

## Glik v. Cunniffe – Videotaping Police Officers

### Description

Let's face it, police officers do not like to be recorded, especially when performing their official duties in the public arena. The fact is that officers are being recorded daily now that the general public carries recording devices in their pockets ready to record at the push of a button. This leads to clear challenges to law enforcement. We first wrote on this subject about a year ago when it was recognized that there was confusion and refusal of officers to understand the First Amendment rights of citizen's to record them. We encourage officers to understand and accept that they would be recorded and to continue to act in the professional manner they do with knowledge that there was a high probability that they were being recorded. Effective and Constitutional policing requires that departments provide guidance through policy and training to ensure that officers understand the common police practices associated in societies rights to record and law enforcements ability to seize such recordings. The foundational issue to first be learned is that to gain the trust of the public we ensure that our operations are transparent though policy, training, internal affairs investigations and now our response to videotaping. Courts across the country have only recently begun to refine the contours of the rights for citizens to record police and in recent Agreements made between The Department of Justice and multiple agencies the topic of standards applicable to this topic have been clearly defined. This article reviews the standards and encourages every department to through policies and training ensure that police officers are knowledgeable about the fundamental rights vested in the general public under the First and Fourth Amendment.

As a result of their lack of understanding, officers across the country continue to arrest individuals who openly record them, in an unobtrusive manner, performing their duties in public. As we have seen, our judicial system has not kept up with the rapid advancements in technology. As a result, sometimes it is unclear whether an officer's actions are permissible and show consideration for the individual's constitutional rights. We are seeing, however, that judges who are beginning to hear the cases regarding this topic are holding that, while not unlimited, an individual has a fundamental First Amendment right to record police officers in the performance of their duties.

A clear example is the case of Glik v. Cunniffe, et al.,<sup>[1]</sup> recently decided by the First Circuit Court of Appeals, which illustrates the reasoning and analysis of courts that find a constitutional right to openly record police officers in the performance of their public duties. The facts of the case as outlined in the decision find that on October 1, 2007, Simon Glik was walking past the Boston Common when he saw 3 police officers arresting a young man. After hearing another bystander say something like, "You are hurting him, stop," Glik thought the officers were using excessive force to effect the arrest and, standing about 10 feet away, began recording the arrest on his cell phone. After the officers had the suspect in handcuffs, one turned to Glik and said, "I think you have taken enough pictures." Glik replied, "I am recording this. I saw you punch him." An officer then approached Glik, and asked him whether he was recording audio. When Glik said that he was, the officer handcuffed him, arresting him for, among other things, violating Massachusetts' wiretapping statute. While the police booked Glik, they confiscated his phone and a computer flash drive, and held them as evidence.

As a result of his recording Glik was eventually charged with violating the wiretapping statute, disturbing the peace, and aiding the escape of a prisoner. The Commonwealth later acknowledged the lack of probable cause for the aiding the escape charge, and dropped it. The Boston Municipal Court later granted Glik's Motion To Dismiss the other charges for lack of probable cause. After the case against him was dismissed, Glik filed an internal affairs complaint with the Boston Police Department, but his complaint was not investigated, and no disciplinary action was taken against the arresting officers.

In 2010, Glik filed a § 1983 action against the officers for violation of his First and Fourth Amendment rights, as well as state law claims under the Massachusetts Civil Rights Act, and for malicious prosecution. The officers moved to dismiss Glik's claims, arguing that they were entitled to qualified immunity "because it is not well-settled that [Glik] had a constitutional right to record the officers." The trial court denied the motion, concluding that "in the First Circuit . . . this First Amendment right publicly to record the activities of police officers on public business is established." The officers then appealed.

The First Circuit explained that, in deciding questions of qualified immunity, it applies a 2-pronged analysis. It must decide: (1) whether the facts alleged or shown by the plaintiff establish a violation of a constitutional right; and (2) if so, whether the right was "clearly established" at the time of the alleged violation. With regard to the "clearly established" prong, there are 2 more parts: (1) the clarity of the law at the time of the alleged civil rights violation; and (2) whether, given the facts of a particular case, a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights. The bottom line, as the Court explained it, is whether "the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional."

On appeal, the officers disputed the clarity of the law establishing a First Amendment right to record police officers carrying out their public duties. Regarding the Fourth Amendment claims, the officers argued that, in light of Massachusetts case law interpreting the wiretap statute, a reasonable officer would have believed there was probable cause to arrest Glik, and would therefore not have understood that the arrest violated the Fourth Amendment.

The First Circuit explained that the First Amendment issue was a "fairly narrow" one: "Is there a constitutionally protected right to videotape police carrying out their duties in public. Citing basic First Amendment principles, as well as case law from other jurisdictions, the Court said the answer was "yes." The Court explained that there was no significance that this case involved a private individual, and not a news reporter, who was gathering information about a public official, such as a police officer. The Court also explained that it was significant that the information was gathered in a "peaceful" manner, as "the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions."

With regard to whether the right to film was "clearly established," the court noted that the issue does not require case law directly on point as the issue "speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area." Ultimately, the Court explained that, "though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Thus, the trial court did not err in denying qualified immunity to the officers with regard to the First Amendment claim.

Once the Court completed its analysis of the application of First Amendment rights they analyzed whether the officers violated the Fourth Amendment. The Fourth Amendment requires that police

ground arrests in probable cause. The Massachusetts wiretap statute makes it illegal to willfully intercept any wire or oral communication. According to Massachusetts law, “intercept” means secretly hearing or recording the contents of a communication of another without permission of all parties to the communication. The relevant question, then, was whether Glik “secretly” recorded the officers at the Boston Common. The Massachusetts Supreme Judicial Court has held that a recording is “secret” unless the person being recorded has “actual knowledge” of the fact of recording.

As the Court observed, Glik’s complaint alleged that he “openly record[ed] the police officers” with his cell phone, and also that the officers “admitted Mr. Glik was publicly and openly recording them.” Therefore, on its face, such conduct falls outside the type of secret recording that the wiretap statute targets. Further, as the Court explained, not only does precedent indicate that using a recording device in “plain sight” constitute enough proof of actual knowledge of the fact of recording, but here the police officers made clear through their actions that they knew Glik was recording them. Specifically, after they handcuffed the initial suspect, one of the officers approached Glik and told him, “I think you have taken enough pictures.” While the officers argued that Glik’s use of a cell phone was not sufficient to put them on notice of the recording, the allegations of the complaint indicate that they were aware of Glik’s surveillance, and knew that Glik was recording them in some fashion. “Simply put, a straightforward reading of the statute and case law cannot support the suggestion that a recording made with a device known to record audio and held in plain view is ‘secret.’”

Accordingly, the Court held that, on the facts of the complaint, Glik’s recording was not “secret,” within the meaning of the Massachusetts wiretap statute. Therefore, the officers lacked probable cause to arrest Glik, meaning that he has a claim for violation of his Fourth Amendment rights.

In May 2012, the City of Boston settled the case with Glik for an amount of \$170,000.<sup>[2]</sup>

Other courts are issuing decisions along the same lines as Glik. In *American Civil Liberties Union of Illinois v. Anita Alvarez*,<sup>[3]</sup> for example, the Seventh Circuit Court of Appeals granted injunctive relief blocking the State’s Attorney’s office from applying the Illinois eavesdropping statute to individuals who audio record police officers who are performing their duties in public places and engaging in public communications that can be heard by individuals witnessing the events.

This issue of taping the officers has also expanded in the officers ability to search, seize and destroy the evidence of the recording by citizen. This requires an analysis through both First and Fourth Amendment application. In 2012 the U.S. Department of Justice interveiend in a lawsuit with the Baltimore Police Department. The matter sharp v. Baltimore City Police Department, et. al. Stemmed from allegations that officers seized, searched and delegated the contents of Sharp’s cell phone after he used it to record officers forcibly arresting his friend. Sharp also alleges that BPD maintained a policy, practice or custom of advising officers to detain citizens who record police while in the public discharge of their duties or to seize, search and delete individuals’ recordings. In a letter prepared by the DOJ to the Court and the Police Department the DOJ’s position on the basic elements of a constitutionally adequate policy on individuals’ rights to record police activity.

While we recommend that officers and supervisors review the referenced documents we provide a summary of the what should be covered in a adequate policy governing officers conduct when their activity is recorded. Department policies on the subject should:

- Identify and clarify the citizens rights pursuant to the First Amendment to record police activity and the Fourth Amendment to search, seize or delete such a recording.
- Ensure that officers understand that citizens have AA First Amendment right to record officers in the public discharge of their duties.
- Clarify that the right to record the public officials is not limited to streets and sidewalks- it includes areas where individuals have a legal right to be present, including an individual's home or business, and common area of public and private facilities and buildings.
- Instruct officers that, except under limited circumstances, officers must not search or seize a camera or recording device without a warrant.
- Advise officers not to threaten, intimidate, or otherwise discourage and individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.
- Should prohibit officers from destroying recording devices or cameras under any circumstances.
- Define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.
- Clarify that when individuals conduct is approaching a criminal offense the officer should recommend a less-intrusive location to the bystander from which they may continue to observe or record the police activity.
- Clarify clear guidance on supervisory review including calling a supervisor to the scene.
- Clarify that a supervisor should be present at the scene, if feasible, before an officer takes any significant action involving cameras or recording devices, including a warrantless search or seizure or arrest related to a recording device.
- Clarify guidelines on the limited circumstances under which it may be permissible to seize recordings and recording devices.
- Clarify that the seizure of a camera that may contain evidence of a crime is significantly different from the seizure of other evidence because such seizure implicates the First, as well as the fourth Amendment.

The recommended language sets the proper foundation for protecting your agency from allegations of First and Fourth Amendment violations. The final area to clarify is one the officer has probable cause that a camera or other recording device contains images or sounds that are evidence of criminal acts what steps do you want your officers to take to obtain a copy. Based on our research we would recommend the following steps:

- Clarify with the citizen that they recorded the police activity and that they have a save copy of that recording.
- If feasible, request a supervisor to respond and mediate obtaining the media recording.
- Provide the citizen multiple options to obtain a copy of the media recording, to include:
  - Request the citizen voluntarily provide the device or recording medium (e.g., the memory chip) to the officer or supervisor.
  - Where possible and practical, and in the presence of the officer, voluntarily transmit the images or sound via text message or electronic mail to the officers official government electronic mail account.
  - Request the citizen consent to take possession of a recording device or medium. The consent must be voluntary. A officer shall not, implicitly or explicitly, coerce consent to take possession or any recording device.

- Request the citizen to accompany the officer or supervisor to the department to copy media as quickly as possible.
- If the citizen declines to consent or voluntarily provide the device or recording medium and the officer believes that exigent circumstances exist insofar as the evidence of criminal activity will be lost absent a seizure of the device without a warrant a supervisor shall be called.
  - If warrantless seizure occurs it must be temporary restraint intended only to preserve evidence until a warrant can be obtained. *Illinois v. McArthur*, 531 U.S. 326, 334 (2001).
  - Absent exigent circumstances, officers shall obtain a search warrant before viewing media that has been seized as evidence.
  - Officers shall not, under any circumstances, erase or delete any media on the seized device.
  - Officers shall maintain media devices so that they can be returned to the owner intact with all images or recordings undisturbed.

A police department can protect itself and its officers by providing adequate policies, training and supervision regarding constitutional policing. Such training should include an extensive review of fundamental First Amendment principles and those police actions which are permissible and within the boundaries of the Constitution, and clarify for officers the current state of the law with regard to a citizen's right to tape record police officers in the performance of their duties.

1. 665 F.3d 78 (2011) [?](#)
2. The incident involving Mr. Glik is not an isolated occurrence. In 2012, the City of Boston paid \$1.4 million to Michael P. O'Brien, who filed a civil rights lawsuit after a Boston police officer knocked him to the ground, causing him to sustain brain trauma, while videotaping a traffic incident with his cell phone. In 2011, the City of Boston paid Maury Paulino \$33,000 to settle a civil rights action after Boston police officers arresting him for using his cell phone to videotape them performing their duties. [?](#)
3. 679 F.3d 583 (N.D.Ill. 2012) [?](#)

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