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WRITER'S DIRECT DIAL NO.

The Honorable Samuel I. Rosenberg  
4811 Liberty Heights Avenue  
Baltimore, Maryland 21207-7193

Dear Delegate Rosenberg:

You have asked about the application of the Maryland Wiretap Act to situations in which citizens record public activities of police officers.

No appellate decision in Maryland specifically addresses the application of that law to recording of police activity. However, we can offer some guidance based on the language of the statute, the case law under the statute in Maryland, and cases in other jurisdictions concerning the application of state eavesdropping statutes to the recording of police activity.

Your question is apparently prompted by recent news reports concerning incidents in which an individual has attempted to record an encounter with the police. See, e.g., P. Hermann, *Crime Scenes: Can you legally record police?*, Baltimore Sun (May 20, 2010); A. Shin, *Traffic stop video on YouTube sparks debate on police use of Md. Wiretap laws*, Washington Post (June 16, 2010), p.A01. At least one of those encounters has resulted in the filing of charges alleging a violation of the State Wiretap Act. Accordingly, at the outset we should make clear the limitations of a legal opinion or letter of advice of the Attorney General's Office. A letter of advice or opinion is not a vehicle for determining the facts of a particular case. Moreover, in accordance with our longstanding policy, in providing you with a letter of advice on this issue, we do not purport to express an opinion on the merits of any pending case.

***State Wiretap Law***

Your question is a matter of statutory interpretation. While the Constitution also constrains electronic surveillance by the police and other agents of the government,<sup>1</sup> it does not generally constrain the actions of private individuals. We start with a brief summary of the State Wiretap Act.

The State Wiretap Act, which was first enacted in 1973, was based in large part on the federal wiretapping and electronic surveillance law, although it is in some respects more protective of privacy than the federal law. *See generally* 85 *Opinions of the Attorney General* 225 (2000). It is codified at Annotated Code of Maryland, Courts & Judicial Proceedings Article (“CJ”), §10-401 *et seq.*

The Act generally limits various forms of eavesdropping. Except as specifically authorized in the statute, an individual may not “wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communications.” CJ §10-402(a)(1). In addition, it is unlawful to wilfully use or disclose the contents of a communication obtained in violation of the Wiretap Act. CJ §10-402(a)(2)-(3).

Critical to understanding the Act are the definitions of key terms. Pertinent to your inquiry, “intercept” is defined as “the aural or other acquisition of the contents of any wire, electronic, or oral *communication* through the use of any electronic, mechanical, or other device.” CJ §10-401(3) (emphasis added). Thus, video recording alone, without the capture of an audio communication, is not regulated by the Wiretap Act.<sup>2</sup> *Ricks v. State*, 312 Md. 11, 28, 537 A.2d 612 (1988). The statute defines “oral communication” as “any conversation

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<sup>1</sup> *See Katz v. United States*, 389 U.S. 347 (1967) (electronic surveillance of pay telephone by FBI was search and seizure subject to Fourth Amendment standards); *Ricks v. State*, 312 Md. 11, 28, 537 A.2d 612 (1988) (nonconsensual video surveillance by police must satisfy Fourth Amendment).

<sup>2</sup> Other laws impose restrict video recording in certain circumstances. *See, e.g.*, Annotated Code of Maryland, Criminal Law Article, §3-901 *et seq.* (crimes relating to visual surveillance of “private places”). None of these laws would apply to the recording of a public encounter between a police officer and a private citizen.

or words spoken to or by a person in private conversation.” CJ §10-401(2)(i).<sup>3</sup> The term “wilfully,” with reference to an interception, means that an interception not specifically authorized by the statute “is done intentionally – purposely.” *Deibler v. State*, 365 Md. 185, 199, 776 A.2d 657 (2001).

The statute specifically authorizes a number of types of interceptions. CJ §10-402(c). For example, a person may intercept a wire, oral, or electronic communication if he or she is a party to the communication and all other participants have given prior consent to the interception. CJ §10-402(c)(3).<sup>4</sup> Other provisions authorize interceptions with one party’s consent when the interception is part of a criminal investigation of certain enumerated crimes. CJ §10-402(c)(2), (9). Only one of the statutory authorizations, which concerns

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<sup>3</sup> The statutory definition also distinguishes oral communications from electronic communications. CJ §10-401(2)(ii) (“‘oral communication’ does not include any electronic communication”). The Act defines wire and electronic communications as follows:

(1) “Wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of a connection in a switching station) furnished or operated by any person licensed to engage in providing or operating such facilities for the transmission of communications.

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(11)(i) “Electronic communication” means any transfer of signs signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.

(ii) “Electronic communication” does not include:

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1. Any wire or oral communication;
  2. Any communication made through a tone-only paging device; or
  3. Any communication from a tracking device.

CJ §10-401(1), (11).

<sup>4</sup> The requirement that all parties consent to the interception is one feature of the Maryland statute that is more protective of privacy than the federal counterpart. *See Miles v. State*, 365 Md. 488, 507-8, 781 A.2d 787 (2001), *cert. denied*, 534 U.S. 1163 (2002).

vehicle stops by police officers who record the stop, relates specifically to a public encounter between a police officer and an individual. CJ §10-402(c)(4).<sup>5</sup> That authorization is discussed in greater detail below.

One who intercepts a communication in violation of the Wiretap Act is subject to criminal and civil sanctions. Each interception may be prosecuted as a felony carrying a potential penalty of up to five years in prison and a \$10,000 fine. CJ §10-402(b). The person who caused the interception may be liable for damages, attorney's fees, and litigation costs to the individuals whose communications were intercepted. CJ §10-410. A device used to intercept a communication in violation of the Act may be seized and forfeited to the State Police. CJ §10-404.

### *Analysis*

In the four decades since the enactment of the Wiretap Act, technology has advanced, resulting in a proliferation of ever smaller and more portable devices with ever increasing capabilities that often include the capacity to record sound. Your question raises one of many possible applications of the Wiretap Act to those devices that will inevitably be addressed by the appellate courts.

The Wiretap Law regulates the interception of oral, wire, or electronic communications. The typical encounter between a citizen and police officer does not involve a wire or electronic communication. Thus, the application of the Act will turn on whether a recording of the audio portion of such an encounter constitutes the interception of an "oral communication" protected by the Act.

### *Whether Police Activity Involves an "Oral Communication"*

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<sup>5</sup> Other types of interceptions authorized by the statute include the use of pen registers and similar devices (CJ §10-402(c)(8)); interception of communications by certain providers of communication services (CJ §10-402(c)(1)); interception of communications of government emergency communications centers during an emergency (CJ §10-402(c)(5)); interception of certain radio and electronic communications through systems intended to be accessible to the general public (CJ §10-402(c)(7)); use of body wires by law enforcement personnel if the officer's safety may be in jeopardy and the communications are not recorded or used in evidence (CJ §10-402(c)(6)); and placement of an interception device within a vehicle to obtain evidence of an anticipated theft of the vehicle (CJ §10-402(c)(10)).

As indicated above, an “oral communication” is “any conversation or words spoken to or by a person in private conversation.” What is a “private conversation”? Does an arrest or stop of a citizen by a police officer involve a “private conversation”?

The federal wiretap statute on which the Maryland Wiretap Act is based does not use the phrase “private conversation.”<sup>6</sup> The federal law defines “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” 18 U.S.C. §2510(2). Thus, the federal wiretap statute applies only to oral communications in which an individual has a reasonable expectation of privacy. *See United States v. Duncan*, 598 F.2d 839, 849-53 (4<sup>th</sup> Cir.), *cert. denied*, 444 U.S. 871 (1979).

An early law review article on the Maryland statute by the former chief judge of the Court of Special Appeals suggested that the definition in the Maryland statute is “considerably more inclusive” than the federal definition. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland’s New Wiretap and Electronic Surveillance Law*, 8 U. Balt. L. Rev. 183, 192 (1979). The article did not explain the basis of that suggestion.

Maryland courts have subsequently characterized the difference in the wording between the State and federal definitions of “oral communication” as “slight” and have construed the phrase in the Maryland statute to incorporate the “reasonable expectation of privacy” standard applied under the federal law. *Fearnow v. C & P Telephone Co.*, 104 Md. App. 1, 33, 655 A.2d 1 (1995), *aff’d in relevant part*, 342 Md. 363, 376, 676 A.2d 65 (1996); *see also Malpas v. State*, 116 Md. App. 69, 83-84, 695 A.2d 588 (1997); *Hawes v. Carberry*, 103 Md. App. 214, 220, 653 A.2d 479 (1995); *Benford v. American Broadcasting Co.*, 649 F. Supp. 9, 11 (D. Md. 1986).

For example, in *Malpas*, the Court of Special Appeals held that a neighbor’s recording of a man shouting at his wife, which could be heard through an apartment wall, did not violate the Wiretap Act. Judge Murphy, then Chief Judge of that court, started from the premise that a person has no expectation of privacy in a statement that he “knowingly exposes to the public,” even if made in his own apartment. He noted that the individual who made the recording could hear the shouting “with his unaided ear”, that he was lawfully in the place (his own apartment) where he heard the shouting, and that his presence there could

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<sup>6</sup> Notably, the definitions of “wire communication” and “electronic communication” do not refer to privacy or “private conversations.” Thus, “privacy is not relevant to determining a violation of the Wiretap Act when a wire communication has been intercepted.” *Fearnow v. C & P Telephone Co.*, 342 Md. 363, 376-77, 676 A.2d 65 (1996).

be reasonably anticipated by the speaker. Judge Murphy concluded that the speaker had no reasonable expectation of privacy in the statements that were recorded, and therefore they did not constitute an “oral communication” protected by the State Wiretap Act. 116 Md. App. at 84-86.

In 2000, the Chief of Police for Montgomery County sought Attorney General Curran’s opinion as to whether a police officer who inadvertently made an audio recording as part of a video recording of a traffic stop would violate the State Wiretap Act. For a variety of reasons, Attorney General Curran concluded that such a recording would not violate the Act. 85 *Opinions of the Attorney General* 225 (2000). That opinion reviewed the case law applying the State wiretap law and concluded that a typical encounter between a uniformed police officer and an individual was unlikely to qualify as an “oral communication” under the Act:

It is also notable that many encounters between uniformed police officers and citizens could hardly be characterized as “private conversations.” For example, any driver pulled over by a uniformed officer in a traffic stop is acutely aware that his or her statements are being made to a police officer and, indeed, that they may be repeated as evidence in a courtroom. It is difficult to characterize such a conversation as “private.”

Similarly, a number of courts have concluded that, for purposes of federal and state electronic surveillance statutes, a suspect who engages in a conversation while seated in a police car does not have a reasonable expectation of privacy in his or her statements. *See, e.g., Kansas v. Timley*, 975 P.2d 264 (Kan. Ct. App. 1998); *United States v. Clark*, 22 F.3d 799 (8<sup>th</sup> Cir. 1994); *United States v. McKinnon*, 985 F.2d 525 (11<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 843 (1993); *United States v. Rodriguez*, 998 F.2d 1011 (4<sup>th</sup> Cir. 1993) (unpublished); *see also* Tex. Atty. Gen. Op. JC-0208, 2000 WL 378883 (April 12, 2000).

85 *Opinions of the Attorney General* at 234 n. 8. The reasoning of that excerpt, which suggested that a police officer would not face prosecution or liability under the Act for recording an arrest or traffic stop in a public place, would apply equally well to a private person involved in the same incident.

*Significance of Conditional Statutory Authorization for Police Recordings of Traffic Stops*

One of the specific authorizations for interceptions of oral communications in the Maryland Wiretap Act relates to interceptions effected by police officers during traffic stops. In the early 1990s, approximately 20 years after the Wiretap Act was first enacted, police had begun to videotape traffic stops.<sup>7</sup> There apparently was some concern that a conversation between a motorist and police officer during a traffic stop might qualify as a private conversation covered by the Act and that an audio recording of the encounter could therefore violate the Wiretap Act. See legislative file for House Bill 265 (1992). Such a concern would certainly be well taken to the extent that the recording device picked up conversations out of earshot of the officer that were intended to be private in nature.

The Department of Public Safety and Correctional Services proposed legislation to explicitly authorize the interception of conversations during traffic stops, which was adopted, with minor amendments, by the General Assembly. Chapter 140, Laws of Maryland 1992, *codified as* CJ §10-402(c)(4). That provision allows a law enforcement officer to intercept an oral communication as part of a video recording of a traffic stop if the following conditions are met: (1) the officer is a party to the communication; (2) the officer has been identified as a law enforcement officer to the other parties to the communication; and (3) the law enforcement officer informs the other parties to the communication of the interception at the beginning of the conversation.

It thus appears that a premise of this 1992 legislation was that a conversation recorded by the officer as part of the video recording would otherwise be a “private conversation” protected by the Act. However, subsequent decisions of the Maryland courts cited above, as well as the authorities cited in the 2000 Attorney General opinion indicate that, in most cases, the conversation between the officer and citizen who is arrested or detained by the officer is not likely to be considered a “private conversation” protected by the Act.

*Application of Eavesdropping Laws of other States to Recordings of Police Activities*

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While there are no cases in Maryland that specifically discuss whether an individual may record a public encounter between a citizen and police officer consistent with the Maryland Wiretap Act, courts in several other states have had occasion to analyze the application of their own eavesdropping laws to such situations. None of the statutes in the

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<sup>7</sup> It is notable that recordings of police activity are often used to exonerate officers of spurious charges of misconduct. See *Scott v. Harris*, 550 U.S. 372 (2007) (holding that videotape of car chase conclusively demonstrated that officer had not used excessive force).

other states is identical to the Maryland Wiretap Act, although all of the statutes are similar in basic outline.

The Washington state law uses language somewhat similar to Maryland's statute in that it prohibits the interception or recording of "private conversation" by any device without first obtaining the consent of all persons engaged in the conversation. In *State v. Flora*, 845 P.2d 1355 (Wash. App. 1992), officers were called to the defendant's house after a neighbor alleged that the defendant had violated a restraining order that the neighbor had previously obtained against the defendant and his family. After an extended conversation with the defendant and others in the street, the officers ultimately decided to arrest him; during the course of the arrest, they discovered a small tape recorder, which had recorded the arrest, hidden among the defendant's papers. The defendant was charged with, and convicted of, recording a "private conversation" – *i.e.*, his arrest.

The Court of Appeals of Washington reversed the conviction, rejecting "the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest..." 845 P.2d at 1357. The court noted that the term "private" had been construed by Washington courts as meaning "secret ... intended only for persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ..." *Id.* The court concluded that the arrest "was not entitled to be private" and the officers could not have reasonably considered their words to be private. Accordingly, the recording of the conversation could not have violated a statute that applies only to private conversations. *Id.* at 1358.

Courts in a number of other states have reached similar conclusions in applying their own eavesdropping statutes. See *Commonwealth v. Henlen*, 564 A.2d 905 (Pa.S.Ct. 1989) (suspect who secretly recorded interview with state trooper in presence of third party did not violate Pennsylvania wiretap law because officer could not have a reasonable expectation that his conversation was confidential under the circumstances); *Jones v. Gaydula*, 1989 WL 156343 (E.D. Pa. 1989) (construing the Pennsylvania wiretap law, the court held that police officers had no reasonable expectation of privacy when an individual who had been arrested recorded his interview with police, despite being asked to stop); *People v. Beardsley*, 503 N.E.2d 346 (Ill.S.Ct. 1986) (suspect placed in back of police car who recorded conversation between two officers in front seat of squad car did not violate Illinois eavesdropping statute as statute protects only conversations intended to be of a private nature under circumstances justifying such an expectation); *Hornberger v. American Broadcasting Co.*, 799 A.2d 566 (N.J. App. Div. 2002) (holding, in a case involving a secret video and audio recording of a



police traffic stop by a television news program, that police officers had no reasonable expectation of privacy and that recording did not violate New Jersey wiretap law).<sup>8</sup>

By contrast, the Supreme Judicial Court of Massachusetts has held that a secret recording of police officers during a routine traffic stop violated the Massachusetts wiretap statute. *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001). That case arose from a confrontational traffic stop that did not result in charges against the individual. However, the individual who was the subject of the stop had secretly turned on a tape recorder at the beginning of the stop and later submitted it to the police department as part of a complaint about his treatment by the police. He was subsequently charged and convicted of violating the Massachusetts wiretap statute.

The Massachusetts statute defined “interception” to mean “to *secretly* hear or *secretly* record the contents of any wire or oral communication through the use of any intercepting device” and defined “oral communication” as “speech, except such speech as is transmitted over the public air waves by radio or other similar device.” 750 N.E.2d at 966 (emphasis added). Thus, unlike the Maryland Wiretap Act, an “oral communication” under the Massachusetts statute need not be part of a “private conversation”; in addition, unlike the Maryland statute, the Massachusetts law specifically proscribes secret recording of an oral communication.

On appeal, the Supreme Judicial Court affirmed the conviction, holding that the Massachusetts statute prohibits all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when such recordings are made without their permission or knowledge. 750 N.E.2d at 967. The court distinguished *Flora*, the Washington case summarized above, on the basis that the prohibition in the Washington wiretap statute was limited to recording of “private

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<sup>8</sup> Some courts have considered whether there is a constitutional right to record public police conduct, although such a right does not appear to be clearly established. *Matheny v. Allegheny County*, 2010 WL 1007859 (W.D. Pa. 2010) (dismissing law suit by an individual who was arrested for violation of Pennsylvania wiretap law after using his cell phone to record an encounter with police officers, and stating that the law is “plainly underdeveloped” as to whether an individual has a First Amendment right to make both video and audio recordings of police activity); *see also Smith v. City of Cumming*, 212 F.3d 1332 (11<sup>th</sup> Cir. 2000) (finding First Amendment right, subject to reasonable time, place and manner restrictions, to photograph and videotape police conduct, but not specifically addressing the audio portion of a videotape); *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (“videotaping or photographing the police in the performance of their duties on public property may be a protected activity”); *cf. Jean v. Massachusetts State Police*, 492 F.3d 24 (1<sup>st</sup> Cir. 2007) (posting of audio and video recording of warrantless search and arrest on Internet protected by First Amendment, even if the creation of the recording violated Massachusetts wiretap statute).

conversations.” *Id.* at 968 n. 6. It distinguished the Pennsylvania decision in *Henlen* and the Illinois decision in *Beardsley* on similar grounds. *Id.* at 968 n.6, 970 n.10. The court emphasized that only secret recording is prohibited by the Massachusetts statute; if the defendant had informed the police of his intent to record the stop – or simply held the recorder in plain sight – there would have been no violation. *Id.* at 971.

### ***Conclusion***

In sum, the State Wiretap Act does not regulate video recording, except to the extent that sound is recorded as part of the video. Whether statements made by a police officer during an encounter with a citizen are protected under the Maryland Wiretap Act depends on whether they are part of a “private conversation” and therefore fall within the definition of an “oral communication” covered by the Act. The Maryland appellate courts have not yet construed the Maryland Wiretap Act as it may apply to a conversation between a police officer and individual during the course of an arrest or other official police action involving the individual. Appellate courts in other jurisdictions have decided a number of such cases. It appears that there are three possible outcomes to such a case under the Maryland Wiretap Act.

First, it is possible that a court might find that a particular encounter between an individual and a police officer involved a “private conversation” and thus qualified as an “oral communication” subject to the Wiretap Act. This seems an unlikely conclusion as to the majority of encounters between police and citizens, particularly when they occur in a public place and involve the exercise of police powers. As best we can tell, no reported appellate decision has reached this conclusion.

Second, a court might reach a conclusion similar to the Massachusetts court in *Hyde* and hold that only a surreptitious recording of a police stop is forbidden by the Wiretap Act. This also seems unlikely, given the difference in language between the Massachusetts and Maryland statutes.

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Finally, a court could hold that a police stop of an individual necessarily is not a “private conversation” and therefore does not involve an oral communication covered by the State Wiretap Act. This conclusion would be consistent with the suggestion made in the 2000 Opinion and with the holdings of the courts in most other states construing state

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eavesdropping statutes. Given the language of the Maryland statute, this seems the most likely outcome in the case of a detention or arrest.<sup>9</sup>

Very truly yours,

A handwritten signature in dark ink, reading "Robert McDonald". The signature is written in a cursive, slightly stylized font.

Robert N. McDonald  
Chief Counsel  
Opinions and Advice

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<sup>9</sup> This conclusion relates solely to the application of the Maryland Wiretap Act. We do not discuss the authority of police officers to control activities of an individual within a police car or police station after an arrest has been made.