

January 16, 2002

Gerry Whitman, Chief
Denver Police Department
1331 Cherokee, Room 402
Denver, Colorado 80204
By facsimile to 303-640-3378 and United States Mail

Dear Chief Whitman:

After a peace march on September 29, the ACLU received a number of complaints about how police officers responded to participants who dressed in black and covered their faces with ski masks or scarves as they marched. According to individuals who served as liaisons with the police that day, the supervisory officers said that there was a standing order to stop anyone with a mask and to arrest anyone who failed to provide identification.

I have seen an after-action report documenting police actions taken in connection with the march. A portion of the report states as follows:

A decision was made by the Division Chief of Patrol to have officers contact individuals who matched the above listed profile [wearing masks] and determine their identity and an explanation of their actions. If there people were uncooperative, upon being contacted, they would be arrested for interference or any other appropriate charge.

Report of Sgt. J.J. Gose, page 2 of 3. The report is dated September 20, 2001, but I believe the correct date is September 29 or September 30.

The report of Sergeant Gose is disturbing for two reasons. First, it suggests that the Denver Police Department regards the wearing of a mask at a demonstration as automatically providing reasonable suspicion to justify a temporary detention pursuant to Terry v. Ohio, 392 U.S. 1 (1968). Second, it suggests that the Denver Police Department believes that an individual stopped pursuant to Terry v. Ohio is legally required to provide identification and to explain his or her actions, and that refusal to do so is grounds for arrest.

I believe that both propositions are legally erroneous, and I write in part to seek your confirmation that they do not represent the policy, the views, or the practice of the Denver Police Department. I also write to request documents that memorialize how Denver police officers have been trained and advised with regard to these legal points. With regard to the documents

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requested in this letter, which are described more specifically below, please regard this as a written request for disclosure pursuant to the Colorado Open Records Act.

The right of expression protected by the First Amendment includes the right to express oneself anonymously. In addition, demonstrators who wear masks are often engaging in symbolic expression. Thus, rather than providing reasonable suspicion that justifies a temporary detention, the masks represent expression that is affirmatively protected by the First Amendment. See, e.g., Church of the Am. KKK v. City of Erie, 99 F. Supp. 2d 583, 588 (W.D. Pa. 2000) (holding anti-mask ordinance unconstitutional under First Amendment to the extent that it prohibited wearing of masks that constituted symbolic speech); Aryan v. Mackey, 462 F. Supp. 90, 92 (N.D. Tex. 1978) (holding that First Amendment protected demonstrators' right to wear masks to protect their anonymity and because the masks had become symbols of protest).

Even if masks did provide reasonable suspicion to justify a stop, and they do not, individuals who are stopped pursuant to Terry v. Ohio are not required to identify themselves or otherwise answer questions. As the Supreme Court has explained, an officer who is conducting a valid Terry stop may request identification and ask some questions, but the individual detained is under no legal obligation to respond:

the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.*

Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (emphasis added). Thus, contrary to the suggestion in Sergeant Gose's report, individuals who fail to provide police with identification or explanations are not subject to arrest -- not for "interference" or any other crime. As the Supreme Court made clear in Berkemer, individuals detained on a Terry stop have no obligation to respond.

It has recently come to my attention that the City Attorney's office has now conveyed to you its view that wearing a mask at a demonstration does not constitute reasonable suspicion for a Terry stop. I am writing to ask you to confirm that you have received such a communication. I also request a copy of the City Attorney's letter or memo to you about this subject, as well as any documents that refer to that communication and any related memoranda or correspondence. I also write to inquire whether you have conveyed the City Attorney's view to the rank and file in the department. If so, I request that you provide me with copies of any general orders, training bulletins or other documents that discuss the question of wearing masks at demonstrations.

In light of the suggestion in Sergeant Gose's report to the effect that individuals can be arrested

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for refusing to provide identification, I would ask you clarify the position of the Denver Police Department. Is it the policy of the department that individuals who are detained temporarily pursuant to Terry v. Ohio can be arrested simply for declining to provide identification or for declining to answer an officer's questions? Finally, please send me copies of any training materials, general orders, training bulletins, or other documents that discuss how an officer can or should respond when an individual detained pursuant to Terry declines to provide identification or answer questions.

I look forward to receiving your response.

Sincerely,

Mark Silverstein,
ACLU Legal Director