

ACLU TESTIMONY IN SUPPORT OF SURVEILLANCE OVERSIGHT ORDINANCE

On behalf of our over 100,000 members and activists statewide, the ACLU of Massachusetts writes in strong support of an ordinance to require surveillance oversight. We thank the City Manager, City Solicitor, Mayor, and Council for the work they have done towards the end of producing a strong ordinance, and here offer specific feedback on how to strengthen the draft ordinance the City submitted to the Council in advance of today's hearing.

A strong oversight ordinance, if enacted, will address a disturbing national trend—local police departments' increased use of surveillance equipment without appropriate checks and balances—by requiring a commonsense oversight approach. The ordinance will strengthen local democracy by engaging elected officials and members of the public in critical conversations about technology, civil rights, and civil liberties in an increasingly digital world marked by racial disparities at every level of the criminal justice system.¹

Crucially, a strong oversight ordinance is *not* prescriptive, in the sense that it will not impose an outright ban on the use of any specific technology. Rather, it would merely institute a *process* to ensure Cambridge's government functions transparently, and with the support of the majority of the people who live in the community. Similar local laws have been passed in communities across the country, and currently over 50 cities and towns nationwide, including Lawrence and Boston, Massachusetts, are considering them. Last year, the City of Somerville enacted an executive order mandating mayoral approval of and public transparency regarding surveillance technology acquisitions. Cambridge should join these communities and pass a strong ordinance requiring commonsense oversight and checks and balances.

The problem: Unchecked, secret government surveillance

Any time a government uses advanced surveillance technology, civil rights and civil liberties are put at risk.² But the use of these tools especially risks violating the rights of historically marginalized communities like people of color, immigrants, Muslims, and the poor.³ These risks are exacerbated by the presence of a federal administration that has demonstrated a commitment to a bigoted, authoritarian agenda, marked by outright hostility to immigrants, people of color, and Muslims. While Cambridge—not President Trump—is in charge of its police department, the City receives federal grant monies from the Trump administration for law enforcement activities, and also participates in information sharing programs and task force operations that involve federal agencies, including through the Metro Boston Homeland Security Region and the Boston Regional Intelligence Center.⁴ Cambridge is home to two world-class research institutions, and a vibrant and

¹ Andrew Khan and Chris Kirk, "What it's like to be Black in the criminal justice system," August 9, 2015, *Slate*. http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html.

² Neil M. Richards, "The Dangers of Surveillance," May 20, 2013, *Harvard Law Review*. <https://harvardlawreview.org/2013/05/the-dangers-of-surveillance/>.

³ Malkia Amala Cyril, "Black America's State of Surveillance," March 30, 2015, the *Progressive*. <http://progressive.org/magazine/black-america-s-state-surveillance/>.

⁴ See, for example, "Mayor Walsh Announces \$18m in Homeland Security Funding for Boston," describing the Metro Boston Homeland Security Region, which includes Cambridge. <https://www.cityofboston.gov/oldnews/Default.aspx?id=20059>.

diverse community made up of citizens and immigrants. It is therefore all the more important that the City of Cambridge makes sure it is only collecting and sharing information about people when absolutely necessary for public safety purposes.

Unfortunately, decisions regarding the acquisition and use of surveillance tools that capture sensitive information about residents and visitors are often made in secret, so that community members and officials do not have the opportunity to weigh in or provide meaningful oversight—or learn, for example, if the police intend to share surveillance data with the federal government. The lack of appropriate checks and balances in this area has enabled the expansion of unchecked surveillance throughout the United States, including in the Boston area, with often devastating consequences for core civil rights and civil liberties, particularly for oppressed peoples.⁵

The solution: Comprehensive, commonsense community oversight

A comprehensive surveillance oversight ordinance will strengthen civil rights and civil liberties for all people in Cambridge, without adversely impacting public safety. Among other things, a strong ordinance aims to achieve three primary goals: transparency, democratic oversight, and ongoing accountability.

First, it will give the public a voice in the City government’s decisions about when, how, and if to use surveillance equipment. Under the terms of a strong ordinance, the Cambridge City Council will hold a public hearing or solicit public input whenever any government entity seeks: funding for surveillance technology; to acquire or borrow surveillance technology; to use surveillance technology in a new way; and/or to implement an agreement to share surveillance data with outside entities. Members of the community will have the opportunity to testify in an open public debate about their views on these matters.

Second, in order to obtain the City Council’s approval for use or acquisition of surveillance technology, a government entity must first publicly publish a Surveillance Impact Report. The report must explain the purpose of using the surveillance equipment, how the equipment functions, and how it will be used and why. It must also detail the training that the agency will provide to the people who will use the technology, as well as disclose whether it will share the surveillance equipment or surveillance data with any other government body—and if so, with whom and under what circumstances.

Third, the requesting government entity must also publish a Surveillance Use Policy. The policy must describe the authorized and prohibited uses of the surveillance equipment, the kind of data it will collect, how the agency will use the data, and what the agency will do to protect the data. It will also describe its data retention policies, and disclose what kinds of data may inadvertently be collected and how that data will and will not be used. Additionally, if the agency seeks to share collected data, it will explain why it wishes to share that information, how it will share the data, and how it will ensure that the other entities will protect the shared information. Further, the requesting entity must also describe its oversight and auditing system, to ensure the technology and surveillance data is not misused or abused. Then the Council will decide whether or not the technology or information sharing agreement and the policy to govern them are a good fit for the City, and vote to approve or deny them. If one or both are denied, the City may not acquire or use the technology.

Finally, a strong ordinance will ensure democratic accountability over the surveillance activities of City agencies. Any government entity using surveillance equipment prior to the passing of the ordinance must obtain approval for the continued use of that technology in a manner consistent with the practices laid out in the ordinance. The ordinance requires each agency that uses approved surveillance equipment to produce an Annual Surveillance Report, and make the Report available to the City Council and on its public website. The Report must include information about how the technology was used, whether surveillance data was shared

⁵ See, for example, “Boston Police used social media surveillance for years, without informing City Council,” February 2, 2018, Privacy Matters. <https://privacysos.org/blog/new-report-shows-boston-police-used-social-media-surveillance-years-without-informing-city-council/>.

with outside entities (and if so, whom, for what purposes, and under what legal authorizations), the results of any internal audits, and the total annual cost for the surveillance technology, to include future budget plans for its continued use.

Ultimately, this ordinance mandates good, democratic, open government. It does not prohibit the use of any specific type of surveillance technology, but rather ensures the community makes decisions in an open, transparent, and democratic manner, and that any approved technology is only used in ways the community consents to in advance.

ACLU recommendations for strengthening the City draft ordinance

Again, we are grateful for the substantial work that has been done to produce the draft ordinance before your committee today. We see it as a solid basis for a comprehensive ordinance, and offer some suggestions to strengthen the language, to ensure it achieves the goal of establishing community oversight of surveillance technology acquisitions and use in Cambridge. The following recommendations will ensure the ordinance achieves these goals:

1. In section 12.22.020 (F) 3 c., the draft exempts “cameras installed in or on a police vehicle” from the requirements of the ordinance. This exemption could be read to include license plate reader cameras. The language should be modified to read, “cameras installed in or on a police vehicle, not to include license plate reader cameras.”
2. In sections 12.22.030 (A) and (B), the draft ordinance requires city agencies to “submit to the City Council a Surveillance Impact Report and obtain City Council approval before” acquiring or using surveillance technologies. The language should read, “submit to the City Council a Surveillance Impact Report *and a Surveillance Use Policy* and obtain City Council approval of both before” acquiring or using surveillance technologies. Similarly, section 12.22.060 (C) should be modified to read: “...including whether the City Council approved, rejected, or required modifications to the Surveillance Impact Report *and/or Surveillance Use Policy*.”
3. In section 12.22.030 (C), the draft states that the Council “shall balance” a number of factors in making its decisions. We recommend the language state: “...the City Council shall consider the safeguarding of individuals’ rights to privacy, freedom of speech, and freedom of association, as well as the investigative responsibilities of the Police Department.”
4. In section 12.22.050 (B), the draft states: “To the extent the City Manager...determines that approving or denying the Surveillance Use Policy would unlawfully obstruct the investigative or prosecutorial functions of the Police Department, the City Council shall simply receive and discuss the applicable portions of the Surveillance Use Policy.” This sentence is a loophole that swallows the entire ordinance, and **should be removed in its entirety**.⁶
5. In section 12.22.060 (A), the draft states: “Similarly, if the City Council received but did not approve a Surveillance Impact Report from the Police Department because of concerns over obstructing the Police Department’s investigative or prosecutorial function, the Police Department must still submit an Annual Surveillance Use Report...” This sentence is confusing and should be removed in its entirety. The ordinance should require that, except in exigent circumstances, the City Council has the final say over surveillance technology acquisitions.
6. In section 12.22.060 (B), the mechanism for ongoing oversight is insufficient. The current draft states: “If the benefits or reasonably anticipated benefits [of the technology] do not outweigh the financial and/or operational costs or civil liberties or civil rights are not reasonably safeguarded, the City Council *may consider (1) recommending modifications to the Surveillance Use Policy that are designed to address*

⁶ The language about “investigative and prosecutorial functions” does not appear in any city surveillance oversight ordinance in the country. It only appears in the Santa Clara *County*, California ordinance, because that ordinance governs county government. The language was included in Santa Clara to ensure the ordinance did not impact the Santa Clara District Attorney or the Santa Clara Sheriff, both of whom are elected officials. None of the city ordinances in California or Washington state include this provision, and it should be removed from the Cambridge draft, because Cambridge is a city not a county.

the City Council's concerns to the City Manager for his consideration; and/or (2) requesting a report back from the City Manager regarding steps taken to address the City Council's concerns." This framework leaves ongoing oversight up to the City Manager, whereas a strong oversight ordinance empowers the City Council to **revoke** authorization for use of a surveillance technology if the Council determines the technology has been used in ways that do not benefit the City and its people. Crucially, this draft provides no mechanism whereby the Council may revoke authorization. In order to ensure ongoing accountability and oversight, the Council must have this authority.

7. The draft ordinance does not establish a process for requiring public input in the City Council's deliberations over Surveillance Impact Reports or Surveillance Use Policies, and it must. The ordinance should stipulate that the Council hold public hearings to discuss every Surveillance Impact Report and Use Policy before the Council votes to approve or deny them. At minimum, in cases where the Council determines it is necessary because of time or resource constraints, the Council must allow for a public comment period before approving or denying any Impact Report or Use Policy.
8. Finally, in section 12.22.070, the draft ordinance states that the City Manager shall enforce the ordinance. This is insufficient. The ordinance should include a right of private action, at minimum, as well as a provision mandating the awarding of successful litigants reasonable attorneys' fees. The ACLU also recommends including whistleblower protections, as outlined in Section 9 of the attached ACLU model surveillance oversight ordinance.⁷

We hope the Council will support a strong surveillance oversight ordinance, and we welcome the opportunity to answer questions and be a resource to the City throughout this process. Thank you.

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⁷ The ACLU's model ordinance is also available online. <https://www.aclu.org/files/communitycontrol/ACLU-Local-Surveillance-Technology-Model-City-Council-Bill-January-2017.pdf>.