

VIA EMAIL ONLY

February 5, 2016

Hon. Joe Simitian (supervisor.simitian@bos.sccgov.org)
Hon. Cindy Chavez (Cindy.Chavez@bos.sccgov.org)
Santa Clara County Board of Supervisors
70 W. Hedding St., East Wing, 10th Fl.
San Jose, CA 95110

Re: Agenda Item 15 - Proposed Surveillance Technology Ordinance

Dear Honorable Supervisors:

I write to urge you to adopt the proposed surveillance equipment ordinance *without any law enforcement exemption*, and also to offer my perspective on the “process” as chair of an ad hoc privacy advisory committee at Oakland City Hall.¹

I am a member of the Oakland Privacy Working Group, which formed in 2013 to oppose Oakland’s Domain Awareness Center (“DAC”). Among our many concerns regarding this project were the lack of oversight, transparency, and limitations on use and data retention. At that time, Oakland had no publicly available policies for any of its surveillance equipment, including automated license plate readers, and Stingray. At full scope, the DAC was proposed as a citywide system that would aggregate the data feeds from 700+ cameras, ShotSpotter, license plate readers, facial recognition software, along with 300 terabytes of storage retaining the data indefinitely.

In response to the public outcry, the Oakland City Council scaled the project back and created a citizen’s advisory committee to craft the policy and procedures governing the DAC. I chaired that committee. The ad hoc committee submitted a privacy and data retention policy for the DAC, and a second separate policy for a helicopter-mounted thermal imaging camera. Both policies were adopted by unanimous vote of the Council. In addition, the ad hoc committee successfully pushed for an ordinance to create a permanent advisory committee, which was also approved by unanimous vote of the Council last month. Both of the policies and the committee ordinance were recommended for approval by staff.

I highlight these unanimous votes for good reason – the amount of political and community buy-in at these later stages was the result of much hard work, many candid conversations, and wise decision making. We have generated a lot of favorable press as a result of this collaborative process, with subsequent invitations to present as a successful case study and municipal model at several notable forums, including a California Department of Justice privacy and surveillance

¹ The December 10, 2015 draft ordinance did not contain a warrant exemption which was included in previous versions. However, the District Attorney’s letter of the same date referenced such an exemption, and also argued that it be lowered to simple reasonable suspicion. An updated draft has not been posted as of the date of this letter.

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symposium in January 2015, and the International Association of Chiefs of Police conference in October 2015.

We replicated our democratic success with the Alameda County Board's adoption of the strongest-in-the-nation Stingray policy last November. Following the lead of the District Attorney's strong initial draft, the ACLU and Oakland Privacy worked with the District Attorney and Board to identify the policy's weaknesses, and create greater transparency into Stingray use. The public discussion and responsiveness by law enforcement, combined with annual reporting as to use, will lead to greater trust between citizens, privacy activists, law enforcement, and elected officials. It is one of those rare win-win political situations that needs to be duplicated.

The approach Santa Clara is taking with the proposed ordinance is such a step. We are now following your lead, as the new Oakland standing privacy committee will draft a similar surveillance equipment ordinance, and Oakland Privacy and others aim to do the same with Alameda County. The 2015 legislative session in California is clear evidence of the trend towards greater oversight of, transparency into, and limitations on, use of surveillance equipment.

The District Attorney's December 10, 2015 Letter

District Attorney Jeff Rosen's letter raised several areas of concern regarding the proposed ordinance, and offered up reasonable hypotheticals as examples of the burden his office would have to comply with if the ordinance was adopted as drafted.

First, it must be pointed out that if either a warrant or reasonable suspicion exemption are placed into the ordinance, Santa Clara has wasted countless taxpayer dollars and hours on this exercise in transparency. The ordinance will be legally meaningless. If the ordinance is not meant to regulate and have oversight of law enforcement's use of surveillance equipment, why bother?

Second, Mr. Rosen's many hypotheticals point out the obvious: use of surveillance equipment has become ubiquitous. The flurry of privacy-protecting legislation across the country in 2015 is evidence of the pushback and desire for enhanced privacy protections and adherence to constitutional policing.

As the Oakland Privacy Working Group's letter addressed the specific concerns raised in Mr. Rosen's letter, I will address the more general process related concerns, namely that it will be an overwhelming burden if his office is forced to comply with this ordinance.

The Oakland ad hoc privacy committee met for just over a year, as we created both policies and procedures from scratch due to a lack of robust models to learn from. We began meeting in May 2014, and the DAC policy was approved on June 2, 2015. We asked very difficult questions of each other, in a very candid manner, sitting at the table alongside administrative staff and the Oakland Police Department ("OPD").

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Once we cleared this initial hurdle and had a template, the ‘burden’ disappeared. Our second policy was created in a one-hour committee meeting. Thermal imaging cameras are regulated by the Supreme Court ruling in *US v. Kyllo*, and presented a perfect test for the ad hoc committee’s vision of regulating Oakland’s surveillance equipment. Sitting down with the helicopter pilots that would operate the equipment, we quizzed them on their anticipated uses and needs. We modified the existing DAC template, and presented it to the Council for adoption. With both privacy activists, regular citizens, and OPD presenting a united front, the policy was easily approved. There is no reason Santa Clara cannot follow this path. As use policy templates are created, the process becomes easy to replicate.

Mr. Rosen’s letter misses a very important point. In arguing that the definition of surveillance equipment is too broad and thus his investigators will be “unable to predict” whether certain equipment is covered by the necessarily broad definition, he ignores the framework of the proposed ordinance, which creates a public space for vetting and debate on appropriate uses, and data retention limits. It is essentially a process to obtain (or not) pre-clearance of a proposed equipment acquisition or new use. Stated simply – with the determination being made at the beginning of the process, instead of later, **Mr. Rosen’s investigators would know with certainty that their equipment has been approved for use in your community.** There is no guesswork.

Mr. Rosen suggests that technology-specific ordinances be created instead, and points to Alameda County as a successful example of such an approach. He again misses the importance of what we achieved. In an act of good faith, the Board, District Attorney, and county counsel all agreed to be in early compliance with SB741. The Board and District Attorney called for a public comment period so that they could ascertain and address the community’s concerns. The District attorney amended her policy to address the issues raised. It is *because* of this public discussion and determination that the benefits outweighed the concerns, not in spite of, that Alameda County now has the strongest privacy policy regulating Stingray use in the country *and* her investigators can proceed to use the equipment.

As to existing surveillance equipment, Mr. Rosen and his investigators would be wise to do as Alameda County is doing – in an abundance of caution, they should voluntarily submit all surveillance equipment for Board approval. Alameda County is currently conducting a survey of all its equipment, which will lead to better informed leadership, and more informed decision making. If Mr. Rosen has doubts as to the application of the ordinance, it is rather simple to submit his equipment for approval by the Board instead of guessing.

Furthermore, the approach Mr. Rosen desires the Board to move to is where the Board will be *with the ordinance*. Assuming a favorable determination is made to proceed, the proposed ordinance requires that underlying technology-specific policies be written. As discussed above, this public determination would have essentially pre-approved the equipment and use, and a specific, clearly defined ordinance will be written as Mr. Rosen suggests. I appreciate that Mr. Rosen does not object to the lack of a law enforcement exemption in the underlying use policy, nor should there be such an exemption as the purpose is to regulate use of the equipment.

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The genius in the approach of your proposed ordinance is that it does not dictate the specifics of the underlying use policy, but requires that a conversation about appropriateness takes place before acquisition or use. This will remove uncertainty for law enforcement, and reduce or eliminate possible community outrage later when the community finds out drones were acquired without public knowledge (Seattle), or that a citywide surveillance network is being planned (Oakland). It isn't so much an equipment ordinance – it's a transparency ordinance.

Santa Clara is to be commended for taking the lead on formalizing the process for public discussion of surveillance equipment. Greater transparency and oversight can only lead to improved trust of law enforcement, and an improved democracy.

Sincerely,

A handwritten signature in blue ink that reads "Brian Hofer". The signature is written in a cursive style with a horizontal line underneath the name.

Brian Hofer
Chair, Oakland ad hoc privacy committee
Member, Oakland Privacy Working Group