

Opinion No. 2013-115

January 24, 2014

The Honorable Karen S. Hopper
State Representative
Post Office Box 864
Mountain Home, Arkansas 72654-0864

Dear Representative Hopper:

I am writing in response to your request for my opinion on the following questions, which you have submitted in connection with your concerns “regarding the rights of citizens to photograph and file charges against city, state and county officials, who are believed to be guilty of violating state statutes”:

1. Are city and county law enforcement agencies responsible for developing policies that adhere to and do not infringe upon, A.C.A. 27-37-306, Arkansas Tint Law; A.C.A. 27-51-202, Restrictions Not Applicable to Emergency Vehicles; and A.C.A. 27-51-204, Maximum and Minimum Speed Limits-Exceptions?
If so, then:
 - (a) Are citizens allowed to photograph or video-tape the believed infractions, with respect to time, place, and manner rules and regulations, as long as positive interference with a governmental function can't be affirmed?
 - (b) Should local law enforcement, prosecuting attorneys, or district judges establish stipulations on a citizen that diminish one's right to record officers in the discharge of their public duties or extort agreements to such stipulations by use of intimidation or threats of incarceration?

- (c) If a citizen documents unlawful activity committed by a chief of police, or by an officer in the city limits, or an elected official working for the city, who is responsible for taking a report and ensuring that the accused will not be shown favor or leniency with respect to due process and equality?
2. If a citizen suspects law enforcement officers or elected officials within the county to be guilty of violating an Arkansas state law, such as A.C.A. 5-54-122, Filing False Report with Law Enforcement Agency, or other state statutes which could end their career, who is responsible for taking a report of the allegation, investigating the allegation, and ensuring that the law is enforced without favor or malice?

RESPONSE

I must note at the outset that, as a public official, I am statutorily precluded from engaging in the private practice of law.¹ Given the specificity of the statutes referenced in your question, I can only assume that your questions relate to particular incidents involving a constituent who is seeking advice regarding the scope of his legal rights. Regrettably, I am precluded from rendering such advice. Accordingly, in the ensuing discussion, I can do no more than set forth generally the scope of official responsibility and accountability in enforcing the laws.

In response to the inquiry preceding the subparts of your first question, in my opinion, law enforcement agencies, while obviously obligated to comply with the laws recited, are not obliged to formulate rules and regulations to ensure that they “adhere to and do not infringe upon” these laws. With respect to subsection (a) of this question, photographing or videotaping a law enforcement is generally impermissible when doing so would obstruct governmental functions. I cannot address the propriety of any such practice under what appear to be the specific circumstances giving rise to your questions. I am unable meaningfully to address the scenario anticipated in subsection (b) of your question, which appears concerned with unspecified allegations of official malfeasance that should properly be directed to private counsel. Finally, with respect to both of your

¹ A.C.A. § 25-16-701 (Repl. 2002).

questions, the discussion below generally sets forth the procedures available for reporting and seeking relief for infractions of the sort contemplated.

Question 1: Are city and county law enforcement agencies responsible for developing policies that adhere to and do not infringe upon, A.C.A. 27-37-306, Arkansas Tint Law; A.C.A. 27-51-202, Restrictions Not Applicable to Emergency Vehicles; and A.C.A. 27-51-204, Maximum and Minimum Speed Limits-Exceptions? If so, then:

- (a) Are citizens allowed to photograph or video-tape the believed infractions, with respect to time, place, and manner rules and regulations, as long as positive interference with a governmental function can't be affirmed?***
- (b) Should local law enforcement, prosecuting attorneys, or district judges establish stipulations on a citizen that diminish one's right to record officers in the discharge of their public duties or extort agreements to such stipulations by use of intimidation or threats of incarceration?***
- (c) If a citizen documents unlawful activity committed by a chief of police, or by an officer in the city limits, or an elected official working for the city, who is responsible for taking a report and ensuring that the accused will not be shown favor or leniency with respect to due process and equality?***

With respect to the general question that precedes your itemized inquiries, city and county law enforcement agencies are clearly charged with upholding the laws.² Law-enforcement agencies are under no duty, however, to formally enact rules or regulations that “adhere to and do not infringe upon” the specific laws recited. I am neither situated nor authorized to address any particular concerns your constituent may harbor regarding official enforcement of these laws.

With respect to subsection (a) of this question, only a finder of fact could determine in any particular instance whether a citizen was justified in videotaping

² See, e.g., A.C.A. § 14-52-203(b) (Supp. 2011), as amended by Acts 2013, No. 726 (charging municipal chiefs of police and officers “diligently and faithfully” to enforce state and local laws).

an officer engaged in his official duties. Although First Amendment rights might be implicated,³ only a finder of fact could determine in any given case whether a citizen's qualified right to videotape in public has been compromised. Moreover, with respect to the particular circumstances giving rise to your question, I can do no more than state again that only private counsel could advise your constituent regarding his legal options. As a general proposition, however, I can affirm that a private citizen has no right to engage in what you term a "positive interference with a governmental function."⁴

As phrased, Subsection (b) of your question appears to answer itself in referring to "stipulations on a citizen that *diminish one's right* to record officers in the discharge of their public duties" and to officials' "*extort[ing]* agreements to such stipulations *by use of intimidation or threats* of incarceration" (emphases added). To the extent that a "right to record officers" exists in any given instance – a determination that could only be made by considering all the attendant circumstances – an official could obviously not properly "diminish" it. Only a finder of fact, however, could determine whether an existing right has been compromised in any particular instance. Likewise, "extortion" constitutes a criminal offense⁵ and hence is impermissible.

However, even if you were to detail particular circumstances that you believe might constitute a "diminishment" of rights or "extortion," I could offer no opinion regarding the justice of these characterizations. I am neither a finder of fact nor authorized to opine regarding the consequences at law of what might be the facts. Simply put, I cannot speculate in a formal opinion regarding specific matters whose resolution properly falls within the jurisdiction of the courts.

With respect to your inquiry in subsection (c) of this question, if a citizen is aggrieved by a municipal law enforcement officer's alleged misconduct, he can

³ For a discussion of First Amendment issues relating to videotaping official police activities, *see, e.g., American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 601 (7th Cir. 2012); *Glik v. Cunniffe*, 653 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000); *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 681 (2009), citing *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 576-77 (1980); *Robinson v. Fetterman*, 378 F.Supp.2d 534, 540-41 (E.D. Pa. 2005).

⁴ The elements of the offense of obstructing governmental functions are set forth at A.C.A. § 5-54-102 (Supp. 2013).

⁵ A.C.A. § 5-36-102(a)(5) (Supp. 2013).

file a complaint either with the police department itself or with the local prosecutor, who may choose to refer a matter to the Arkansas State Police for possible investigation.⁶

Question 2: If a citizen suspects law enforcement officers or elected officials within the county to be guilty of violating an Arkansas state law, such as A.C.A. 5-54-122, Filing False Report with Law Enforcement Agency, or other state statutes which could end their career, who is responsible for taking a report of the allegation, investigating the allegation, and ensuring that the law is enforced without favor or malice?

As was the case with your first question, I suspect that your reference to a specific statute relates to some particular incident or incidents that prompted your request. Again, I cannot provide counsel to individuals regarding how they should proceed to challenge the conduct of a public official or agency with respect to a particular grievance. I can do no more than note that, as a general matter, the remedies referenced in my response to your first question would apply equally to an official's violation of the referenced statute,⁷ which declares it a Class A misdemeanor to file a false report with a law enforcement agency or prosecuting attorney's office alleging criminal activity by another individual. Only counsel familiar with the circumstances to which you suggest this statute might apply could provide counsel regarding what recourse, if any, a complainant might have.

⁶ In this regard, the ASP Criminal Investigation Division Operations Manual at 68, contained within the ASP Policies and Procedures (August 2012), at 348, provides in pertinent part:

- When a member of the public contacts a special agent or supervisor with a complaint against a public official, the complainant should be encouraged to contact the appropriate prosecuting attorney with the complaint. The prosecuting attorney may then request, through the director's office, that the Arkansas State Police investigate the complaint; and
- In reviewing a request for an investigation of a public official and prior to approval of such request, several factors should be considered including, but not limited to, any ongoing civil or criminal litigation involving the complainant and the public official.

For additional information regarding the possible role of the Arkansas State Police in investigating alleged misconduct by law enforcement officers or other public officials, *see* Ops. Att'y Gen. Nos. 2010-133 and 98-255.

⁷ A.C.A. § 5-54-122 (Supp. 2013).

The Honorable Karen S. Hopper
State Representative
Opinion No. 2013-115
Page 6

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

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