

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

MEMORANDUM

TO: Fred P. Moosally
Acting Director
Alcoholic Beverage Regulation Administration

FROM: Wayne C. Witkowski 
Deputy Attorney General
Legal Counsel Division

DATE: June 26, 2009

SUBJECT: Can an Advisory Neighborhood Commission Videotape a
Business Establishment Licensed by the Alcoholic Beverage
Regulation Administration?
(AL-09-414)

This memorandum is in response to your memorandum of June 1, 2009 requesting this Office's views regarding whether an Advisory Neighborhood Commission (ANC) may conduct videotape surveillance of an Alcoholic Beverage Control (ABC)-licensed establishment (licensed establishment) in order to gather evidence for a protest hearing.¹ The Alcoholic Beverage Regulation Administration (ABRA) is seeking advice on this matter in order to provide guidance to the ANCs and the licensed establishments for the protection of the community, the business owners and other individuals or entities that may be affected. According to your memorandum, ABRA believes that such videotaping of licensed establishments would be permitted if the surveillance was in the public domain and was fair to the establishments, but is concerned that there may be constitutional implications of such activity by an ANC when it acts as a government entity. Specifically, you requested our views on: 1) whether videotaping by an ANC of a licensed establishment is permitted if the images are in the public domain; 2) whether ANC videotaping is permitted if it captures images of events on the private property of the licensed establishment; 3) when would ANC videotape surveillance constitute

¹ Pursuant to ABRA regulations, the Alcoholic Beverage Control Board (Board) is required to hold an adjudicatory proceeding known as a "protest hearing" whenever any objection is filed to a licensing action, (including the issuance of a new license, license renewal, transfer of a license to a new location, substantial changes in the operations of a licensed establishment, or changes in license class) for the purpose of taking evidence as to the appropriateness of the licensing action. 23 DCMR 1606.

“harassment” of the establishment; and 4) what purposes may such videotaping serve in a contested case brought before ABRA.

Conclusion

In my view, videotape surveillance of a licensed establishment by an ANC -- whether in the public domain or within the establishment’s property -- does not have any constitutional implications for the proprietor, employees or other persons being taped. However, licensed establishments may prohibit such surveillance on their private property, by banning those entering their establishments who are engaging in this activity or by banning any videotaping on the premises. Finally, there should be no prohibition against an ANC submitting such videotapes as evidence in a protest hearing if lawfully obtained and authenticated in accordance with ABRA rules and procedures.

Discussion

Based on your memorandum and our discussions with Jayme Kantor, Assistant Attorney General, of ABRA’s General Counsel’s Office, ABRA has received reports that ANC Commissioners or their designees have conducted videotape surveillance of licensed establishments to determine if they are complying with the requirements of their ABC licenses. It appears that most of the surveillance has been in the public space surrounding the establishment, although there may have been some taping on the property of particular establishments.

Preliminarily, I agree with your view that to the extent that the videotape surveillance is conducted by an ANC Commissioner or a private citizen on behalf of the ANC, the activity would be public in nature and therefore constitute state action with potential constitutional implications. However, I would note that if private individuals conduct the videotaping, not at the behest of the ANC, and subsequently provide the tapes to the ANC, the nexus between their acts as private citizens and governmental action would be difficult to establish for purposes of triggering constitutional protections. *See, e.g., U.S. v. Lima*, 424 A.2d 113, 117 (D.C. 1980), where the court explained that “[a]lthough a private individual may act unlawfully and violate the privacy of another, no constitutional violation has occurred absent government involvement in the intrusion.” This memorandum will address only actions made directly by ANC Commissioners or at their behest.

1. Videotaping in the Public Domain

In my view, an ANC’s videotape surveillance of a licensed establishment, when limited to the area in the public domain, would not trigger protections against government intrusion under the Fourth Amendment with respect to the business or other individuals whose images may be caught on tape. The Supreme Court’s decision in *Katz v. U.S.*, 389 U.S. 347 (1967), established that surveillance in the public domain triggers Fourth Amendment protection against government intrusion only when there is an expectation of privacy. In *Katz*, the defendant was convicted of illegally conveying gambling

information by telephone, based on conversations the FBI had monitored with a device attached to the outside of a public booth. The Court reasoned that even though the telephone booth was in a public place, “[o]ne who occupies it, shuts the door behind, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” *Id.* at 352. Mr. Justice Harlan, in his concurring opinion, identified the two-part test of what protection the Fourth Amendment affords in this context—“first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

Since *Katz*, courts that have considered application of the Fourth Amendment to cameras aimed at public streets or other areas frequented by a large number of people have held that the use of cameras to record activity that can be seen by the naked eye does not normally constitute a search that would implicate the Fourth Amendment on the ground that any expectation of privacy one might have in these areas is unreasonable. *See Slobogin, Symposium: Public Privacy: Camera Surveillance of Public Places and the Rights on Anonymity*, 72 Miss. L.J. 213, 236 (citing cases); *U.S. v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000), *cert. denied* 531 U.S. 1038 (2000) (defendant did not have expectation of privacy that would prevent covert video cameras on a telephone pole overlooking the outside of his residence); *McCray v. State*, 581 A.2d 45, 48 (Md. Ct. Spec. App. 1990), *cert. denied*, 322 Md. 131 (1991) (“Generally, one walking along a public sidewalk or standing in a public park cannot reasonably expect that his activity will be immune from the public eye or from observation by the police.”); *Cf. U.S. v. Knotts*, 460 U.S. 276, 281-2 (1983) (a person traveling in a vehicle on public thoroughfares has no expectation of privacy).

The video surveillance by the ANC would also not be successfully challenged on First Amendment grounds. To establish such a claim, there must be a showing that the videotaping of the licensed establishment’s activities infringes or inhibits First Amendment expression. In *Laird v. Tatum*, 408 U.S. 1 (1972), the plaintiff political activists alleged that the Department of the Army’s surveillance activities deterred them from exercising their First Amendment rights. The Court, reversing the D.C. Circuit, held that the plaintiffs lacked standing to sue because their alleged injury was too speculative, arising not from any specific action taken against them, but merely from their knowledge that the Army was engaged in surveillance activities.² Similarly in this situation, without more information establishing that the ANC use of video surveillance would somehow chill or infringe the expression of those whose images are captured, surveillance conducted regarding license compliance of a licensed establishment would not likely have First Amendment implications.

² The case did not involve the use of video surveillance. Indeed, the plaintiffs did not complain of any specific action of the Army against them or that there was evidence of illegal or unlawful surveillance activities. *Id.* at 9.

2. Videotaping on Property of Licensed Enterprise

The conclusion that surveillance in the public domain *outside* of the licensed establishments would not implicate the Fourth Amendment privacy protections extends also to surveillance *inside* the establishments. The threshold question in deciding whether the surveillance on the private property of an establishment constitutes a search for purposes of the Fourth Amendment is whether there is a reasonable expectation of privacy by the owners of the licensed establishment or other individuals whose images may be captured on tape. As the Court explained in *Katz*, “[t]he Fourth Amendment protects people, not places”, and therefore “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections.” 389 U.S. at 351.

When a business opens its doors to the public, the owners or proprietors, or even the patrons inside, do not have a reasonable expectation of privacy to trigger a Fourth Amendment claim. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (when a police officer enters a commercial area and examines it, the officer has not conducted a search). Thus, when the ANC Commissioner (or ANC agent) enters such a commercial area in the same manner as any other patron, the proprietors of the establishment are not constitutionally protected from what may be seen on the property, either by the naked eye or by the use of a video camera. *See U.S. v. Knots, supra*, 460 U.S. at 284 (nothing in the Fourth Amendment prohibits government officials from enhancing their ability to see something which is already public).

3. Harassment by ANC

You posed the question as to when such video surveillance would constitute “harassment” of the licensed establishment. Because we have not been presented with particular facts, we cannot opine on this question, which would depend on the circumstances. As discussed above, the licensed establishment does not have to permit the ANC or any patron from interfering with its business operation, and may ban an individual from videotaping on the premises. A business has the right to ban individuals from its premises, unless they have a “constitutional or statutory right to remain”. *Safeway v. Kelly*, 448 A.2d 856, 863 (D.C. 1982).³ While ABRA is authorized by statute to conduct inspections of licensed establishments without prior notification, D.C. Official Code § 25-201(c)(4) (2008 Supp.), the ANC does not have such regulatory authority and can be excluded from the premises when engaged in surveillance activities.

4. Use of Videotapes in contested cases

In my view, there would be no prohibition in admitting videotapes in a protest hearing that were obtained lawfully by an ANC. Pursuant to D.C. Official Code § 25-601 (2008

³ Unlawful entry on the private property of a business may result in civil liability, or in a situation where the intruder refuses to leave upon the demand of the proprietor, in a criminal prosecution for unlawful entry under D.C. Official Code § 22-3302 (2008 Supp.). *See Bean v. U.S.*, 709 A.2d 85, 87 (D.C. 1998); *Safeway v. Kelly, supra*, 448 A.2d at 863; *Kelly v. U.S.*, 348 A.2d 884, 886 (D.C. 1975).

Supp.), an affected ANC is an entity with standing to file a protest. At a hearing held “for the purpose of taking evidence as to the appropriateness of the licensing action” (23 DCMR 1606), the ANC, as a party, should be permitted to produce information by testimony or by video, if such technology is permitted at protest hearings for other parties, and if the tapes are deemed to be lawfully produced and properly authenticated in accordance with ABRA’s procedures.

Should you have any questions, please contact Sheila Kaplan, Senior Assistant Attorney General, Legal Counsel Division, at 724-5386, or me at 724-5524.