



July 20, 2012

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Chief Henry Trabert
Aberdeen Police Department
60 N. Parke Street
Aberdeen, MD 21001

Dear Chief Trabert:

We write on behalf of the American Civil Liberties Union of Maryland, to address an important constitutional issue confronting police departments today: the right of private citizens to make audiovisual recordings of public police activity. In order for us to gain a better sense of current policies and practices among Maryland police departments, we are surveying departments throughout the state, and as part of that survey, we ask that you provide us with a copy of your policy and all accompanying training materials regarding the rights of citizens to record police activity.¹

Due to the prevalence of cell phone cameras, misunderstandings between police and citizen journalists have arisen with increasing frequency in recent years, and the ACLU is often contacted by citizens alleging violation of their rights to record official conduct. As a result, we have been involved in legal challenges over the issue, and recently have benefitted from input by the United States Department of Justice,² allowing us to develop considerable expertise in the area. Thus, beyond our collection of information about current police policies, it is our hope that by providing examples and sharing information about best practices with law enforcement officials, we can assist police in protecting the rights of citizens as well as public safety, and establish Maryland as a national leader in this area of constitutional law.

¹Please consider this a formal request under the Maryland Public Information Act, Md. Code Ann., State Gov't Art., §§ 10-611 to 628. If your department does not yet have a policy specifically addressing this issue, please let us know that. In that instance, you might consider using the enclosed model policy as a guide as you develop your own.

²As is discussed at greater length below, the Department of Justice (DOJ) intervened in a pending ACLU lawsuit against the Baltimore City Police Department in which a Maryland man is challenging police erasure of his cell phone videos after he recorded officers violently arresting his friend. See *infra* p. 3.

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The Constitution Protects the Right to Record

Preserving information about government officials in a medium that can be easily distributed, such as an audiovisual recording, “serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.” *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). Although no Maryland law limits the rights of citizens to peaceably record and disseminate video of public encounters between police officers and private citizens, there has in the past been a misunderstanding in some quarters that such recording is prohibited under the state’s Wiretap Act, Md. Code Ann., CJ §§ 10-402(a)(1)-(3).

This misunderstanding was challenged by the ACLU in 2010, when the Maryland State Police and Harford County State’s Attorney charged motorcyclist Anthony Graber with illegal wiretapping after he recorded his own encounter with a state trooper and posted the recording on YouTube. Mr. Graber was recording his motorcycle ride with a camera mounted on his helmet, when an unmarked car blocked him at a highway exit and a gun-wielding plainclothes trooper exited the vehicle to give him a speeding ticket.³ Because Mr. Graber failed to turn off his camera immediately and later posted video online showing the trooper’s conduct, police and Harford prosecutors charged him with three counts of felony wiretap violations.

In response to a legislator’s inquiry related to the Graber prosecution, the Maryland Attorney General⁴ issued an opinion on the propriety of such charges -- rejecting the notion that the Maryland Wiretap Act bars citizen recording of police officers interacting with the public. The Attorney General noted that because “statements that a person knowingly exposes to the public are not made with a reasonable expectation of privacy,” recording of those communications is not barred under Maryland or federal wiretap laws. 85 Opinions of the Attorney General 225, 233 (*quoting Malpas v. State*, 695 A.2d 588 (1997)) (internal quotations omitted). The Attorney General further advised that, while no Maryland appellate court had yet directly ruled on the issue, the most likely outcome in such a case would be a finding that police encounters with individuals in public are *not* private, and therefore not covered under the State Wiretap Act. *supra* n. 3 at 10-11. The Attorney General’s prediction proved correct shortly thereafter, when the Harford County Circuit Court dismissed all charges against Mr. Graber prior to trial, stating that it could not “by any stretch, conclude that the Troopers had any reasonable expectation of privacy in their conversation with

³<http://www.youtube.com/watch?v=RK5bMSyJCsg>.

⁴Advice Letter from Robert N. McDonald, Chief Counsel, Opinions and Advice, Md. Office of the Attorney General, to the Hon. Samuel I. Rosenberg (July 7, 2010) (available at http://www.oag.state.md.us/Topics/WIRETAP_ACT_ROSENBERG.pdf). Notably, no appellate court anywhere in the United States has held that police officers have a reasonable expectation of privacy in their public, on-the-job communications.

[Mr. Graber] which society would be prepared to recognize as reasonable.” *State v. Graber*, 2010 Md. Cir. Ct. LEXIS 7, 19 (Md. Cir. Ct.).⁵

A federal appellate court in Massachusetts reached a similar outcome several months later in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), an ACLU case in which Boston attorney Simon Glik was wrongly prosecuted for recording a police incident on his cell phone camera. After the criminal charges against him were dismissed, Mr. Glik filed a lawsuit against the police and the City of Boston. The First Circuit, in finding that arresting officers were not protected by qualified immunity, noted that Mr. Glik had been “exercising clearly-established First Amendment rights in filming the officers in a public space, and that his clearly-established Fourth Amendment rights were violated by his arrest without probable cause.” *Id.* at 79. That lawsuit ended in a \$170,000 settlement in March of this year.⁶

Only two months after the *Glik* settlement, the Seventh Circuit issued an opinion in another ACLU case, reaffirming the constitutional right to make audiovisual recordings of public police activity. In *ACLU v. Alvarez*, the ACLU is challenging an Illinois statute that severely restricts the right of citizens to record police performing public duties, making such conduct without the consent of the recorded officers a Class 1 Felony. 679 F.3d 583 (7th Cir. 2012). Preliminarily enjoining the law’s enforcement, the Seventh Circuit reversed the trial court’s dismissal of the lawsuit, and remanded the case for trial. *Id.* In doing so, the court noted that the Illinois statute “restricts far more speech than necessary to protect legitimate privacy interests.” *Id.* at 586-87.

Even when criminal charges are not pursued or threatened, however, the lack of clear policies and training have led to police misunderstanding of the law and civil rights violations. In the Maryland ACLU’s *Sharp* case referenced above, an incident at the 2010 Preakness Stakes gave rise to federal court litigation and ultimately, to intervention by the United States Department of Justice. *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL (D. Md. filed August 31, 2011). There, Owings Mills resident Christopher Sharp made an audiovisual recording on his cell phone of the violent arrest of a female acquaintance by Baltimore City police officers. Police detained Mr. Sharp and badgered him into surrendering his phone, claiming they needed to download the recording as “evidence.” Instead, the officers deleted every recording stored on the phone, including many of Mr. Sharp’s young son. Recording of the arrest taken by another witness⁷ shows police ordering the witness to turn his camera off – misstating that Maryland law prohibits recording of police officers in public. The Baltimore City Police Department later conceded that at the time of this incident the Department had no policy addressing citizen rights to record officer conduct on the job.

⁵For web access to the full opinion, see http://www.righttorecord.org/wp-content/uploads/2011/07/Court_Opinion_092710.pdf.

⁶See http://www.aclum.org/news_3.27.12.

⁷See <http://www.youtube.com/watch?v=nWF3Ddr7vdc>.

DOJ Guidance Offers a Roadmap for Sound Policy Development

In a nod to the national importance of the constitutional issues at stake in the *Sharp* case, the Civil Rights Division of the U.S. Department of Justice intervened in the matter early in 2012 to express the federal government's view that citizens have a constitutional right to record police officers publicly performing their official duties. After its initial "Statement of Interest" in the case,⁸ the DOJ followed up with a detailed letter to the parties and the court offering guidance on important elements police departments should include in their policies and training:

- (1) affirmatively set forth the First Amendment right to record police activity;
- (2) describe the range of prohibited police responses to individuals observing or recording the police;
- (3) clearly describe when an individual's actions amount to interference with police duties;
- (4) provide clear guidance on the necessity of supervisory review of any proposed action to be taken by officers against an individual who is recording police;
- (5) describe the narrow circumstances under which it is permissible for officers to seize recordings and recording devices;
- (6) indicate that no higher burden be placed on individuals exercising their right to record police activity than that placed on members of the press.⁹

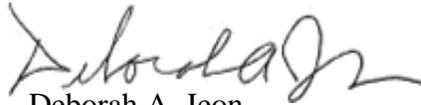
Although this guidance was issued in the *Sharp* case, it was intended to assist police departments more generally in developing appropriate policies and training programs with respect to the public's right to record. Indeed, we think the DOJ's selection of a Maryland case in which to make its first-ever statement on this issue gives our state an extraordinary opportunity to become a national leader in recognizing and respecting the right of citizens to record official police conduct. We hope you agree, and will seize this opportunity to review and, if necessary, modify your department's internal policies and training on the rights of citizens to record public police activity. By working together proactively in this way, and taking heed of the DOJ guidance, we believe we can make Maryland's law enforcement officers a model for others to follow.

⁸See http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf.

⁹Letter from Jonathan M. Smith, Chief, Special Litigation Section, Civil Rights Div., DOJ, to Mark H. Grimes, Office of Legal Affairs, Balt. Police Dep't, and Mary E. Borja, Wiley Rein LLP (May 14, 2012) (available at http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf).

Thank you for your time and attention to this matter. We look forward to seeing your policy and training materials, and hope to have the opportunity to collaborate with your department in addressing this critical civil rights issue.

Sincerely,



Deborah A. Jeon
Legal Director



Kathryn Bendoraitis
Law Clerk