



April 19, 2017

Providence City Council
City Hall, Room 310
25 Dorrance Street
Providence, RI 02903

Re: Proposed Community Safety Act – SUPPORT

Dear Providence City Council members:

On behalf of the Electronic Frontier Foundation (“EFF”), I write to urge the Providence City Council (the “Council”) to adopt the proposed Community Safety Act (the “Act” or “CSA”). The Act would do a great deal to advance civil liberties and restore trust in law enforcement by placing sensible limits on agencies to protect constitutional rights.

EFF is a nonprofit civil liberties organization that works to protect free speech and privacy rights in the digital world. EFF was founded in 1990, is headquartered in San Francisco, and is supported by over 33,000 members.

1. Why the Council should adopt the Act.

New technology has the power to improve our lives. It can make our government more accountable and efficient. But technology can also intrude on privacy, chill free speech, degrade democracy, and unfairly burden vulnerable communities, including low-income communities and those long subject to racial discrimination.

In order to safeguard constitutional rights—including First Amendment rights to speech and association, Fourth Amendment rights to be free from unreasonable searches and seizures, and Fourteenth Amendment rights to equal protection under law—use of powerful new technologies by local law enforcement agencies must be rigorously overseen by courts and local policymakers. Unfortunately, secrecy surrounding the use of often military-grade surveillance technology has precluded effective oversight for over a decade. In that context, robust restrictions on police surveillance and



searches are not only entirely appropriate, but necessary and even long overdue.

The mounting need for transparency and oversight grows especially compelling in the context of police programs that cast individuals with presumptive suspicion. Despite Due Process and the presumption of innocence it implies, gang injunctions have imposed sometimes onerous restrictions on individuals without an opportunity to prove their innocence. The misuse of intelligence information absent effective oversight is predictable, and entirely preventable.

Not only have policymakers enjoyed little transparency into local police activities, but across the country, police have retaliated against residents who have threatened their political position by recording videos that have shone light on longstanding abuses. By buttressing the constitutional right to record and observe police, and protecting grassroots journalists from retaliation for their documentation of police activities, local legislation can support transparency and create opportunities for policymakers inclined to conduct more rigorous oversight.

The Act's requirements are straightforward, reasonable, and indeed, compelled by principles to which our Republic has been constitutionally committed since it was founded.

2. The Act would prohibit race from being used as a pretextual basis for searches, seizures, or surveillance.

Biases pervade our nation's criminal justice system, including that of the State of Rhode Island. Surveillance of individuals for arbitrary reasons—including on the basis of constitutionally protected characteristics such as race and gender—increasingly involves electronic platforms.

For example, police in most major cities have access to cell-site simulators engineered to monitor cell phone networks; collect content, metadata, and location data; and deny service to a device or even plant malware. These devices were used widely across the U.S. for several years without being checked or balanced by judicial warrants before they were revealed to policymakers and judges.



Video observation and recording, increasingly coupled with advanced facial recognition technology, represent a further example of electronic surveillance tools used to monitor individuals.

By prohibiting “any investigatory activity” based “in whole or in part” on race and the like, section (b) of the Act will ensure that police do not discriminate in deploying these powerful spying technologies.

3. The Act would ensure First Amendment rights to observe and record public servants.

First Amendment jurisprudence has long held that civilians enjoy an unambiguous right to observe and record police activities, so long as they do not interfere with those activities.¹ In spite of that rule, district courts have held in some recent cases that the civilian right to observe is less robust, going so far in some cases to perversely require a civilian seeking to assert that right to first declare their open hostility to police even at the risk of potential violence or retaliation.²

In the context of contemporary controversies, this erosion of long-settled First Amendment rights also threatens police accountability, which has been dramatically advanced by civilians using cell phone video and social media to document and publish evidence of abuses.

The CSA would advance both First Amendment rights, as well as police accountability, by creating an independent statutory basis for the civilian right to observe and record police activities. In particular, section (c)(2)(3) requires that “[p]olice shall not interfere with, harass, demand identification from, or otherwise intimidate members of the public making video or audio recordings of police activity in any place the individual who is recording has a legal right to be present.”

4. The Act would ensure First Amendment rights to speech and assembly, as well as Fourth Amendment rights to be free from unreasonable government scrutiny absent a basis for suspicion.

¹ See *Glik v. Cunniff*, 655 F.3d 78 (1st Cir. 2011).

² See, e.g., *Fields v. City of Philadelphia*, (E.D. Pa 2016), *appeal docketed*.



Across American history, law enforcement agencies including the Federal Bureau of Investigations have engaged in politicized surveillance unrelated to the legitimate promotion of public safety.³ Similar problems have plagued national security programs, whose powers have sometimes been misused by agency employees and contractors to monitor their former lovers.⁴

In that context, ensuring rights to assembly and speech guaranteed by the First Amendment requires restraining intelligence collection and ensuring its relevance to legitimate criminal investigations. Section (f)(1) does so, by requiring that “Providence Police Department shall not engage in targeted electronic surveillance to collect or retain information about the lawful activities of targeted individuals or groups *without reasonable suspicion that such activities relate to criminal activity or a judicial warrant specific to the time, place, and target of such surveillance.*” (emphasis added)

Among other things, this would bar police from directing automated social media monitoring against advocacy organizations absent individualized reasonable suspicion of crime.

5. The Act’s requirements of gang databases support Due Process.

In other parts of the country, police have constructed gang databases in order to track individuals suspected of involvement with organized crime. Such databases, however, have often entailed casting presumptive suspicion on individuals based on association, or even worse, race.

In California, for instance, state auditors discovered that the state’s program received “no state oversight” and operated “without transparency or meaningful opportunities for public input,”⁵ prompting the state legislature

³ See Church Committee, *The FBI, COINTELPRO, And Martin Luther King, Jr.: Final Report Of The Select Committee To Study Governmental Operations With Respect to Intelligence Activities* (2011).

⁴ See See Andrea Peterson, *LOVEINT: When NSA officers use their spying power on love interests*, Washington Post (Aug. 24, 2013), available at <https://www.washingtonpost.com/news/the-switch/wp/2013/08/24/loveint-when-nsa-officers-use-their-spying-power-on-love-interests>.

⁵ See California State Auditor, *The CalGang Criminal Intelligence System* (August 2016), available at <https://www.eff.org/document/calgang-audit>.



to intervene by passing a new law providing notice of inclusion and an opportunity to contest it.⁶

The Act includes similar provisions. For example, Section (F)(8) imposes crucial requirements protecting the Due Process rights of individuals by requiring that the criteria used to identify gang affiliations be made public, and that they exclude constitutionally protected factors including race and association.

Section (F)(9) similarly protects Due Process by allowing individuals an opportunity to inquire whether their names have been included in any gang database, and requiring law enforcement to answer within 10 business days. Section (F)(10) creates a process through which an individual can challenge their inclusion on a gang database, while (F)(13) allows a route to removal for people who have “no convictions within a two-year period after their name has been placed on the ‘gang list,’ and no new evidence meeting the criteria for inclusion on the ‘gang list’ has been found....”

6. The Act includes mechanisms enabling self-enforcement to ensure its effectiveness.

Finally, the Act would empower members of the public to bring a private cause of action to enforce the Act through a court injunction, as well as compensatory and punitive damages to remedy abuses and deter them. EFF strongly supports these critical enforcement tools in section (I)(2), as well as the provision for attorney’s fees in section (I)(3).

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Public safety requires trust between government and the community served. Reasonable limits on law enforcement agencies help enable that trust, while also defending the rights and liberties articulated in the Constitution and Bill of Rights. Accordingly, EFF urges the Council to adopt the proposed Community Safety Act.

⁶ See Ali Winston, *California’s gang database gets less secretive, but problems linger*, *Reveal* (Sep. 30, 2016), available at <https://www.revealnews.org/blog/californias-gang-database-gets-less-secretive-but-problems-linger/>.



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

If you have any questions, please do not hesitate to call me at (415) 436-9333, extension 171, or to email me at shahid@eff.org.

Sincerely,

Shahid Buttar
Director of Grassroots Advocacy
Electronic Frontier Foundation