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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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June 25, 2018

Louis A. DePasquale
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

***Re: Surveillance Ordinance - Explanatory Comments and Responses to Issues
Raised by the ACLU at the 4/17/18 Public Safety Committee Meeting***

Dear Mr. DePasquale:

I am pleased to submit to you revisions to the proposed draft Surveillance Technology Ordinance (the "Ordinance"), both redlined and clean drafts of which are attached hereto for your review and submission to the City Council for its consideration.

By way of background, and as you are aware, City staff including you, Deputy City Manager Lisa Peterson, Police Commissioner Branville Bard, and members of this office have been meeting and conferring with Kade Crockford of the American Civil Liberties Union of Massachusetts (the "ACLU") on several occasions over the last year and a half, including numerous teleconferences with Ms. Crockford in order to discuss the concerns the ACLU and Digital Fourth have expressed with regard to the Ordinance. The ACLU had submitted questions concerning the Ordinance during the October 18, 2017 Public Safety Committee hearing to which the City responded in meetings and telephone conferences thereafter. During the April 17, 2018 Public Safety Committee hearing the Committee requested that a revised version of the Ordinance be prepared for a City Council meeting to be held in late May or early June. At the April 17, 2018 Committee Hearing, the ACLU also submitted a number of specific questions related to the Ordinance; City staff met with the ACLU on June 14, 2018 to discuss those questions as well as other questions that had previously been submitted to City staff, and City staff then had a teleconference with Ms. Crockford on June 18, 2018 to discuss the proposed revisions City staff made to the Ordinance in order to address the ACLU's questions.

Set forth in detail below are questions and issues raised by the ACLU together with our responses to the same and further explanation, if any, regarding the City staff's recommendations as to those issues.

A. DEFINITIONS.

1. Section 12.22.020(B)—Definitions—Exigent Circumstances: Whether to Include Significant Property Damage or Loss in the Definition of Exigent Circumstances (p. 2 of the redlined Ordinance).

The ACLU suggested that “significant property damage or loss” should be removed from the Ordinance’s definition of Exigent Circumstances in Section 12.22.020(B).

- City staff do not recommend that “significant property damage or loss” be removed from the definition of Exigent Circumstances in Section 12.22.020(B) of the Ordinance. By way of example, in the event that the Police Department receives a tip that a large property may be destroyed by one or more individuals, and such property destruction poses public health or similar risk to the general public, the Police Department needs the ability, under Section 12.22.040 of the Ordinance, to acquire and use on a temporary basis Surveillance Technology not previously approved by the Council, in order to mitigate or remove the risk that such property destruction poses. Indeed, other Surveillance Ordinances recently adopted in Berkeley and Davis, California, contain “property damage” in their definition of exigent circumstances. Moreover, there may be circumstances where the Police Department receives a tip that someone intends to destroy property used for emergency response purposes, i.e., someone could target all of the City’s fire trucks or ambulances, and in so doing, hamper the City’s ability to respond to fire and health emergencies, leading to loss of life. Given those risks, City staff strongly recommend that this language not be altered. However, in order to address the ACLU’s concerns, City staff have added the following language to the definition of Exigent Circumstances in Section 12.22.020(B): “The use of Surveillance Technology in Exigent Circumstances shall not infringe upon an individual’s right to peacefully protest.”

2. Section 12.22.020(F)(3)(c)—Definitions—Exemption for Cameras Installed In or On a Police Vehicle: Excluding Cameras with License Plate Reading Technology from the Exemption for Cameras Installed In or On a Police Vehicle (p. 5).

The next suggestion of the ACLU’s is to add “except license plate readers” to 12.22.020(F)(3)(c) which exempts cameras installed in or on a police vehicle from the requirements of the Ordinance, in other words, making “license plate readers” subject to the provisions of the Ordinance.

- That change is agreeable to City staff, and City staff have revised 12.22.020(F)(3)(c) to include: “cameras installed in or on a police vehicle, except cameras with license plate reading technology”, so that cameras with

such technology will not be exempt from the requirements of the Ordinance.

3. **Section 12.22.020(H)—Definitions—Technology-Specific Surveillance Use Policy: Adding a Definition of Technology-Specific Surveillance Use Policy (p. 8).**

Because the ACLU suggests that a City department should be required to submit a specific Surveillance Use Policy as to a specific technology when the City department is seeking Council approval of the specific Surveillance Technology, City staff have added a new definition for a “Technology-Specific Surveillance Use Policy” in Subsection (H) of 12.22.020.

B. **ACQUISITION AND USE OF SURVEILLANCE TECHNOLOGY.**

1. **Sections 12.22.030—Acquisition of Surveillance Technology and 12.22.040—Temporary Acquisition and Use of Surveillance Technology in Exigent Circumstances: Adding the Requirement that a Technology-Specific Surveillance Use Policy be Submitted with a Surveillance Impact Report (p.p. 8–12).**

As noted in the preceding paragraph, the ACLU has suggested that a City department should be required to submit a Surveillance Use Policy when the department is seeking Council approval of acquisition and use of a specific Surveillance Technology under 12.22.030(A) and (B), or when the department is submitting an Annual Surveillance Report to the Council under 12.22.060(A).

- That change is agreeable to City staff, and City staff have thus included the requirement that a Technology-Specific Use Policy be submitted along with a Surveillance Impact Report required in Sections 12.22.030(A) and (B), and 12.22.040 where the specific technology for which approval is sought is not already covered under the City’s Surveillance Use Policy.

2. **Section 12.22.030(C)—City Council Approval of Acquisition of Surveillance Technology: Language Revision (p. 9).**

Section 12.22.030(C) provides that “in approving, and/or disapproving any acquisition of Surveillance Technology, the City Council shall balance the safeguarding of individuals’ right to privacy against the investigative and prosecutorial functions of the Police Department and promoting and ensuring the safety and security of the general public.” The ACLU suggested that the City use the word “consider” in place of “balance.” In addition, during the June 14, 2018 meeting, the ACLU also suggested that the word “against” be replaced with the phrase “as well as.”

- Those changes are agreeable to City staff, and City staff have revised Section 12.22.030(C) as well as Section 12.22.050 (B) to read: “In

approving, and/or disapproving any acquisition of Surveillance Technology, the City Council shall consider the safeguarding of individuals' right to privacy as well as the investigative and prosecutorial functions of the Police Department and promoting and ensuring the safety and security of the general public.”

3. **Sections 12.22.030(D) and 12.22.040: Surveillance Impact Report and Technology-Specific Surveillance Use Policy to be Made Available No Fewer than 7 Days Prior to Council Meeting (p.p. 9–10).**

The ACLU also stated that the Ordinance does not allow for enough public input as written.

- In response, City staff have added the following language to the Ordinance:
 - i. A new section has been added to Section 12.22.030 as follows: “(D) Any Surveillance Impact Report, and, if necessary, Technology-Specific Surveillance Use Policy submitted to the City Council under Section 12.22.030 shall be made publicly available no fewer than seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.”
 - ii. City staff also added the following language to 12.22.040: “Any Surveillance Impact Report, and, if necessary, Technology-Specific Surveillance Use Policy submitted to the City Council under this Section shall be made publicly available no fewer than seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.”

C. **SURVEILLANCE USE POLICY.**

1. **Section 12.22.050(A)—Submission of Surveillance Use Policy to the City Council: Surveillance Use Policy Shall be Made Publicly Available No Fewer than 7 Days Prior to Council Meeting (p. 10).**

As part of the revisions City staff made in order to address the ACLU's concern that there is not enough opportunity for public input in the Ordinance as written, City staff have also revised the language of the Ordinance with respect to the submission of the Surveillance Use Policy.

- City staff added the following language to 12.22.050(A): Any Surveillance Use Policy submitted under Section 12.22.050 shall be made publicly available no fewer than seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.

2. Section 12.22.050(B)—Council Approval of the Surveillance Use Policy: ACLU Concern re “Unlawfully Obstruct” Language (p. 10).

The ACLU suggested that the following sentence be removed from Section 12.22.050(B) regarding the Council’s authority to approve or disapprove a Surveillance Use Policy: “To the extent the City Manager determines that approving or disapproving 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 change is not recommended, as it would allow the City Council to have ultimate decision making authority over critical decisions relating to the investigative and prosecutorial functions of the Police Department rather than the Police Commissioner and the City Manager. It also potentially runs afoul of the provisions of the City’s Plan F Charter, as it appears to relate more to operational issues and the discretion provided under the Charter to the City Manager than to the broader policy making role of the City Council. City staff discussed the ACLU’s suggested change with Ms. Crockford during the June 14, 2018 meeting with her and explained that this was not acceptable to the City. City staff also believe that this concern is addressed in Section 12.22.060(B)(1), which gives the City Council an opportunity to “recommend modifications to the Surveillance Use Policy that are designed to address the City Council’s concerns to the City Manager for his consideration.” Therefore, to the extent the City Council has a concern over a provision in the Surveillance Use Policy, the City Council will have an opportunity to recommend that the City Manager revise same accordingly.

D. ANNUAL SURVEILLANCE REPORT.

1. Section 12.22.060(A)—Submission of Annual Surveillance Report Approval: Language Revision (p.p. 10–11)

The ACLU stated that the following language in the second sentence of Section 12.22.060(A) is confusing and should be removed: “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 Report within twelve (12) months of the City Council’s receipt of the Surveillance Impact Report, and annually thereafter on or before March 1.”

- City staff is agreeable to revising the language of that section. After review, City staff suggest revising Section 12.22.060(A) by separating it into three subsections as follows:

“(1) A City department head who has obtained approval for the use of Surveillance Technology or the information it provides under Section 12.22.030 or Section 12.22.040 of this Chapter, must submit an Annual Surveillance Report within twelve (12) months of City Council approval, and annually thereafter on or before March 1.

(2) Where the Police Department submitted a Surveillance Impact Report, and, if necessary, a Technology-Specific Surveillance Use Policy that the Council did not approve prior to the Police Department’s use of the Surveillance Technology, the Police Department must still submit an Annual Surveillance Report within twelve (12) months of the City Council’s receipt of the Surveillance Impact Report, and annually thereafter on or before March 1.

(3) Any Annual Surveillance Report submitted under this section shall be made publicly available no fewer than seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.”

Section 12.22.060(A)(3) is also discussed in Section 2 below.

2. Section 12.22.060(A)(3)—Submission of Annual Surveillance Report: Annual Surveillance Report Shall be Made Publicly Available No Fewer than 7 Calendar Days Prior to Council Meeting (p. 11).

In response to the ACLU’s concern about allowing enough opportunity for public comment, City staff have revised Section 12.22.060(A) of the Ordinance to require that Annual Surveillance Report be submitted at least seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.

“(3) Any Annual Surveillance Report submitted under this section shall be made publicly available no fewer than seven (7) calendar days prior to the date of the Council meeting where it shall be discussed.”

3. Section 12.22.060(B)—Council Review of Annual Surveillance Reports: Enforcement (p. 11).

The ACLU stated that Section 12.22.060(B) is insufficient for enforcement purposes, and suggested that the language be revised to provide that . Section 12.22.060(B) currently reads: “. . . If the benefits or reasonably anticipated benefits 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 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.”

- In order to address the ACLU's concern, City staff have added the following language to Section 12.22.060(B): "and/or (3) recommend to the City Manager that use of the Surveillance Technology cease."

E. ENFORCEMENT OF THE ORDINANCE.

1. Section 12.22.070—Enforcement: Right of Action and Penalties for Violation (p.p. 11–12).

The ACLU submitted a comment stating that the Ordinance should provide for a private right of action, the award of attorneys' fees to successful litigants, and whistleblower protections.

- City staff do not recommend that the City provide such a private right of action for a variety of reasons, which City staff have explained to Ms. Crockford, and as explained below.

In cases where a City employee violates the Surveillance Use Policy or parts of the Surveillance Ordinance, the City Manager has the authority to discipline such an employee, including terminating the employee. Furthermore, the City's Employee Manual and Collective Bargaining Agreements contain provisions for disciplining employees, up to and including termination, where the employee violates a City policy or a municipal ordinance. In addition to the policy considerations that mitigate against the City providing for individuals to bring private causes of action against the City or City employees personally for alleged violations of a City ordinance, such a provision in a municipal ordinance would likely conflict with the provisions of the Massachusetts Tort Claims Act ("Chapter 258") which immunizes Massachusetts municipalities and their officials and employees from liability in, among others, claims based upon an act or omission of a public employee when the employee is exercising due care in the execution of any regulation of a public employer, or any municipal ordinance or by-law. The Legislature of the Commonwealth enacted Chapter 258 to act as a limited waiver of the common law doctrine of sovereign immunity, and thus, enabled the Commonwealth and its political subdivisions (i.e., cities and towns) to be sued in courts in limited circumstances. The Supreme Judicial Court has held that sovereign immunity is still in effect unless consent to suit has been expressed by the terms of a statute, or appears by necessary implication from them. To provide for a private right of action under the Surveillance Ordinance would be a significant deviation from Chapter 258, and would mean that any City employee or elected or appointed official could be subject to personal liability in actions stemming from alleged violations of the Ordinance regardless of whether the alleged violation was intentional. To the extent a City employee may commit an intentional tort or violate civil rights, there are existing remedies under state and federal laws which, depending on the allegations, permit individuals to file lawsuits against the City and City

employees for civil rights violations and intentional torts. For instance, an individual who was subject to surveillance without a warrant may file a lawsuit in state or federal court against both the City and the City employee for the alleged civil rights violation, and collect damages if successful, for such civil rights violation.

After careful consideration of this matter, however, and having reviewed the provisions of the Surveillance Technology ordinances adopted in Davis, California and Seattle, Washington, City staff recommend that the following language be included in Section 12.22.070 of the Ordinance. City staff believe that the below language meets the appropriate balance between the existing remedies available to individuals under state and federal law, the protections afforded to municipalities under Chapter 258, and providing members of the public with the ability to seek redress under this Ordinance:

- (A) Enforcement Officials. This Chapter shall be enforced by the City Manager or his/her designee.

- (B) Violation. Any person injured by a violation of this Chapter may institute proceedings for injunctive relief, declaratory relief, or a court order in a court of competent jurisdiction to enforce the provisions of this Chapter, subject to the provisions of Subsection (C) below. Any action instituted under this Subsection (B) shall be brought against the City of Cambridge, but not against City employees. No monetary damages or award of attorneys' fees shall be allowed in any legal proceeding for any alleged injuries arising out of any alleged violation(s) of this Chapter.

- (C) Notice and Procedure.
 - (1) No legal proceeding under Subsection (B) above shall be brought unless the City has first been given written notice within thirty (30) days of the alleged violation(s) addressed to the City Clerk and specifying: (a) the name and address of the person(s) allegedly injured; (b) the date(s), time and place(s) of the alleged violation(s); and (c) a detailed description of the alleged injury.

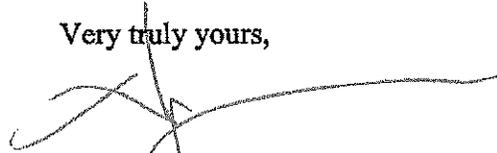
 - (2) Prior to the initiation of any legal proceeding under Subsection (B) above, the City shall be permitted ninety (90) days from the date of the City's receipt of the written notice of the alleged violation(s) within which to investigate such alleged violation(s) and, if substantiated, to correct such alleged violation(s).

 - (3) If the alleged violation(s) is substantiated and subsequently cured, the City shall so notify the person(s) allegedly injured by such alleged violation(s) and a notice shall be posted on the City's website that

describes the corrective measure(s) taken to address the violation(s) and no legal proceedings to remedy the alleged violation(s) shall be allowed pursuant to Subsection (B) above.

- (D) Nothing in this Chapter shall be construed to limit or affect any individual's rights under state or federal laws.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nancy E. Glowa", written over a vertical line.

Nancy E. Glowa
City Solicitor

Attachments: Clean and Redlined Revised Drafts of Surveillance Ordinance