

## Smile, You're on Candid Camera!

# MA District Court Declares the MA Wiretap Statute Unconstitutional Insofar as it Prohibits Recording of Government Officials Performing Their Duties in Public Space

*Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018)

By Keith H. Bensten, Day Pitney LLP

In *Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018), Chief Judge Saris held that the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 (the “Wiretap Statute”) is unconstitutional insofar as it prohibits audio recording of “government officials,” including law enforcement officers, performing their duties in “public spaces.” The decision involved two cases: one filed by private citizens (*Martin v. Gross*); and another filed by a nonprofit that engages in undercover journalism (*Project Veritas v. Conley*).

The Wiretap Statute criminalizes the willful “interception” of any “communication.” An “interception” occurs when one is able “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device” without the consent of “all parties to such communication.” The Wiretap Statute does not criminalize recording that is done openly or video recording that is not accompanied by audio recording.

In *Martin*, plaintiffs K. Eric Martin and René Pérez sued the Suffolk County district attorney and the Boston police commissioner seeking declaratory and injunctive relief. Both plaintiffs have openly recorded police officers performing their duties in public on numerous occasions. They have recorded one-on-one interactions with the police, traffic and pedestrian stops of others, and protests. Neither plaintiff has been arrested for violating the Wiretap Statute. Both asserted that they have wanted to secretly record police officers performing their duties in public on many occasions, but neither has done so for fear that doing so would endanger them or provoke hostility from police officers.

In *Project Veritas*, plaintiff Project Veritas Action Fund (“PVAF”) sued the Suffolk County district attorney challenging the constitutionality of the Wiretap Statute. PVAF is a nonprofit that uses secret recordings to investigate government officials and candidates for public office. Although PVAF has not secretly recorded government officials in Massachusetts, PVAF identified four projects that it claims it would have pursued but for the Wiretap Statute.

The parties in both cases cross moved for summary judgment on plaintiffs’ claim that the Wiretap Statute is unconstitutional in the circumstances presented. In *Martin*, plaintiffs’ summary judgment motion concerned the secret recording of police officers performing

their duties in public. In *Project Veritas*, plaintiff’s motion concerned the secret recording of government officials doing the same. The district attorney also filed a motion to dismiss on ripeness grounds in both cases. (In *Martin*, defendants raised other preliminary issues that are not addressed in this article.) In support of its ripeness argument, the district attorney argued that the resolution of plaintiffs’ claims involved a host of fact-dependent considerations that plaintiffs did not sufficiently develop in either case.

The Court rejected the district attorney’s ripeness argument. The Court explained that plaintiffs desired to secretly record government officials and police officers performing their duties in public but have not done so because of the Wiretap Statute. The Court also noted that defendants have sought criminal complaints and have charged people for violating the Wiretap Statute numerous times in recent years. The Court thus concluded that there was a live controversy and that resolution of the case need not be postponed.

The Court then considered three issues in its constitutional analysis on the parties’ summary judgment motions: (1) whether plaintiffs’ claims should be treated as “facial” or “as-applied” challenges; (2) what level of scrutiny ought to apply to plaintiffs’ claims; and (3) whether the Wiretap Statute survives that degree of constitutional scrutiny. On the first issue, the Court noted that constitutional claims in similar cases often have the characteristics of both facial and as-applied challenges. Here, the Court held that the challenges were facial because plaintiffs sought to partially invalidate the Wiretap Statute. But the Court noted that the claims were limited to two sets of circumstances: secret recording of police officers performing their duties in public spaces; and secret recording of government officials doing the same.

On the second issue, the Court rejected PVAF’s argument that strict scrutiny ought to apply. The Court held that the Wiretap Statute is a content-neutral restriction on conduct and not a content-based restriction on expression. On this basis, the Court concluded that intermediate scrutiny applied.

On the third issue, the Court explained that to pass muster under intermediate scrutiny a law must be narrowly tailored to serve a significant government interest but need not be the least restrictive means of satisfying that interest. Instead, there must be a close fit between the ends and means. Defendants argued that the government interest at issue was ensuring that all citizens receive “guaranteed notice of being recorded, so that one can respond appropriately.”

The Court held that the Wiretap Statute is not sufficiently tailored to serve the government’s interest. In reaching this conclusion, the Court relied on the First Circuit’s decision in *Glik v. Cunniff*, 665 F. 3d 78 (1st Cir. 2011). That case involved a 42 U.S.C. § 1983 claim by a man who was arrested for using his cell phone to openly film several police officers arrest someone on Boston Common. In *Glik*, the First Circuit held that openly filming government officials engaged in their

(continued on next page)

duties in a public space was protected by the First Amendment, subject to reasonable time, place, and manner restrictions. The First Circuit reasoned that gathering information about public officials that can be disseminated to others furthers a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs. Relying on these precepts, Judge Saris held that the First Amendment right recognized in *Glik* extends to secretly recording government officials, including police officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. In explaining her decision, Judge Saris echoed the *Glik* Court's statement that the privacy interests of police officers and government officials must yield to the First Amendment interest in newsgathering and information dissemination.

Judge Saris also addressed some hypotheticals that defendants raised about the potential impact of the Court's ruling. In particular, defendants expressed concern that secret recording might implicate public safety issues where police officers meet with confidential informants or encounter crime victims on the street. In those situations, Judge Saris reasoned that police officers may conduct such conversations away from bystanders or in private (i.e., non-public) settings. Judge Saris also cited case law noting that police discussions concerning matters of national and local security often do not occur in public settings.

The *Martin* decision is especially notable today when police interactions with the public are the subject of intense debate and scrutiny. The decision may serve as a check on government power insofar as it may encourage government officials, including police officers, to perform their duties in an appropriate and lawful manner. More broadly, the decision is a timely reminder of the importance of the First Amendment's protection for newsgathering and information dissemination.

*Keith Bensten is an associate at Day Pitney LLP. An experienced civil litigator, Keith represents businesses and employers in complex commercial, product liability, and employment litigation. He has represented businesses and individuals in litigation matters in federal and state courts throughout the United States.*

Interested in contributing to the next edition of the FBA Massachusetts Chapter Newsletter?

Please send your submissions to the Editor, Harrison Kaplan, at [hkaplan@eckertseamans.com](mailto:hkaplan@eckertseamans.com).