



VIA EMAIL ONLY

August 11, 2016

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BART Communications & Tech. Modernization Comm.
300 Lakeside Drive
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Re: Surveillance Equipment Ordinance

Dear Honorable Directors:

Thank you for the opportunity to comment on the proposed Bay Area Rapid Transit (“BART”) surveillance equipment ordinance. As a member of Oakland Privacy (“OP”), and chair of the City of Oakland’s Privacy Advisory Commission, I appreciate that BART is addressing community concerns related to the use of surveillance equipment in a good faith and transparent manner.

OP is a citizen’s coalition that works regionally to defend the right to privacy and enhance public transparency and oversight regarding the use of surveillance techniques and equipment. We were instrumental in the creation of the first standing municipal citizens’ privacy advisory commission in the City of Oakland, and we have engaged in successful privacy enhancing legislative efforts with the Counties of Alameda and Santa Clara. In 2016, we successfully urged the County of Santa Clara to adopt a surveillance equipment ordinance similar to what we hope BART will adopt.

Throughout this good-faith process that began with a discussion of a pilot automated license plate reader program, and which has since morphed into a larger discussion about BART’s use of surveillance equipment, more than a few BART Directors have publicly stated that they envision BART as a regional leader on this issue, due to its unique jurisdiction-crossing reach throughout the greater Bay Area. OP was excited to be invited to participate in round-table discussions regarding BART’s use of surveillance equipment.

Your Communications and Technology Modernization Committee unanimously voted to direct staff to consider the ACLU’s model surveillance equipment ordinance. A sub-group met to begin

drafting an appropriate version of the ordinance that would meet BART's needs, and minimize the impact of surveillance equipment use upon our civil liberties. Unfortunately, the current draft 'policy' defeats the intent of the initial concept, and OP does not recommend that it be adopted. For the draft language to match BART Director's stated position, a return to the original intent of the ordinance must take place.

BART'S PROPOSED PROCUREMENT THRESHOLD EXCEPTION DEFEATS THE PURPOSE OF THE ORDINANCE

A hallmark of the model ordinance is that oversight takes place, and that it be continuous. Both Oakland and the County of Santa Clara saw wisdom in requiring that law enforcement first seek permission from elected leaders prior to possibly acquiring or using surveillance equipment. A representative form of government does not work when decisions are unilaterally made by the administration without proper checks and balances in place. BART's current draft allows for such decisions to occur. By including a \$100,000 threshold exception to the ordinance, the administration has effectively defeated the purpose of the proposed ordinance. See Draft Policy, Section 2 (1)(b). Almost no surveillance equipment today costs more than \$100,000, and every day such equipment costs less. No entity in the Bay Area has included any cost threshold in this ordinance, let alone one that escapes all oversight. This loophole must be stricken. Furthermore, no entity has included an exception for trial use of surveillance equipment. We fail to see the utility in such a provision. Misconduct can occur even within a 30-day trial period, and as a practical matter, trial use would be extremely difficult to track. One could simply change vendors, with consecutive "trial" periods occurring for a lengthy period, again defeating oversight and the intent of the ordinance. OP recommends that the original model language of Section 2 (1)(b) be adopted instead.

BART'S PROPOSED SECURITY SENSITIVE INFORMATION EXCEPTION DEFEATS THE PURPOSE OF THE ORDINANCE

It was with some surprise that we learned that the BART administration unilaterally determines what infrastructure or information is determined to be "Security Sensitive Information" ("SSI"), that the Board has no input into this decision making process, and that absent certain exceptional circumstances, the Board is not made aware of SSI related matters. A system with no checks and balances is unacceptable in a democracy, and in a regionally important entity such as BART.

However, having worked on Oakland's Domain Awareness Center, with a federally regulated Port, we are aware of the legitimate security concerns regarding infrastructure such as the Transbay Tube. No use policy written in Oakland has demanded or received schematics or photos of heavily regulated or secure areas, nor do citizens or elected leaders need such information to make an informed decision about the use of surveillance equipment by BART. We appreciate the inclusion of a definition of SSI into the proposed draft to better explain the purpose and intent of the SSI designation. OP recommends that clarifying language be added to this definition to expressly state that surveillance equipment, any underlying use policy, and the information included in the required annual reports are *not* SSI. This would allow for the non-disclosure of legitimate SSI, and also prohibit misuse of this designation.

COMPLIANCE WITH THE ORDINANCE MUST NOT BE OPTIONAL

Both Section 5 and 6 of the draft policy state that the Board may grant exceptions to compliance with submission of a use policy and surveillance report, respectively. While inclusion of this language by the staff was probably well intentioned and intended to allow for flexibility, this broad exception could invite abuse. OP recommends that the exception language be amended to state instead that the Board may “grant an extension of ninety days”, so that the exception is not open ended, and yet it still allows the administration a reasonable amount of flexibility and time to comply, should such time be needed. See Draft Policy, Section 5, and Section 6 (1).

SUFFICIENT SPECIFICITY MUST BE PROVIDED TO ALLOW FOR INFORMED DECISION MAKING

Staff has included language that allows for withholding from public review any information “deemed SSI or otherwise subject to confidentiality or safety concerns.” See Draft Policy, Section 6 (3)(a). Notwithstanding the fact that this decision will be made unilaterally by law enforcement, this loophole is large enough to defeat the purpose of the ordinance. OP recommends that the following language be stricken from this provision: “except those deemed SSI or otherwise subject to confidentiality or safety concerns...” Subpart (b) should also be amended, by striking “except those deemed SSI...”

PRIVACY RIGHTS ARE NOT THE SOLE FOCUS OF THE ORDINANCE

At an earlier meeting with your Committee, I implored you not to focus solely on our right to privacy. Surveillance equipment use can impact so much more, including our freedom of expression, association, religion, and speech. Staff has made a small but substantive substitution in Section 7 (4), swapping the original language “civil liberties and civil rights” for the narrower “privacy rights.” OP recommends that the original language be adopted. This ordinance is meant to protect more than our right to privacy, and staff acknowledges as much in the prefatory language within various “Whereas” clauses.

AN ENFORCEMENT MECHANISM IS NECESSARY TO ESTABLISH CREDIBILITY

Both Oakland and the County of Santa Clara have seen the wisdom and utility in adopting enforcement mechanisms in their respective surveillance equipment ordinances and use policies. If BART is to be a regional leader as its Directors have stated, they must have an enforceable ordinance. As a threshold matter, it sends a message that use of surveillance equipment must be carefully considered first before proceeding to use, and that the intent of this ordinance is to prevent misconduct, not lawful police work. While we understand that the administration and counsel would not wish to invite potential legal action, as our elected leaders the Board must assert itself here by imposing consequences for misuse of surveillance equipment. Without checks and balances, good governance is not possible.

OP acknowledges the utility in providing a “right to cure” provision in the ordinance, as staff suggests. We hope that adoption of our proposed ordinance will result in compliance, not litigation. The proposed Section 8 should be stricken and replaced in its entirety with the

following: “Any violation of the Ordinance constitutes an injury, and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in a court of competent jurisdiction to enforce this Ordinance, provided that the violation at issue has not been cured within 30 days of written receipt of non-compliance by the Board from a member of the public. A Court shall award costs and reasonable attorney’s fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.”

Both Oakland and the County of Santa Clara work with public unions, and if they can impose this enforcement mechanism, so can BART. The County of Santa Clara imposed additional criminal penalties for non-compliance with their ordinance.

SECTION 9 IS A FURTHER ATTEMPT TO DEFEAT THE INTENT OF THE ORDINANCE

BART staff has introduced a wholly new category into the draft ordinance that seeks to exempt from oversight 1) equipment in use prior to adoption of the ordinance; 2) technologies deployed in sensitive areas; 3) technologies deployed in response to concerns raised in closed session; 4) technology owned or operated by third parties, and 5) technologies deployed within certain secure perimeters on BART property.

As a practical matter, an exception for third parties is not needed. BART does not govern non-BART entities. If BART allows a third party to install surveillance equipment on its property, and BART does not use the equipment, nor receive information from the third party, then the ordinance does not apply. Conversely, if BART will access or operate the equipment, or receive information from the third party, then the provisions of Section 2(1)(b-d) may govern.

OP recommends that all of Section 9 be stricken. While we understand the intent to exclude equipment possessing the same capacities and capabilities, excluding equipment used by BART’s police department, as a desire to lower the administrative burden on staff, this seems unlikely to work in practice. What factors would be considered in making this determination that the equipment is “materially the same”, and who would make this determination? To achieve credibility and maintain transparency in this decision making process, this determination would have to be made in a public setting, and the factors considered made publicly available. This is precisely what the ordinance achieves with Sections 2-4.

Neither Oakland nor the County of Santa Clara adopted such exceptions. BART has a smaller police force and less crime to combat than its neighbors, and should reasonably have less of a burden in complying with the ordinance. If the Board intends to be a regional leader on this issue as many Directors have stated, such exceptions must be removed from the ordinance.

CONCLUSION

Like other local entities, BART and its police department have a need to repair their image. By increasing transparency into use of surveillance equipment, being held accountable, and discussing with the public in good faith the potential appropriate uses of said equipment, the Board will be sending a signal throughout the Bay Area that cannot be ignored – that

transparency is best, that oversight is necessary, and that BART intends to use its regional position for leadership in this critical area. We look forward to continued discussions with the Board and administrative staff on final language for a surveillance equipment ordinance.

Sincerely,



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