April 12, 2011

By Electronic Mail

San Francisco Entertainment Commission
City Hall, Room 453
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: ACLU-NC Comments on Proposed Adoption of Rules Related to Security at Places of Entertainment and One Time Events

Dear members of the Entertainment Commission,

I am writing on behalf of the American Civil Liberties Union of Northern California. It has come to our attention that the Entertainment Commission is considering adopting rules concerning security at places of entertainment and one-time events. We are concerned that these proposed rules unnecessarily intrude into the privacy and free-speech rights of San Franciscans and others who may attend such events.

As we understand it, the proposed rules would apply to places of entertainment, as defined in San Francisco Police Code § 1060(k), and to one-time events involving entertainment, as defined in § 1060.29. In each case, the regulations are directed at events and performances that provide "entertainment," which includes a wide range of expressive activities including plays, poetry recitations, music, and expressive dancing. § 1060(g). These activities are protected by the First Amendment and the even broader protections of free speech provided by the California Constitution, [1] and overbroad regulation of them threatens to impermissibly chill the exercise of these rights, both by those who wish to communicate a message and those who want to hear it.[2]

We are particularly concerned about two of the proposed rules. One of these would require that all patrons, performers, and other "occupants" be ID scanned, with the results retained at least 15 days and "made available to local law enforcement upon request." The second would require that video

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[1] For example, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 398 (2001), our supreme court reiterated that "entertainment is entitled to the same constitutional protection as the exposition of ideas," giving poetry, abstract painting, and music as examples of such protected expression.

[2] Because the First Amendment protects the right to communicate with others, it has long been "well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

cameras make a record of every person entering or leaving the event, and again that those records be maintained for 15 days and made available to the police "upon request."

These requirements are inconsistent with the constitutional guarantees of free speech and privacy that protect all Californians. The First Amendment recognizes a right to engage in First Amendment activities anonymously.[3] The proposed rules would eviscerate this right, because the police would be entitled to a list of all the speakers and all the attendees at any event, and video showing them entering and leaving, with no requirement that the police make even the slightest showing of a legitimate need to obtain that information.

The proposal to allow the police unlimited access to these records also violates our state constitutional protection of individual privacy. Under the California Constitution, the police do not have unlimited access to information we provide to businesses. Thus, our supreme court has held that the police must get a warrant before they obtain from a hotel a list of the phone calls that a guest has made from his room, or before they obtain from a guest's credit card company a list of charges.[4] In light of the First Amendment's right to participate anonymously in expressive activities, the protections for the names of speakers and listeners should be no less than the protections for shopping lists.

Nearly four decades ago the People of this state overwhelmingly passed a constitutional amendment to include an express protection for privacy. As our supreme court has held, this amendment was intended to guard against a wide range of threats to our privacy, including "government snooping and the secret gathering of personal information," "the overbroad collection and retention of unnecessary personal information by government and business interests," and "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party."[5] Yet the proposed rules appear to allow all of these. We strongly urge the Commission to take a close look and consider whether these rules are necessary and justified in intruding upon the constitutional privacy and free speech protections of Californians.

Sincerely,

Michael T. Risher
Staff Attorney

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[3] *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (also noting that an individual's "decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").
[4] *People v. Blair*, 25 Cal.3d 640, 653-54 (1979).
[5] *White v. Davis*, 13 Cal.3d 757, 775 (1975).