Cause

If the individual declines to voluntarily provide the device or recording medium, or to electronically transmit the sound and/or images where possible and practicable, and the member believes that exigent circumstances exist insofar as the evidence of criminal activity will be lost absent a seizure of the device, the member shall contact the Watch Commander, Criminal Investigations Division (CID).

Evidence on a Camera or Recording Device; Probable Cause

- The Watch Commander, CID, or other official with supervisory authority over the member, must be present at the scene before a member takes any significant action involving a person's use of a recording device. This includes warrantless search or seizure of a camera or recording device, or an arrest.

Evidence on a Camera or Recording Device; Probable Cause

- The member shall inform the Watch Commander of the nature of the evidence of criminal acts believed to be contained on the device.

Evidence on a Camera or Recording Device; Probable Cause

- The Watch Commander, CID, shall, in consultation with the Commander, CID, determine whether exigent circumstances, including the seriousness of the possible crime at issue, permit the seizure of the device without a warrant.

Evidence on a Camera or Recording Device; Probable Cause

Warrantless seizure is permissible only when:

- There is probable cause to believe that the property holds contraband or evidence of a crime; and
- The exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Evidence on a Camera or Recording Device; Probable Cause

- If the Watch Commander, CID, finds that exigent circumstances permit the seizure of the device without a warrant, approval shall be given to the member for the seizure.

Evidence on a Camera or Recording Device; Probable Cause

- The member shall obtain and provide CCN numbers to the individual possessing the device.
- Any such seizure must be a temporary restraint intended only to preserve evidence until a warrant can be obtained. *Illinois v. McArthur*, 531 U.S. 326, 334 (2001).

Viewing/Listening to Evidence on a Camera or Recording Device

- Absent exigent circumstances, members shall obtain a search warrant before viewing photographs or listening to recordings on a camera or memory chip that has been seized as evidence.

Viewing/Listening to Evidence on a Camera or Recording Device

- In exigent circumstances, where there is reason to believe that an immediate search of the seized material is necessary to prevent death or serious injury, members shall contact the Watch Commander, CID, for authorization to review photographs or recordings without a warrant.

Viewing/Listening to Evidence on a Camera or Recording Device

- The Watch Commander, CID, in consultation with the Commander, CID, may authorize such review without a warrant.
- Photographs or recordings that have been seized as evidence and are not directly related to the exigent purpose shall not be reviewed.

Viewing/Listening to Evidence on a Camera or Recording Device

- Members shall not, under any circumstances, erase or delete, or instruct or require any other person to erase or delete, any recorded images or sounds from any camera or other recording device that is in the possession of a nonmember, or that has been voluntarily turned over or seized under the terms of this order.

Viewing/Listening to Evidence on a Camera or Recording Device

- Members shall maintain cameras and other recording devices that are in Department custody so that they can be returned to the owner intact with all images or recordings undisturbed.