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BY ELECTRONIC MAIL ONLY

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Oleg Chernyavsky
Director of Legislative Affairs
New York City Police Department
One Police Plaza
New York, N.Y. 10038
(Oleg.Chernyavsky@nypd.org)

Re: NYPD Drone Use and Draft Policy

Dear Mr. Chernyavsky:

On behalf of the New York Civil Liberties Union, we write to follow up on our meeting last week at which we discussed the NYPD's plan to start using drones and the draft Operations Order (dated 9/12/18) you provided us. We appreciate the Department's interest in our views and, as we agreed we would at the end of the meeting, write with specific comments, concerns, and suggested changes. We do so with the understanding the NYCLU may have additional comments as the process proceeds.

As a general matter, we note the Department's stated commitment to use drones narrowly and specifically not to use them for surveillance of political or other lawful activity, an approach that aligns with the NYCLU's overarching concerns about law-enforcement use of drones. At the same time, we are concerned that the draft policy is written so loosely as to open the door to the very type of surveillance the Department claims to eschew. With that in mind, we offer the following comments.

Large Scale Events and Compliance with *Handschu*

The Department's draft policy authorizes use of Unaccompanied Aircraft Systems ("UAS") to monitor vehicle traffic and pedestrian congestion at large scale events, as well as rooftop security observation at shootings or large scale events. What constitutes a "large scale event" is not defined. While the examples the Department mentioned of the Women's March and Times Square New Year's Eve celebrations undoubtedly are large scale events that contribute to congestion, the policy offers no guidance as to what an appropriate lower attendance threshold should be, nor is it clear—as discussed below—who has the authority to decide whether an event is of sufficient scale to fall within the policy. The Department should provide more specific guidance on this point.

Further, as with any other video-recording tool, the use of UAS at protests and demonstrations raises concerns about surveillance. The mere presence of police cameras—let alone cameras that are airborne, mobile, and equipped with sophisticated technology and 4K resolution—can create a chilling effect on the public’s exercise of First Amendment rights. While we note the draft any UAS policy would need to comply with *Handschu*, we believe the specific effect of the draft we note the policy’s recognition of that need requires additional discussion to assure the Department does not use these devices for intelligence gathering or political surveillance during such events. The Department also must ensure that any use of UAS at such events is properly documented to allow for monitoring of compliance with *Handschu* and other relevant Patrol Guide provisions.

Public Safety or Emergency Situations

With respect to the policy allowing the Chief of Department to approve requests to use a UAS for “public safety or emergency situations,” we reiterate the concern we expressed at the meeting that this provision’s vagueness has the potential to dramatically expand the use of these devices based on the Chief of Department’s discretion. The policy should better define the circumstances contemplated by this provision and should include limitations -- such as a requirement the emergency situation involve an immediate danger of death or serious physical injury to a person -- before the Chief may authorize use of a UAS.

Procedure for Requesting and Approving Use

The draft policy authorizes a commanding officer, executive officer, or duty captain to request the use of a UAS and authorizes the responding TARU officer to determine whether to utilize the device. In our discussion, it was unclear whether the TARU officer was making that determination based on whether the proposed use of the UAS complied with the substantive terms of the draft policy or whether, as the Department suggested, that determination was to be based solely on weather conditions and the technical feasibility of flying the UAS. The policy should clearly specify who bears responsibility for assuring compliance with the substantive requirements for use of a UAS and include instructions for the proper procedure to resolve any dispute that may arise between the requesting commanding/executive officer or duty captain and the responding TARU officer.

Retention

Retention periods for UAS footage must be short, especially given the concerns discussed below about the threats to privacy inherent in maintaining and potentially subjecting a database of footage to new forms of analysis. While we would prefer a 24-hour retention period rather than the 30-day baseline retention period in the draft policy, we are primarily concerned about the unbounded discretion afforded the Legal Bureau to extend retention. Extended retention may be appropriate for the specific scenarios we discussed – in response to a pending subpoena or Freedom of Information Law Request or in contemplation of filed or reasonably anticipated litigation – but the policy must be clear in limiting extension to specific situations like these.

We reiterate our concern with the potential retention of footage because of its value for training purposes, given that virtually any video recording could be deemed to have such value. However, should the Department decide to retain some UAS footage for use in training, the Department must at minimum ensure that any personally identifiable information of individuals appearing in the footage is redacted.

Facial Recognition and Future Technological Developments

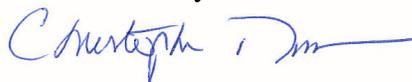
We appreciate that the policy prohibits equipping a UAS with facial recognition software. However, nothing prohibits the use of such software on the footage recorded by a UAS while that footage is retained by the Department. Depending on the frequency of their deployment, UAS devices may generate recordings that capture the movements and activities of hundreds of thousands of people. If those recordings are subjected to facial recognition or any other form of automated analysis or analytics, it would constitute a substantial intrusion into the lives of countless New Yorkers. And while facial recognition is one current area of concern, the tools and technologies available for use with UAS devices and footage will continue to advance in ways not contemplated by the proposed policy, including software capable of recognizing particular behaviors or a person's gait. The Department's policy should ensure that UAS will not be equipped with and that footage captured by UAS will not be subjected to any form of image analysis with the intention of identifying individuals or generating descriptive metadata on them.

Public Access and Reporting

Lastly, we discussed the importance of making information on the Department's use of UAS publicly available, including through Freedom of Information Law requests for the information that will be logged under the policy. Transparency surrounding how these devices are used will be essential for the public to gauge the extent to which their operation adheres to the policy and is otherwise appropriate. The Department should take the opportunity to be proactive in this regard and should commit to regularly reporting on its use of UAS, including letting the public know when and how many times they are used, the number of criminal investigations aided by the use of a UAS and the extent to which such UAS was helpful, the number of and types of non-criminal uses of a UAS and the extent to which such UAS was helpful, and the total cost of the UAS program.

Again, we appreciate the invitation to review the proposed drone policy. Once you and your colleagues have had a chance to consider our comments, we suggest we meet again to discuss your response and how you intend to proceed.

Sincerely,



Christopher Dunn
Michael Sisitzky
Daniel Schwarz