



OFFICE OF THE DIRECTOR OF POLICE
THE UNIVERSITY OF TEXAS SYSTEM
TRAINING BULLETIN 005



CITIZENS' RIGHT TO RECORD THE POLICE
AUGUST 25, 2014

I. Purpose

The purpose of this training bulletin is to provide guidance to all commissioned officers on the topic of citizens' rights to record the activities of police officers as officers discharge their duties.

II. Discussion

Numerous court decisions in recent years have affirmed that citizens have the constitutional right to publicly record the police as officers perform their official duties. However, the courts have also ruled that citizens' right to record officers can be subject to reasonable time, place and manner restrictions.

Examples of appropriate time, place and manner restrictions would be instances where citizen-recorders pose articulable safety risks to the officer(s) by being too close physically or if the recordings could expose or compromise sensitive police practices or identities.

Consequently, officers performing their duties in public should assume no expectation of privacy and must always assume they are being recorded as they discharge their duties.

Case law researched for this bulletin speaks only to recording in public places and does not address the question of recording the police within an individual's own private space (e.g. personal residence). Nevertheless, the agency will operate on the premise that, absent meeting the threshold of criminal interference, individuals inside their private spaces are free to film/photograph/record officers discharging their duties.

Additionally, persons recording the police discharging their duties in public places *from* a private property position other than their own requires the individual to first obtain the property owner's permission (See Robinson v. Fetterman below).

Note: Case law and statutes presented below may be paraphrased or a partial version.

III. Definitions

Oral communication—means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. The term does not include an electronic communication. (Texas CCP § 18.20)

Time, place and manner restrictions—Limits that the government can impose on the occasion, location, and type of individual expression in some circumstances

IV. Texas Penal Code §38.15: Interference with Public Duties

A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with:

- (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law;
- (3) a firefighter, while the fire fighter is fighting a fire or investigating the cause of a fire;
- (4) an animal under the supervision of a peace officer, corrections officer, or jailer, if the person knows the animal is being used for law enforcement, corrections, prison or jail security, or investigative purposes

It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.

V. Texas Penal Code §16.02: Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications

(b) A person commits an offense if the person:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication

(c) *It is an affirmative defense to prosecution under Subsection (b) that:*

- (4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:
 - (A) the person is a party to the communication

VI. Texas Government Code § 552.119 Exception: Photograph of Peace Officer

(a) A photograph that depicts a peace officer as defined by article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from the requirements of § 552.021 (Availability of Public Information) unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration, or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

**VII. University of Texas System Rules and Regulations of the Board of Regents
Rule 80107: Filming Motion Pictures or Television Productions**

This rule covers only motion pictures and television productions regardless of the media used for filming.¹

Requests to film a motion picture or television production are reviewed and considered on a case by case basis.

Subject to the provisions of this Rule, it is within the discretion of the Chancellor or the president of an institution, *following consultation with campus security personnel*, to determine whether to grant the request.

VIII. Filming and Photographing University of Texas System properties

The following are examples of filming and photography guidelines and/or rules in place at the UT Austin and UT Dallas campuses. They are presented here as a general overview of the policies in effect on those campuses; each UT System campus may have its own rules and/or guidelines and the policies consulted on a case by case basis.

University of Texas at Austin Filming Guidelines¹

- Commercial photography is not allowed
- Incidental, unobtrusive non-commercial filming or photography by visitors or tourists to the campus is allowed
- An amateur film or photograph made on campus could be posted on a personal web site or page such as a Facebook page, but may not be used for any direct commercial purposes
- A non-commercial film or photograph made on campus may be posted on a video sharing site such as Youtube, but may not be used for any commercial purpose

University of Texas at Dallas Photography Guidelines²

- The University of Texas at Dallas requires fully executed Talent Release Forms before using a person's likeness in photos, video, CD-ROMs, websites, remarks and written work
- In order to protect the privacy and safety of UT Dallas students, staff and faculty and guard the reputation of our University, no unauthorized commercial video or photography is permitted on UT Dallas premises
- Standard exceptions to this policy apply to gatherings or events, e.g., ceremonies and athletic events, wherein there is no reasonable expectation of privacy

¹ The University of Texas at Austin University Communications Filming Guidelines

² University of Texas at Dallas Office of Communications

IX. Case Law

American Civil Liberties Union of Illinois v. Alvarez, F.3d, 2012 WL 1592618 (7th Cir. 2012)

- By Illinois statute it is a felony to audio record a conversation unless all parties consent
- As a result, the ACLU postponed its "Chicago police accountability program" for fear that members would be arrested while recording police as they performed their duties
- Subsequently, the ACLU filed suit against Illinois States Attorney Anita Alvarez alleging a violation of First Amendment rights
- The 7th Circuit Court of Appeals held that "Audio recording is entitled to First Amendment protection"

Buehler v. City of Austin/Austin Police Department et al A-13-CV-1100 ML

- Buehler was arrested on January 1, 2012 by Austin police officers when he attempted to videotape them arresting an individual for DWI
- Buehler filed suit alleging violations of his First, Fourth and Fourteenth Amendment rights
- U.S. District Court for the Western District of Texas found that private citizens have the right to record officers in public places as they perform their official duties
- Case has not been appealed by the city as of the date of this bulletin

Fordyce v. City of Seattle, 840 F. Supp. 784, 788 (W.D. Wash. 1993)

- Fordyce alleged interference by City of Seattle police officers in his attempt to videotape a public protest march
- According to the suit, officers were "not pleased" with his actions and attempted to dissuade Fordyce from recording
- Later in the day, Fordyce was arrested for violating a Washington State privacy statute which forbids recording private conversations without consent of all participants
- On motion of the prosecuting attorney, the charges against Fordyce were dismissed
- Subsequently, Fordyce brought a civil rights suit against the City of Seattle and eight police officers for interfering with his First Amendment right to gather news
- 9th Circuit Court of Appeals recognized a "First Amendment right to film matters of public interest"

Gericke v. Begin, 2014 WL 2142519, (1st Cir. 2014)

- Gericke was traveling with a friend in Weare, New Hampshire when police pulled over her friend's car.
- Gericke began filming the encounter with her camera and informed the officer that she was doing so
- Other officers on scene arrested her and charged her with unlawful interception of oral communications and seized her camera
- 1st U.S. Court of Appeals ruled that a First Amendment right extends to when the police stop a vehicle to question the driver.
- Ruled that Gericke "was exercising a clearly established First Amendment right when she attempted to film the traffic stop in the absence of a police order to stop filming or leave the area"
- *This is an important case as "it suggests that police can restrict individuals filming law enforcement while performing law enforcement duties if a reasonable officer would believe safety is at risk"*³

Gilles v. Davis, 427 F.3d 197, 203 (3rd Cir. 2005)

- Gilles, a member of "Campus Ministry" and a "self-styled campus evangelist, began preaching on the campus of Indiana University of Pennsylvania. Timothy Petit, another member of Campus Ministry, recorded the event with a video camera
- A crowd of 75-100 students gathered and became animated in response to Gilles' preaching
- Campus police arrived and reported that a "near riot was taking place" and arrested Gilles for disorderly conduct and other charges to include a violation of Pennsylvania's Wiretap Act as he had recorded the incident using a hidden Dictaphone
- Petit was arrested for disorderly conduct, resisting arrest and failure of disorderly persons to disperse; police also seized his video camera
- The court suggested that "videotaping or photographing the police in the performance of their duties on public property may be a protected activity"
- The appellate court also noted that "generally, photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection"

³ Mass.Gov Legal Update June 10, 2014

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

- Glik, while walking in Boston Common, observed three Boston police officers making an arrest. Due to his concern that they were using excessive force, he filmed the encounter on his cellphone
- Although Glik was approximately 10' away and not interfering with the arrest, one of the officers told him to cease recording; when the officer found that the video included audio, he arrested Glik for a violation of the Massachusetts wiretapping law and his cellphone and computer flash drive seized as evidence
- The ACLU represented Glik in a civil rights lawsuit against the officers and the city alleging violations of Glik's First and Fourth Amendment rights
- Court held that video recording an arrest in a public place constituted an exercise of clearly established First Amendment right
- Court held that the right to film police has limitations
 - The exercise of First Amendment rights is subject to reasonable time, place, and manner restrictions
- The court also allowed the lawsuit alleging a Fourth Amendment violation of wrongful arrest and a First Amendment violation to proceed in the trial court
- 1st Circuit Court of Appeals ruled the three Boston police officers were not immune from liability
- City of Boston required to pay Glik \$170,000 for his damages and legal fees

Mannie Garcia v. Montgomery County, Md. 8:12-cv-03592-JFM

- Garcia, a professional photographer, observed police arresting two men; concerned that the officers were using excessive force he began recording the encounter
- Officers became upset when Garcia would not cease recording and placed him under arrest for disorderly conduct and a breach of the public peace
- Original trial court found Garcia not guilty; Garcia then filed a Civil Rights suit against the officers
- In March, 2014 the U.S. Department of Justice filed a "Statement of Interest" and maintained that the right of individuals to photograph police comes under the First, Fourth and Fourteenth Amendment to the U.S. Constitution
- DOJ's statement further maintains that not only do individuals have a First Amendment right to record officers publicly doing their duties, they also have Fourth and Fourteenth Amendment rights protecting them from having those recordings seized without a warrant or due process⁴

⁴ U.S. Department of Justice, March 4, 2013

Robinson v. Fetterman, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005)

- Believing officers were conducting unsafe roadside vehicle inspections, Robinson obtained permission from a private property owner to videotape officers from that property
- Officers approached Robinson and asked him to stop videotaping; when he refused, he was arrested and his video camera seized. Robinson was convicted of harassment by a local judge
- On appeal, the U.S. District Court for the Eastern District of Pennsylvania overturned Robinson's conviction and ruled that there is a free speech right to film police officers in the performance of their public duties
- The Pennsylvania State Police was ordered to pay \$35,000 in compensatory damages and the three arresting officers to each pay Robinson \$2,000 in punitive damages

Scott Edward Berrett v. The State of Texas 01-02-01210-CR (2004)

- Defendant Berrett was stopped for a traffic violation, became belligerent, irate, uncooperative with the officer and began videotaping the encounter
- Berrett refused to sign the citation and the officer placed Berrett under arrest. When told to place his arm behind his back Berrett refused and continued to film the encounter in a manner that precluded his arrest
- The original trial court found Berrett guilty of interfering
- On appeal, Berrett contended that his refusal to place his hand behind his back was not voluntary, but was instead an omission to act for which he could not be held criminally liable; furthermore, that his actions were "mere speech" which is a defense to prosecution
- Appeals Court found that the defendant's actions in repeatedly pulling away from the officer and filming the encounter in such a way as to interfere with the arrest were more than "mere speech"

Sharp v. Baltimore City Police Department, D. Md., No. 1:11-cv-02888

- Sharp had his cellphone seized by City of Baltimore police officers after he filmed the officers making an arrest
- ACLU filed a lawsuit alleging a violation of Sharp's First Amendment rights
- City settled: monetary settlement of \$25,000 to Mr. Sharp, payment of Sharp's legal fees of \$220,000, a formal written apology from the police commissioner and a new departmental policy regarding expectations of city police officers being recorded

Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000)

- Smith filed suit against the City of Cumming, Georgia alleging violation of First Amendment rights due to harassment and a claim that Smith had been prevented from videotaping police actions
- 11th Circuit Court recognized “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph police conduct”

Willie E. King v. The City of Indianapolis, Jonathan M. Lawlis, Robert K. McCauley, Brad Alford, Michael B. Wright and David Miller, 1:11-cv-01727

- King used his cellphone to videotape police officers arresting another man; officers stopped him from recording and seized his cellphone
- King claimed the city and the officers violated his First, Fourth and 14th amendment rights and filed a federal civil rights case against the city of Indianapolis and the officers involved
- Court affirmed the right of citizens to observe and record the actions of police officers
- Settlement awarded King \$200,000 and required the police chief to issue a legal bulletin explaining that citizens have the right to record police as long as they maintain a safe and reasonable distance, do not interfere with the officers' work, and do not pose a danger



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