

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Trials&TRIBULATIONS

### Big Brother has long been watching

By **JAMES S. WOLFORD**  
Daily Record Columnist

Unquestionably, the terrorist attacks of Sept. 11, 2001 changed our country.

Under the auspices of securing the safety of its citizens, our government has initiated a number of policies and procedures that curtail our privacy rights and civil liberties, including public video surveillance.

Throughout our country, cities are installing and expanding public video surveillance systems at an unprecedented rate. New York City; Los Angeles; Washington, D.C.; Chicago; Baltimore and even Monroe County maintain some form of video surveillance program (Martha T. Moore, "Cities Opening More Video Surveillance Eyes," USA Today, June 18, 2005). Just the other day, Rochester Police Department Chief David T. Moore announced that 30 new cameras will be installed in high crime areas, the locations of which remain undisclosed.

Last year, New York City announced plans to expand its surveillance program dramatically (Cara Buckley, "Police Plan Web of Surveillance for Downtown," New York Times, July 9, 2007). By last count, more than 2,300 video cameras exist in New York City, and there has been a new surge for public video surveillance programs in smaller communities. Towns with as few as 500 residents are now turning to video surveillance (Clay Carey, "Cameras Provide Budget Security for Small Town," The Tennessean, Dec. 14, 2006).

On the day of this writing, a SUV belonging to Marshawn Lynch (Buffalo Bills star running back) was involved in a hit and run. Guess what? The Buffalo Police are reviewing video surveillance of the accident scene to help determine the identity of the driver. On my way into work, I also noticed a video camera mounted on the top of a speed limit sign in the Town of Brighton on Elmwood Avenue.

The price communities and their citizens pay in sacrificing an individual's privacy rights and civil liberties should be a major concern. When communities choose to pursue plans for a video surveillance system, it is critical that they take appropriate steps to protect privacy rights and civil liberties when establishing such systems, as this powerful new technology can be subject to abuse, even with the best of intentions.

An initial question that should be considered before installing surveillance is whether cameras are likely to be effective in achieving the community's law enforcement goals. A 2003 study commissioned by the Home Office in London (the equivalent of our Department of Homeland Security) found that video surveillance accounts for nearly three-quarters of that agency's crime prevention spending, but has little effect on violent crimes (The Constitution Project, *Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties*, 2nd Ed. 2007). Some studies have indicated

video surveillance has little, if any, effect in deterring property crime when adjustments such as increased lighting in public areas may be a more effective deterrent (*Id.*)

Some proponents of video surveillance often contend it will prevent the threat of terrorism; unfortunately, recent history suggests otherwise. In London, the horrific bombing in the London Underground on July 7, 2005, was not prevented by video surveillance even through the terrorists were clearly captured on video prior to the attack. Indeed, one could conclude that a terrorist committing suicide will not think twice about having his or her act caught on video. The vast network of London's video cameras was not able to provide advance warning necessary to enable authorities to prevent such an attack.



Beyond the question of effectiveness, there is obviously the significant threat to privacy rights created by the use of such systems. One can only imagine that with comprehensive video surveillance, the government can now, without any real oversight, create a file on any U. S. citizen that includes that person's activities and match that with background information available from private and government records.

Activities most of us would consider completely innocent easily could be interpreted as criminal when viewed under the government's microscope, and potentially could be used against criminal defendants at trial. The government in a conspiracy trial may be able to introduce years of video footage of co-defendants meeting on public streets as evidence of an agreement to commit a conspiracy.

The idea and thought that the government would be able to record and retain video of innocent activities such as going to and from psychiatrists' offices, alcohol and drug counseling meetings, clinics, support groups or other "sensitive" venues, is a real fear most Americans should consider. Video surveillance also represents a significant threat to the personal privacy of members of certain political, social or religious organizations, and certainly could be used to target members of minority groups such as Muslims and Arab-Americans. These groups, and others, may be targeted under the guise of national security. Similar to the inappropriate targeting of racial and ethnic minorities, this kind of unwarranted surveillance could be motivated either by popular misconceptions or the prejudices of a particular surveillance operator.

Consider the recent contract workers for the U. S. State Department who inappropriately reviewed the passport files of the three presidential candidates, and perhaps others, for no other reason than curiosity. Also recently in Washington, D.C., a police lieutenant was convicted of using police databases to blackmail married patrons of gay establishments (Avis Thomas-Lester & Toni Locy, "Complaint of Extortion

*Continued ...*

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Continued ...

Attempt Led to Probe of Police Unit," Washington Post, Nov. 12, 1997, at B4).

The U.S. Supreme Court has recognized that "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks." *Delaware v. Prouse*, 440 US 648, 663 (1979). With this in mind, diligent research revealed no court decisions that found a network of public cameras infringes on a citizen's First or Fourth Amendment rights.

The Supreme Court has held that individuals have a right to remain anonymous while engaging in protected First Amendment activities. *McIntyre v. Ohio Elections Commission*, 514 US 334, 343 (1995). Nevertheless, courts have not yet recognized that modern video surveillance systems can unconstitutionally chill First or Fourth Amendment activities.

There has been ongoing litigation in the Southern District of New York concerning the New York City Police Department's filming of political demonstrations, but the decisions focus on the extent to which the parties have complied with a court-ordered consent decree. See *Handschu v. Special Servs. Div.*, 475 F.Supp.2d 331 (SDNY 2007), vacated *Handschu v. Special Servs. Div.*, 2007 WL 1711775 (SDNY 2007) rehearing denied *Handschu v. Special Servs. Div.*, 2008 WL 515695 (SDNY 2008).

In one California case, owners of a cyber café challenged a local ordinance requiring such businesses to install video surveillance systems to monitor all entrances, both interior and exterior. *Vio v. City of Garden Grove*, 115 Cal. App. Fourth 425, 447 (Cal. Ct. App. 2004). The Court of Appeals for California upheld this requirement, finding it did not impact First Amendment rights because it was "a content-neutral manner restriction, narrowly tailored to advance the city's legitimate interest in public safety and deterrence of gang violence" (*Id.*) Although the case involved cameras filming both the exterior and interior premises of the café, the court's analysis treated the cafés as public spaces in which individuals would have a reasonable expectation of privacy. However, the case did not involve a network of public cameras that might have required the court to reassess what a reasonable expectation of privacy actually entails.

The best way to protect individual rights from threats posed by video surveillance is to create strict written guidelines governing the design

of such systems and the collection of footage. As one might expect, there are numerous studies, both pro and con, on the effectiveness of public video surveillance. Nevertheless, a study from the Constitution Project Guidelines for Public Video Surveillance is particularly insightful, and contains a series of recommendations to help protect our civil liberties and privacy rights in these situations (*Supra* at 4). The report is a bipartisan recommendation from a broad coalition of policy experts, former government officials and legal scholars from throughout the political arena.

The guidelines outline several court principles that should govern the operation of any public video surveillance system. Such a system should be created only to serve a clearly articulated law enforcement purpose and specifically must be designed to serve that need. This purpose will determine how the system should be designed, including where cameras would be located and what technological features are needed. In addition, video surveillance systems should always be designed to minimize any possible intrusions into the private lives of community residents. For example, a system designed to capture footage of attempted terrorist attacks might feature cameras fixed on government buildings and other likely targets. Those same cameras, however, should not be able to look through the windows of nearby apartment buildings or social halls.

Despite the fact that significant evidence suggests video surveillance is not an effective deterrent against most crimes — except perhaps traffic violations — it seems likely that in this day and age of law enforcement first and civil liberties last, communities will continue to turn to video surveillance as a solution. Increased public surveillance, although mostly ineffective, means an ever increasing risk of trampling on civil liberties. Nevertheless, it is possible to design surveillance systems in a way that minimizes the threats to privacy rights and civil liberties.

Government video surveillance programs should be used only to serve a clear purpose and should operate with strict oversight under strict written guidelines designed to fulfill a specific purpose and prevent abuse. We should not have to choose between increased safety and the loss of civil liberties.

*James S. Wolford is a partner with The Wolford Law Firm LLP and practices in the areas of commercial, personal injury, employment and criminal litigation.*