

TO: PERSONS CHARGED WITH VIOLATING PENNSYLVANIA'S WIRETAP STATUTE FOR VIDEO/AUDIO TAPING LAW ENFORCEMENT OFFICERS

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RE: THE LAW ON VIDEO/AUDIO TAPING LAW ENFORCEMENT OFFICERS ENGAGED IN THEIR PUBLIC DUTIES

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The law is clear that Pennsylvania's Wiretap Statute¹ and its prohibition against the interception of oral communications turns on whether the speaker had a specific expectation of privacy that the contents of the communication in question would not be intercepted, and whether such an expectation was justifiable under the circumstances.² The Courts of this Commonwealth have ruled that Pennsylvania's Wiretap Statute was designed not to protect parties from any and all secretive or surreptitious recordings,³ but only from those recordings which

¹ 18 Pa. C.S. §5703

² Agnew v. Dupler, 717 A.2d 519, 523-24 (Pa. 1998) (stating that implicit in any discussion of the expectation that a communication would not be unlawfully recorded is a discussion of the right to privacy, and that a communication or conversation amounts to a protected oral communication under the Pennsylvania Wiretap Act only where the speaker possessed a reasonable expectation of privacy in that conversation).

³ Note that while a sister state Supreme Court in Commonwealth v. Hyde, 750 N.E.2d. 963, 967 n. 5 (Ma. 2001) determined that the language of Massachusetts' wiretapping statute meant to be a strict prohibition against ALL secret recordings, that Court acknowledged that the majority of state wiretapping statutes protect only against recordings where the words are spoken with a reasonable expectation of privacy. The Pennsylvania Supreme Court has, in fact, determined that language of this state's wiretapping statute falls into the latter category and is implicated (and therefore charges are appropriate) only where there is a reasonable expectation of privacy. Agnew, 717 A.2d. at 523 (stating that "one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy"). Furthermore, the Massachusetts Supreme Court specifically noted that even under the more restrictive standard of the Massachusetts wiretap statute, no violation could be found where the taper "informed the police of his intention to tape record the encounter, **OR** even held the tape recorder in plain view." Hyde, 750 N.E.2d at 971 (emphasis added).

violated a person's reasonable expectation of privacy.⁴ Therefore, in order to establish a prime facie case under the Wiretap Statute, the Commonwealth or claimant must show four elements: 1) that a person engaged in an oral communication; 2) that there was an expectation that the communication would not be intercepted; 3) the expectation of privacy was justifiable under circumstances; and 4) the accused attempted or successfully intercepted the communication, or encouraged another to do so.⁵

In the case of somebody charged under the Wiretap Statute for intercepting the oral communications of a police officer during the course of the officer's public duties, the proper inquiry would be whether the officer in those circumstances had a reasonable expectation of privacy. Countless state and federal courts have held that an officer discharging his or her duties in public does NOT have a reasonable expectation of privacy in those duties.⁶

⁴ Id. citing to the reasonable expectation of privacy standard set forth in Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988) (determining whether a party had a reasonable expectation of privacy requires the reviewing court to determine; 1) did the person manifest or exhibit an expectation of privacy, and; 2) is that expectation of privacy one that society is prepared to recognize as reasonable.)

⁵ Agnew, 717 A.2d. at 523. Additionally, any attempt by a party to rely on Commonwealth v. McIvor, 670 A.2d 697, 703-04 (Pa. Super. 1996), for the proposition that all that is needed for a violation of the Wiretap Statute is a expectation that the conversation in question will not be intercepted is reliance misplaced. "[T]he Pennsylvania Supreme Court clearly stated after McIvor that 'it is not possible to have an expectation of non-interception absent an expectation of privacy.'" Schwartz v. Dana, 196 F.R.D. 275, 283 n. 7 (E.D. Pa. 2000), quoting Agnew, 717 A.2d. at 523. "The Agnew decision's interpretation of the Wiretap Act is controlling." Schwartz, 196 F.R.D. at 283 n. 7.

⁶ See e.g., Kelly v. Borough of Carlise, 622 F.3d 248 (3d Cir. 2010) (holding that the law was clearly established in Pennsylvania that an "oral communication" under the Wiretap Act only covered communications in which the speaker had a reasonable expectation of privacy and that police officers do not have a reasonable expectation of privacy in their interaction with suspect and members of the public); Commonwealth of Pennsylvania v. Henlen, 564 A.2d 905, 907 (Pa. 1989) (an investigating police officer furtively taped by the suspect during an interrogation had no expectation of privacy because what occurred between the two might later be used in court anyway); Agnew, 717 A.2d. at 524 (on-duty police officers had no expectation of privacy in their conversations in the presence of other officers); Gross v. Taylor, 1997 WL 535872 *7 (E.D. Pa. 1997) (police officers on duty and in their patrol cars had no reasonable expectation of privacy); Johnson v. Hawe, 388 F.3d 676, 681 (9th Cir. 2004) (holding that the taping of a "police officer in the performance of an official function on public thoroughfare" cannot be criminalized because of the lack of an expectation of privacy); State v. Flora, 845 P.2d 1355, 1358 (Wn. App. 1992) (finding that police officers making a public arrest had no

Furthermore, the use of Pennsylvania's Wiretap Statute to prosecute individuals recording the public duties of police officers or other public officials—without interfering or compromising the duties of those official—infringes upon conduct protected by the First Amendment to the U.S. Constitution.⁷ While such

expectation of privacy in the conversations that occurred during the arrest and furthermore, the court refused “to transform the [wiretap statute] into a sword available for use against individuals by public officers acting in their official capacity”); Phillips v. Township of Cumberland, 2007 WL 2688718 *1 (W.D. Pa. 2007) (holding that officers or citizens had no reasonable expectation of privacy in or near a police patrol car, etc., because a patrol car is not like a phone both where “a person should reasonably expect that his conversation would not be monitored”); Hornberger v. American Broadcast Companies, Inc., 799 A.2d 566, 594 (D.N.J. App. Div. 2002) (refusing to find journalists had violated the state wiretap act by intentionally set out to film a racial profiling stop and search, with the Court specifically holding that many “Courts have held that police officers do NOT have a reasonable expectation of privacy when they are interacting with suspects) (emphasis added); (Angel v. Williams, 12 F.3d 786, 79 (8th Cir. 1993) (holding as a matter of law that it was objectively unreasonable for prison guards to have any expectation of privacy while engaged in their duties at the jail).

⁷ See e.g., Glik v. Cunniffe, et al., No, 10-1764, *9-12 (1st Cir. August 26, 2011) (holding the recording of government officials, including police officers, who are engaged in performing their public duties serves a cardinal First Amendment interest and holding that the fact the filming was done by a private individual and not a reporter is a distinction without a difference since “the public’s right of access to information is coextensive with that of the press.”); Giles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (holding that videotaping and photographing the police in the performance of their public duties enjoys a degree of First Amendment protection); Smith v. City of Cumming, 212F.3d 1332, 1333 (11th Cir. 2000) (holding that 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” which includes the right to photograph or videotape police conduct); Robinson v. Fettermen, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005) (finding that “[v]ideotaping is a legitimate means of gather information for public dissemination and can often provide cogent evidence...there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants” in a public place); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (holding that the First Amendment protects the right to record or film matters of public interest on a public street); Connell v. Town of Hudson, 733 F.Supp. 465, 468-71 (D.N.H. 1990) (First Amendment protects the right to photograph police at a crime scene); Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634, 638 (D. Minn. 1972) (same); Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (First Amendment protects the right to film public meetings); Lambert v. Polk County, Iowa, 723

recordings might, in fact, be subject to reasonable time, place, and manner restrictions so as not to interfere with legitimate police activities, an application of 18 Pa. C.S. §5703 that bans all recording of public police activities is clearly not such a constitutionally permissible time, place and manner restriction.

F.Supp. 128, 133 (S.D. Iowa 1989) (a non-media photographer had the First Amendment right to record or photograph an event occurring in public).