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JOHN W. WHITEHEAD
Founder and President

June 3, 2022

By Electronic Mail

The Honorable Sylvester Turner, Mayor
Members of the Houston City Council
900 Bagby
City Hall Annex, First Floor
Houston, TX 77002

Re: Exterior Security Cameras Ordinance Sec. 28-671 through 673

Dear Mayor and Council Members:

As a civil liberties organization that works to protect the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”¹ The Rutherford Institute² is concerned about the Exterior Security Cameras Ordinance,³ adopted by the Houston City Council on April 20, 2022,⁴ which circumvents important constitutional safeguards prohibiting police from conducting warrantless surveillance on the citizenry.

By requiring private businesses to purchase and install digital surveillance cameras that carry out round-the-clock, citywide surveillance on the populace while “allowing” police to access the footage at any time, for any reason, and without the need of a court-issued warrant, Sec. 28-672(c) of the Ordinance appears designed to sidestep the Fourth Amendment to the U.S. Constitution.

Yet as the following legal analysis makes clear, this thinly veiled attempt to evade oversight and accountability for Fourth Amendment violations by entering into a quasi-private/public arrangement regarding the ownership and governance of digital surveillance cameras will not likely hold up to judicial scrutiny. Thus, in order to better balance the liberty and security interests of the community, it is our recommendation that the City Council take

¹ U.S. Const., Amend. 4.

² The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

³ City of Houston, Texas, Ordinance No. 2022-307,
https://library.municode.com/tx/houston/ordinances/code_of_ordinances?nodeId=1149137.

⁴ Jay R. Jordan, “New Houston ordinance requires night-life businesses to install security cameras, turn footage over to police,” *Houston Chronicle* (Apr. 20, 2022), <https://www.chron.com/news/houston-texas/article/Houston-security-camera-law-aclu-city-council-17109460.php>.

preemptive measures before the Ordinance goes into effect mid-July to address the glaring constitutional concerns relating to warrantless citywide surveillance by police.

The Exterior Security Cameras Ordinance

As part of Mayor Turner’s One Safe Houston initiative, on April 20, 2022, the Houston City Council overwhelmingly passed an ordinance ostensibly aimed at addressing “an increase of violent crimes due to the pandemic, social anxiety and economic uncertainty, open carry law and a strained criminal justice system resulting in a criminal backlog of cases.”⁵

The Exterior Security Cameras Ordinance requires certain private businesses (all bars, nightclubs, sexually-oriented businesses, convenience stores and game rooms inside city limits) to work in consultation with the Houston Police Department in order to install digital surveillance cameras that record the exterior property areas at all times. Business owners must bear the costs of the cameras, ensure the cameras are in proper working order, maintain recordings for at least 30 days, and provide video footage within 72 hours to police upon their request without a search warrant. The ordinance also requires convenience stores to place lighting, at least six foot-candles in brightness, in any place to which customers are permitted access. The lighting must be turned on between sunset and sunrise and shall not be directed onto residential properties.

The camera and lighting requirements are slated to take effect mid-July, on the 90th day following passage and approval of this ordinance. Failure to comply with the Ordinance is a punishable offense for business owners with fines of \$500 per day.⁶

The Ordinance seeks to circumvent the Fourth Amendment’s warrant requirement as it relates to surveillance

By placing the burden to conduct round-the-clock, citywide surveillance on private businesses, the City of Houston is clearly attempting an end-run around the Fourth Amendment’s warrant requirement as it relates to surveillance by government officials.

Under the Fourth Amendment’s warrant requirement, police must first obtain a court-issued search warrant before they can carry out a search of someone’s person or property. In order to obtain a search warrant, police must show probable cause (supported by an oath or affirmation) that a search will uncover proof of criminal activity.

Even though police are being given carte blanche access to the surveillance footage from these digital cameras, by lodging the responsibility for the cameras with private businesses, the City is proceeding as if it is not bound by the warrant requirements of the Fourth Amendment. Consequently, the Ordinance does not require any independent intermediary such as a judge or

⁵ “Security Camera Ordinance,” Agenda Item 43, City of Houston-City Council, April 19, 2022, <https://houston.novusagenda.com/agendapublic/CoverSheet.aspx?ItemID=25591&MeetingID=536>.

⁶ Code of Ordinances, City of Houston, Texas, Sec. 28-673 and 1-6(a).

magistrate to confirm that the police's demand for video footage is supported by probable cause of criminal activity under oath, it does not limit the scope of the video footage which can be requested by the police in order to prevent obtaining extra and unnecessary video footage, and it does not require the crime to be violent or even serious in relation to the Ordinance's stated goal of reducing violent crime. Moreover, while the Ordinance places a small limitation on police to obtain "video footage in connection with crime investigations," that phrase is broad, vague, and subject to abuse.

Warrantless surveillance could make it more difficult to prosecute lawbreakers

While the City's stated objective for this warrantless surveillance is to fight rising crime, taking shortcuts to avoid getting a search warrant may very well make it more difficult for the courts to hold suspected lawbreakers accountable for wrongdoing. For example, if video footage obtained under this statute without a search warrant is found to violate the Fourth Amendment, and the footage is necessary to prove a crime or identify an offender, it can result in the evidence being excluded from consideration at trial.⁷ Related charges would likely be dismissed since that evidence could not be used against him.

In this way, warrantless surveillance gives rise to constitutional violations which in turn could result in violent criminals avoiding liability, thereby undermining the stated purpose of the Ordinance.

The Ordinance creates an unjustifiably wide digital dragnet for a significant amount of non-criminal activity, resulting in the potential for abuse or misuse of video footage

Even when police do obtain video footage in connection with investigating a crime, a significant amount of non-criminal activity could also be observed after having been caught in this unjustifiably wide digital dragnet created by the Ordinance. For example, since recording is required even when businesses are closed, an owner who wants to use his business property for another purpose during off-hours, such as for a private political, religious, or romantic meeting, would also be recorded. Any of that recorded non-criminal activity obtained by police could then be used to embarrass or harass people, especially since there are no restrictions on its use or further dissemination by the police.

The U.S. Supreme Court has noted that information about a person's location "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations."⁸ Thus, there is significant potential for abuse or misuse of video footage obtained by police through this Ordinance without the limitations which a search warrant would provide.

⁷ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."); *Arizona v. Evans*, 514 U.S. 1 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.").

⁸ *Carpenter v. U.S.*, 138 S. Ct. 2206, 2217 (2018).

Private businesses should not be compelled to act as extensions of law enforcement

Private, sidewalk and “public space” surveillance programs sold to communities as a sure-fire means of fighting crime have become a troubling aspect of a public-private partnership that gives government officials access to all manner of surveillance cameras on sidewalks, on buildings, on buses, and even those installed on private property that violates the spirit, if not the letter, of the Fourth Amendment.

In addition to the aforementioned privacy concerns, there are concerns about the business owners’ property rights being violated by the City. Just as a “[government] cannot co-opt [private businesses] to deliver its message for it” because “the First Amendment does not permit the State to sacrifice speech for efficiency,”⁹ the City should not be able to commandeer private businesses and compel them to do police-work in a sacrifice of personal privacy and property rights for mere government efficiency and convenience.

Moreover, the City appears to be exploiting an alleged increase in crime as an opportunity to justify seizing greater control of private businesses and excessively surveilling the non-criminal activity of its residents. Indeed, while *lighting* has been shown to reduce crime, the City offers no evidence that continually recording activity outside of certain businesses will reduce crime or that a lack of video surveillance caused the City’s alleged increase in crime.

The Ordinance helps give rise to a surveillance society that endangers everyone

The U.S. Supreme Court has stated that a “person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁰ Couple these surveillance cameras with facial recognition and behavior-sensing technology and you have the makings of “pre-crime” cameras, which scan your mannerisms, compare you to pre-set parameters for “normal” behavior, and alert the police if you trigger any computerized alarms as being “suspicious.”

Precrime aims to prevent crimes before they happen by combining widespread surveillance, behavior prediction technologies, data mining, precognitive technology, and neighborhood and family snitch programs to enable police to capture would-be criminals before they can do any damage. However, this kind of program inevitably gives rise to a suspect society in which the burden of proof is reversed so that guilt is assumed and innocence must be proven.

As the 7th Circuit Court of Appeals has warned: “we are steadily approaching a future with a constellation of ubiquitous public and private cameras accessible to the government that catalog the movements and activities of all Americans. Foreseeable expansion in technological

⁹ *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

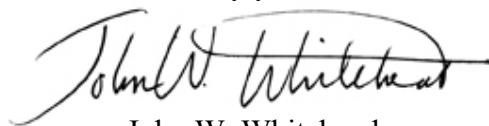
¹⁰ *Carpenter*, 138 S. Ct. at 2217.

capabilities and the pervasive use of ever-watching surveillance will reduce Americans' anonymity, transforming what once seemed like science fiction into fact. Constitutionally and statutorily mandated protections stand as critical bulwarks in preserving individual privacy vis-à-vis the government in this surveillance society.”¹¹

The “Framers of the Constitution sought ‘to place obstacles in the way of a too permeating police surveillance.’”¹²

It is our hope that the City Council will act swiftly and preemptively to rectify the damage this Ordinance threatens to wreak on critical constitutional bulwarks which serve to preserve our individual privacy.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John W. Whitehead
President

¹¹ *U.S. v. Tuggle*, 4 F. 4th 505, 509-10 (7th Cir. 2021).

¹² *Id.* at 510 (quoting *U.S. v. Di Re*, 332 U.S. 581, 595 (1948)).