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September 1, 2022

VIA EMAIL

San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102
Email: Board.of.Supervisors@sfgov.org

Re: The Bar Association of San Francisco's Opposition to the San Francisco Police Department's Live-Surveillance and Historical Review Surveillance Cameras

Dear Members of the Board of Supervisors:

The Bar Association of San Francisco (BASF), representing nearly 8,000 members, writes to express its opposition to the San Francisco Police Department's (SFPD) Non-City Entity Surveillance Cameras Policy (Policy), given the serious Fourth and First Amendment implications of the Policy. BASF is the largest legal organization in Northern California dedicated to criminal justice reform. In 2015, BASF established the Criminal Justice Task Force (CJTF), consisting of judges, prosecutors, public defenders, law enforcement (police and sheriff), private counsel, civil liberties advocates, and others, to advance systemic criminal justice reforms in San Francisco. BASF has a long history of undertaking legal research, supporting best practices and innovative ideas in the area of criminal justice reform, and has been deeply involved with modernizing and improving policing by SFPD.

We encourage and strongly support effective law enforcement and agree that public safety is a serious concern to San Franciscans, and we understand why SFPD might view increased surveillance as part of the solution to the current challenges in San Francisco. BASF believes that the better approach to public safety challenges is improved policing services, not the sort of mass surveillance proposed here. BASF and CJTF have been proud to assist SFPD in modernizing its policies and practices over the course of the past years, following the recommendations made by the U.S. Department of Justice in 2016. Notably, none of those federally-recommended reforms included a recommendation of mass surveillance.

Our legal research further makes clear that the proposed changes to Administrative Code 19B may give rise to litigation and jeopardize criminal



proceedings in certain cases. It does not appear to be unduly burdensome to require SFPD to seek an expedited warrant should it become necessary to gain access to desired camera footage. Failure to seek a warrant will invite civil lawsuits against San Francisco and, if footage is gathered as proposed, the evidence will likely be subject to suppression litigation in a criminal proceeding, jeopardizing any prosecution on which it relies. A warrant should be necessary to set forth the need for an extraordinary measure like live surveillance. Legal process and the approval of a judicial officer is readily available to law enforcement and has always protected the rights of San Franciscans as well as the integrity of criminal prosecutions.

Apart from these concerns, it is not clear the Policy will result in greater public safety given the absence of any evidence or data suggesting that SFPD needs radically expanded surveillance capabilities to do its job. Law enforcement agencies in this country have always been capable of ensuring public safety while also respecting Americans' civil liberties and we see no reason for a departure from traditional techniques. Should limited and exigent circumstances so require, the SFPD should seek a warrant to protect itself, the investigation, and the citizens of this City for the reasons set out above. Along those lines, BASF suggests that SFPD review its General Orders on Search Warrants (DGO 5.16)¹ and the Guidelines on First Amendment Activities (DGO 8.10)² and work with the Police Commission to assure their General Orders reflect the most recent legal decisions implicating the Fourth and First Amendments.

We therefore urge you to reject the proposed Policy unless it is substantially amended to respect the privacy and First Amendment rights of San Francisco's residents and visitors.

The Proposed Policy is Vague and Overreaching

The proposed Policy encroaches on the rights of San Franciscans to all of their daily activities, whether to demonstrate in public, organize to do so, or visit their doctor, meet with a friend whether downtown or near public housing, attend school, or earn a paycheck, without fear of police surveillance. The Board should not implement it and should instead refocus SFPD on traditional and modern community policing techniques that fall well within the limits of the law.

The proposed Policy would permit without a search warrant, SFPD access to "live monitoring during an exigency, or *significant events with public safety concerns*, or *investigations relating to active misdemeanor and felony violation*" for periods

¹ DGO 5.16 (Search Warrants) is currently under revision.

² DGO 8.10 (Guidelines on First Amendment Activities) has not been updated since 2008 to reflect recent case law.



up to 24 hours of privately owned cameras throughout the City.³ It also would permit, again in the absence of a warrant or subpoena, SFPD to review historical footage of privately owned cameras for purposes of “gathering evidence relevant to an investigation.” As we learned at the presentation before the Rules Committee of the Board of Supervisors, many privately owned cameras throughout San Francisco now provide highly developed technology, capable of zooming in closely enough to read the text on an individual’s cell phone, an otherwise private and constitutionally protected activity.

The proposed Policy as drafted does not impose any meaningful limitation on invasive police surveillance. It would permit SFPD to access thousands of private cameras throughout San Francisco to live-monitor anyone when there is a “Significant Event with public safety concerns” or an “investigation[] relating to active misdemeanor and felony violations.” A “Significant Event,” as the policy defines it, is any “large or high-profile event.” That captures most of San Francisco’s most celebrated gatherings, such as the Pride Parade, the Folsom Street Fair, Outside Lands, the Chinese New Year parade, the Cherry Blossom Festival in Japantown, the Ghirardelli Square Tree-Lighting Ceremony and other important opportunities for San Franciscans to exercise their First Amendment rights, whether demonstrating in support of Black Lives Matter, the right of a woman to choose, or to engage in labor action against an employer. There is no meaningful or clear limitation on the over-inclusive language, and as such, the proposed Policy is vulnerable to Constitutional challenge. Even a craft brew festival or a Giant’s game qualifies as a “high-profile event,” as written, subjecting large swaths of San Francisco to invasive police surveillance with no commensurate public safety justification.

The proposed Policy’s “investigation” prong permits even broader surveillance, posing especially problematic complications should criminal prosecutions result from the surveillance. Misdemeanor violations include trespassing, vandalism, fare evasion, petty theft, and many other low-level crimes. Those occur with regularity nearly everywhere, and investigations can remain open for years. Moreover, the time limits the proposed Policy imposes are illusory. It provides that “temporary live monitoring will cease ... within 24 hours after” SFPD gains access to a camera, but it fails to limit the number of times access can be renewed.⁴ The proposed language is neither narrow nor targeted, as would be required for any warrant application.

³ Presentation by SFPD to San Francisco Board of Supervisors Rules Committee, Presentation dated July 11, 2022 (Emphasis added.)

⁴ San Francisco Administrative Code § 19B.7(a)(2) provides that “surveillance technology” must “cease ... within seven days.” However, that limitation applies only to cameras SFPD has accessed to address “exigent circumstances,” as defined in the Code, and the policy does not incorporate it by reference.



The proposed Policy's treatment of "historical video" is no less concerning. Under the proposed Policy, SFPD may request, obtain, and review historical video footage "for purposes of gathering evidence relevant to a criminal investigation." SFPD may then keep that footage for two years, or, if it is part of an "ongoing investigation," indefinitely. This vague language is exceedingly permissive. Setting aside that content from nearly any camera in San Francisco may be "relevant to" some criminal investigation, the proposed Policy does not explain what separates "live" from "historical" footage. If SFPD reviews a video feed with a two-minute delay, is the content "live" (in which case the investigation must be relevant to an "active" criminal violation and cannot be recorded) or "historical" (in which case those conditions do not apply)? The proposed Policy does not say.

Critically, while the proposed Policy prohibits SFPD from using biometric identification and facial recognition technology, the changes sought by SFPD fail to limit, or even address, other advanced applications modern surveillance networks provide. As noted, many of the private cameras SFPD would be able to have access to have high-definition resolution, night vision, or zoom capabilities so powerful they can observe otherwise highly private and protected activity. Moreover, by linking together the thousands of cameras to which it would have access, and dumping the disparate footage into a single database, SFPD would have the power to comprehensively track any person in the city from the time she leaves her house in the morning to the moment she clicks off her reading light at night. *See, e.g., Lee Dye, Surveillance Systems Are Getting Smarter, ABC NEWS (Nov. 30, 2014, 3:20 AM) (describing eight-year-old technology that allows "multiple cameras to follow an individual as she moves through a crowd, switching seamlessly from one camera to the next as the target moves from one field of view to another," even if "the target disappears for a while and then reappears in a different area").*⁵ Whether it is a commute to work, a walk to conduct banking, a bike ride to meet a friend, or an evening stroll with a date or an intimate or sexual exchange, the Policy would give SFPD the power to weave together an unbroken chain of observation.

The proposed Policy is incomplete or misguided in other ways, too. It does not explain how a request for either live or historical footage is made, what documentation is required before a request is approved, where that documentation will be maintained, how each camera will be accessed, or whether and how access is terminated when justification for a video feed ends. It also allows SFPD to seek blanket consent from private citizens for access to their cameras, a potential path

⁵ <http://abcnews.com/Technology/surveillance-systems-smarter/story?id=27242336&singlePage=true>.



for mischief - residents might not be prepared to resist. All of these defects are likely to invite legal challenges.

The Proposed Policy Violates Residents' Privacy Rights

In addition to the problems above, the Policy's broad authorizations enabling police viewing of live and/or collect may violate the Fourth Amendment rights of San Francisco's visitors and residents, and therefore cannot serve one of the primary purposes for which the policy was intended. For the same reason, the proposed Policy may also subject San Francisco to expensive lawsuits for violating residents' First Amendment rights.

The Fourth Amendment requires that police obtain a warrant, supported by probable cause, before conducting a search. The "basic purpose" of that requirement "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). Historically, the Fourth Amendment guarded against the government's physical trespass onto private property. But "innovations in surveillance tools"—particularly those used in public spaces, like the cameras at issue here—have pushed the Supreme Court to re-conceptualize the Amendment's protections. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). Today, "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

While "no single rubric definitely resolves" which activities the Fourth Amendment safeguards, the Court has provided some "basic guideposts." *Carpenter*, 138 S. Ct. at 2214. Those ensure that the Fourth Amendment "secure[s] the privacies of life against arbitrary power" and "place[s] obstacles in the way of a too permeating police surveillance," particularly where individuals will otherwise find themselves "at the mercy of advancing technology." *Id.* (quotations and citations omitted). Government surveillance violates these principles when it transgresses "a person's expectation of privacy in his physical location and movements"—something that is most likely to occur when advancing technology permits police to surveil in a manner that previously was "difficult and costly and therefore rare[]," or to collect information that is "detailed, encyclopedic, and effortlessly compiled," *id.* at 2216, 2217, particularly when that technology enhances the senses on which police traditionally relied.

The proposed Policy does exactly that. It allows police to turn any street into a stakeout at the click of a button. Like other modes of warrantless surveillance that the Supreme Court has held violate the Fourth Amendment, commandeering thousands of cameras from a central location "is remarkably easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S. Ct. at 2218. It also allows police to "travel back in time to retrace a person's



whereabouts, subject only to the retention policies of [a camera's owner]." *Id.* "Whoever the suspect turns out to be, he [may] effectively [have] been tailed every moment of every day" so long as some camera, somewhere in San Francisco, had him in view. *Id.* The problem, moreover, will only get worse as cameras become cheaper and easier to install and operate—as they will—allowing anyone to attach one (or many) to their homes, shops, cars, and bikes.

It does not matter, for Fourth Amendment purposes, that the cameras at issue are privately owned and (mostly) capture people as they move around out in the open. Fourth Amendment protections extend to information "held by a third party," *id.* at 2217, and to "movements ... disclosed to the public at large," *id.* at 2215 (citing at *United States v. Jones*, 565 U.S. 400, 430 (2021) (opinion of Alito, J.)). Nor does it matter that surveillance cameras are hardly new technology. The issue is not the security cameras themselves, but the way the proposed Policy permits police to use them. The proposed Policy provides access to an ever-growing (and potentially limitless) network of cameras, from a central location, with no restrictions on, or even mention of, advanced software that will allow the government to track anyone, anywhere, so long as a camera has them in view. Such dragnet-style surveillance will not take a mere snapshot of a person in public. It will, over time, construct a "precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415 (opinion of Sotomayor, J.). By allowing police to track "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, [and] the gay bar," comprehensive surveillance cuts deep into the basic privacy rights San Franciscans hold dear. *Id.* (citation omitted). "[B]y making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track," the proposed policy "may alter the relationship between citizen and government in a way that is inimical to democratic society." *Id.* (quotation marks omitted).

**The Solution to San Francisco's Public Safety Challenges is
Improved Traditional and Community Policing Tactics,
Not Mass Surveillance**

Public safety can be achieved without abandoning residents' Constitutional rights in favor of unprecedented levels of surveillance. Mass surveillance does not enjoy support from experts in modern policing and runs afoul of the traditional process required by law. As proposed, there is little evidence that the proposed Policy will actually improve our community and safety but there is enormous danger that it will undermine our most basic rights. We encourage the San Francisco Board of



THE BAR ASSOCIATION OF
SAN FRANCISCO

Supervisors to put the Constitutional rights of San Francisco's residents and visitors first.

Respectfully,

Yolanda Jackson
Executive Director & General Counsel
The Bar Association of San Francisco

cc: Mayor London Breed
David Chiu, San Francisco City Attorney
Chief William Scott, San Francisco Police Department
Brooke Jenkins, San Francisco District Attorney
Manohar Raju, San Francisco Public Defender