

Opinion on the Statutory Regulations governing / regarding the Installation and Operation of
Video Surveillance Devices

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Japan Federation of Bar Associations

I. Summary of the Opinion

Recently, the number of CCTV called “security cameras” (crime prevention cameras) is increasing in Japan. The increase of such security cameras, which continuously photograph, video-record and distribute images of a large number of unspecified persons at an accuracy sufficient to identify individuals irrespective of whether a crime has been committed or not, cannot be ignored from the perspective of the guarantee of privacy rights, etc.

Thus, we propose that certain legislation is enacted to provide for the following standards and criteria to regulate the installation and operation of such security cameras.

1. Standards concerning the Place of Installation

(1) Public Places

When installing security cameras in or facing towards public places where a large number of unspecified persons may freely pass through or stay, such as a road, park, etc., in relation to the place of installation, the following criteria shall be satisfied:

- (i) It shall be a place where crimes have been frequently committed or it is highly probable that crimes will be committed there in the future;
- (ii) It is expected that the installation of security cameras will have a definite effect in preventing crimes in relation to (i);
- (iii) There are no alternative means that are less detrimental to privacy rights, etc., than the installation of security cameras; and
- (iv) When a public authority is the installer, it must consult in advance with a third-party body independent from any public administrative agency; and when an entity other than a public authority is the installer, it must give notification to such third-party body after the installation.

(2) Facilities, Stores, etc.

When installing security cameras on the premises of a facility (including a station yard) or store, etc., through which a large number of unspecified persons may freely pass through, in relation to the place of installation, the following criteria shall be satisfied:

- (i) It shall be a place where the necessity for such security cameras is clearly recognized, such as that there is considerable probability of crimes or trouble occurring; and
- (ii) It is expected that the installation of security cameras will have a definite effect in

preventing crimes or troubles in relation to (i)

(3) Condominiums, etc.

When installing security cameras in the communal areas of a housing complex such as a condominium, etc., in relation to the place of installation, the following criteria shall be satisfied:

- (i) It shall be a place where the necessity for such security cameras is clearly recognized, such as that there is a considerable risk of the occurrence of crimes or trouble occurring; and
- (ii) Such decision to install security cameras shall be made through certain processes stipulated by its management association, etc.

2. Standards concerning the Functions of the Apparatus Installed

Security cameras allowed to be installed in accordance with 1. above cannot be prohibited from having the following functions:

- (1) The function to identify specific individuals through automatic cross-referencing with other databases of facial images, etc.; and
- (2) The function to record sounds and voices at a place where the sounds and/or voices of a large number of unspecified persons may be collected.

3. Operational Standards Pertaining to the Installer

Installers shall comply with the following operational standards:

(1) Collection of Image Information

It shall be clearly indicated at the place of installation of a security camera that video-recording is performed, the purpose of such video-recording, as well as the installer's name and contact information, etc.

(2) Use of Image Data and Provision to a Third Party

(i) Image data shall not be used for any purpose other than for the purpose of installation. In particular, it must not be used for any secondary purpose, such as by using a device to identify specific individuals through automatic cross-referencing of highly personal identifiable facial images, etc., with other databases.

(ii) Any image data no longer necessary for the purpose of installation shall be immediately deleted.

(iii) No images other than those relating to a crime committed at the place of installation shall be provided discretionarily to the investigating authority without a warrant.

(3) Access Right of the Data Subject

The request by the data subject for disclosure shall be complied with.

4. Operational Standards for the Investigating Authority

With respect to images etc., captured by security cameras collected lawfully by the

investigating authority as per 3-(2)-(iii) above, the following operational standards shall be applied to prevent any deviation from the core principles governing warrants and to guarantee the right to due process in criminal proceedings.

- (1) Such images etc., shall not be collected, stored, used, or provided to a third party for any purpose (e.g., for the purposes of public order, public security, etc.) other than for use in the criminal proceedings of a crime that has actually been committed.
- (2) When images are used as evidence in criminal proceedings, the investigating authority shall preserve all such images collected from the security camera in relation to the relevant crime until the completion of the criminal proceedings of the case and comply with any request by the defense counsel for disclosure of the same.
- (3) The investigating authority shall promptly delete the images except for such images required to be preserved as per (2) above.

5. Supervisory Body

A third-party body independent from a public administrative agency shall be established to supervise whether security cameras are installed and operated according to the standards set by law, and authority shall be given to such body to conduct investigations and issue recommendations and correction orders, etc., to their installers.

II. Reasons for the Opinion

1. Current Situation regarding the Installation and Operation of Security Cameras

- (1) In Japan, the number of security cameras (referring to cameras which continuously capture images of not only persons who have actually committed a crime but of a large number of unspecified persons at an accuracy sufficient to identify individuals and record and distribute such images indiscriminately) is rapidly increasing.

A plethora of security cameras has been installed by both public and private entities at stores, facilities, stations and so on (according to media reports, approximately 56,000 units have been installed at stations alone nationwide as of January 2012), and these cameras record the appearance and behavior of the multitude of persons that pass by. Police departments have also been increasingly installing security cameras on public roads, directly recording the appearance and behavior of people.

Moreover, if such security cameras are equipped with a facial recognition system, it is now possible to conduct searches and matches for specific persons across an immense expanse of image information.

A facial recognition system detects an image of a human face from the subjects photographed or filmed by security cameras and analyzes such detected facial image by instantly converting the geometry and characteristics of such face, primarily

through measuring where eyes, ears, and nose, etc. are relatively located, to numerical values to cross-reference them automatically with a pre-registered database of faces of specific persons.

If such a “facial recognition system” is used by connecting the stored data with the cameras operating at various locations via a network, it is possible that privacy rights violations may arise at a level not foreseen by existing laws.

- (2) In September 2011, the National Police Agency released its “Final Summary Report” of the “Study Group on Street Crime Prevention Camera Systems Installed by the Police” (hereinafter referred to as the “Study Group”).

The report proposes to further promote the installation of crime prevention cameras as well as to promote the installation of crime prevention cameras by municipal governments and private organizations.

Even if individual security cameras are not equipped with a facial recognition system, if the information from such security cameras is analyzed based on locations, times, etc., it would be possible to determine the movements and behavior of specific persons afterwards. If the security cameras are further networked and equipped with a facial recognition system, the accuracy will significantly increase, and this will pose a problem as the faces, appearances, behavior, and expressive activities of people, in public spaces may be sequentially recorded and retrieved.

2. Non-existence of Regulatory Legislation

Currently there exists no legislation which provides for how security cameras are to be installed or operated in the public and private sector. Only a small number of cities and wards have established ordinances. It is also limited to some prefectures that have operational guidelines in place for security cameras. Furthermore, such ordinances and guidelines fail to provide for strict restrictions from the perspective of minimizing the provision of collected images to third parties. Hence, under the current circumstances, if a crime is committed, a large volume of images from security cameras is discretionarily provided to the police without careful consideration as to whether it is relevant or necessary, and it is also unknown how such images are actually stored or used, etc.

3. Human Rights subject to Restrictions

(1) Portrait Rights and Privacy Rights

In public places, people cannot actually avoid seeing or being seen by one other so long as they live in a community as social beings. In this case, the memory of an individual remains only in a person’s consciousness, and such memory is not always accurate and can hardly be reproduced accurately. Hence, the issue of the violation of privacy, etc., by way of the memory being passed on to others accurately will not arise.

On the other hand, the accuracy of a recording and its reproducibility are the essential qualities of digital images and videos, and it is characteristic that they can be easily put to a secondary or tertiary use. An individual's likeness being captured as digital images or videos without such person's knowledge, poses a very serious risk of the violation of portrait rights and privacy rights because the data subject cannot control when, by whom and for what purposes such images and videos will be used.

Even on a public road, any person is guaranteed the freedom to not have his or her face or appearance unnecessarily photographed (this is referred to as the "portrait right", which is a type of privacy right) without their consent with respect to use of photographing as an exercise of public power, as one of the freedoms in an individual's life (Supreme Court judgment of December 24, 1969; judgment in the case of the Kyoto Prefectural Federation of Students' Self-Governing Association).

It is a matter of course that photography and the publication of such photography by a private person also pose the issue of whether such act constitutes a tort or not, and it has also been confirmed by court precedents that there exist portrait rights and privacy rights which shall be protected even on a public road.

Moreover, it is far easier to reproduce, verify or use digital images and videos than images made by non-digital film, and accordingly, the problem involved is far more serious than the risk of privacy violations by photographing as discussed in the abovementioned Supreme Court judgment.

(2) Freedom of Movement

Now that facial recognition apparatuses are increasingly put into practical use, it has become possible to trace the behavioral history of specific persons registered in a facial recognition database from the location of where security cameras are installed. Such circumstances would impose a negative psychological effect (so called "chilling effect") on the free will and movements of an individual based on the fact that the individual would feel that his or her behavior is constantly being monitored by those administering the security cameras.¹

(3) Freedom of Expression and Freedom of Thought and Conscience

Even very simple records of a portrait may allow a person to deduce the preferences, interests, thoughts, etc., of a specific person when such records correlate with specific places and how such specific persons behave, which may violate the freedom of expression and the freedom of thought and conscience.

¹ This is also recognized by the "Opinion 4/2004 on the Processing of Personal Data by means of Video Surveillance" of the EU Data Protection Directive ARTICLE 29 Data Protection Working Party.

With the advent of recent security cameras equipped with an additional device to record sounds and voices, the risk of violation of the aforesaid rights will be even greater because they make it possible to record not only images but also the content of conversations and utterances and to review and analyze them afterwards.

4. Consideration on Utility

(1) UK Parliament

Security cameras are said to have crime prevention effects. However, it was reported as follows² in the parliament of the United Kingdom, which is famous for having the greatest number of security cameras in operation.

“It is not certain whether security cameras are contributing to a reduction in overall crimes or they are simply causing crimes to move outside the surveillance areas. Some analysis results indicate that security cameras have little surveillance effect. Many state that cost-effectiveness analyses are too crude in general.”

- (2) What was pointed out in (1) was subsequently supported by an online news article dated August 24, 2009.³ According to the article, only one crime was solved for every 1,000 security cameras in London during the year 2008, and it has been highlighted that, “CCTV leads to massive expense and minimum effectiveness. It creates a huge intrusion on privacy, yet provides little or no improvement in security. The Metropolitan Police has been extraordinarily slow to act to deal with the ineffectiveness of CCTV.”

An article in the Asahi Shimbun dated August 3, 2010, reports that the UK government launched a comprehensive review of security cameras. The background of the article is that in the UK there is a growing sense for the need to consider that “excessive terrorism countermeasures have infringed on the freedom of its citizens,” as well as raising questions regarding the balance between privacy and the installation and operation of security cameras, and the actual effectiveness of the security cameras compared to the significant cost associated with such cameras.

(3) The Campbell Collaboration

According to Professor Koichi Hamai of the Ryukoku University Law School, the results of the analysis concerning the effectiveness of security cameras (CCTVs) in crime reduction conducted in 2003 under the Campbell Collaboration are summarized

² Koji Ishimura: “Drafting of Restrictions on Security Cameras in Western Countries – Security Cameras and Privacy of Citizens –” (“Privacy Rights Movements Around the World and Surveillance Society: To Cope against the Resident Registry Network, ID Cards, Security Cameras and Fingerprinting” compiled by Ryuta Itagaki, Toshimaru Ogura, Takashi Shiraishi; Akashi Shoten 2003) p.243.

³ <http://yro.slashdot.org/story/09/08/24/2031258/One-Crime-Solved-Per-1000-London-CCTV-Cameras>.

as follows⁴:

“Evaluating the aforesaid results in a comprehensive manner, security cameras have preventive effects regarding automobile-related crimes in parking spaces but no effect is recognized against violent crimes. Further, such preventive effects ... cannot be said to be dramatic. Further, such effects are recognized only in studies in the United Kingdom. In other words, it’s not that security cameras are ineffective in crime prevention, scientifically speaking, but such effects are limited to crimes such as thefts by car break-in in parking spaces, etc.”

(4) Study Group of the National Police Agency

The “Final Summary Report”⁵ of the aforesaid Study Group of the National Police Agency summarizes the measured results of the effects of the security cameras installed at the East exit of Kawasaki Station in Kanagawa Prefecture obtained by comparing 2009 and 2010 data roughly as follows:

Geographic analyses indicate (i) the possibility of geographical shifts (i.e., only crime locations shift) for the total number of recognized criminal offences, snatch thefts and bicycle thefts; (ii) spread of gains regarding automobile-related crimes (i.e., crimes decrease in the surrounding areas as well); and (iii) that the effect is small for violent crimes (p.32-33 of the “Final Summary Report”).

The consideration section of the report states that it could not be concluded that there were statistically significant changes for automobile-related and violent crimes, while there were statistically significant differences in the number of recognized bicycle thefts, but it should be interpreted that such a significant decrease in the level of crimes in the area of security camera installation was the result of comprehensive crime prevention measures including the installation of crime prevention cameras, considering the fact that in FY2010, large-scaled operations to remove illegally-parked bicycles were conducted several times in the area surrounding the East exit of JR Kawasaki Station with the full cooperation of Kawasaki City (p.36-37 of the report).

Security cameras do not exert preventive effects against all crimes. Further, their utility has not been proven with respect to the types of crimes against which preventive effects of security cameras were expected.

(5) Brief Summary

As stated above, the effectiveness of security cameras in crime prevention has hardly

⁴ “Age of Personal Identification Everywhere and Anytime” in the “Security Cameras Installation Experiment: Explanation of Odds Ratio” by Professor Hamai at the Pre-symposium of JFBA 53rd Human Rights Protection Conference, 2nd Sectional Group. The same research paper is cited on page 15 of the aforesaid Final Summary Report of the Study Group of the National Police Agency.

⁵ http://www.npa.go.jp/safetylife/seianki8/7th_siryu_2.pdf

been proven up to now. For this particular reason, when installing security cameras for the purpose of crime prevention, the decision must be made after carefully considering their utility. Otherwise, this could lead to failure to implement other useful preventive measures.

5. Existence of Other Means

There are other means to prevent crime in an area or place in question which are expected to be more effective in crime prevention than security cameras, such as (i) publicizing to residents where and during which time periods molestation and snatch thefts are frequently committed to pre-empt evasive action and (ii) installing lights to illuminate streets in order to induce pedestrians to use those particular streets as well as to make it easier for people to recognize each other to deter crimes, and so on. Accordingly, it is necessary to consider whether there are means other than security cameras which are expected to have more resounding effects in crime prevention.

6. Infringement on the Principles Governing Warrants

Even if recorded images prove helpful in the arrest of a criminal after a crime has been committed, this is only coincidental, and does not justify the continuous daily photographing and recording of the public. Except for areas which experience frequent criminal activity, it is not only completely void of meaning and utility but obviously detrimental to the public to install numerous security cameras in places where crimes are unlikely to be committed. Furthermore, if the recorded images/videos are provided to the police with minimal ease, such provision should be said to infringe the principles governing warrants.

7. Overseas Legislative Restrictions on Security Cameras

In regard to video surveillance, many of the provisions of the EU Data Protection Directive are directly applicable. As such, it is required that images are collected for legitimate and specific purposes, used within such scope and retained only for a limited period of time.

The regulatory trends in the EU member states are that photography in public places is prohibited in principle.

In particular, German laws restrict the use of security cameras by both public and private entities, providing that “Monitoring publicly accessible areas using optic-electronic devices (video surveillance) shall be lawful only as far as necessary (i) for public bodies to perform their duties, (ii) to exercise the right to determine who shall be allowed or denied access, or (iii) to pursue legitimate interests for specifically defined purposes, and there are no indications of overriding legitimate interests of the data subject” (Section 6b of the Federal Data Protection Act), based on the idea that any video surveillance in “publicly

accessible spaces (broadly including stores, etc.)” violates the right of self-determination with respect to information and therefore always requires due legal grounds satisfying the principle of proportionality.

8. Court Precedents concerning Photography by Cameras or Security Cameras

Court precedents concerning photography on streets as an initiative of the police include the aforesaid case of the Kyoto Prefectural Federation of Students’ Self-Governing Association, where the (i) current nature of the crime, (ii) necessity and urgency of preservation of evidence and (iii) appropriateness of the method were required as criteria. The judgment on automatic speed monitoring devices dated February 14, 1986, by the 2nd petty bench of the Supreme Court, also held, only merely though, it constitutional to photograph the actual scenes of speeding violations.

The judgment rendered in the case of San’ya District Monitoring by Television Cameras (Tokyo High Court judgment of April 1, 1988) required the (i) significantly high probability of crime occurrences, (ii) necessity and urgency of preservation of evidence and (iii) appropriateness of the method as criteria.

This standard indicates that the installation of security cameras by a public authority in public places such as on public roads, etc., may be allowed only if they selectively photograph actual scenes of where violations occur (i.e., speeding control devices) or when they are installed only in places where crimes are committed frequently.

The judgment of February 23, 1977, by the Sapporo High Court adopted a similar standard also for private persons, holding that photography is allowed “where (i) it is made for a legitimate purpose acceptable under normal social conventions, such as for collecting news materials for legitimate reporting, preserving evidence for legitimate labor-related measures, preserving evidence to exercise legal rights in litigation, etc., (ii) there is an urgent need for such photography, and (iii) such photography is made by an appropriate method within a generally allowable limit.”

Thus, this standard should be interpreted to mean that a legitimate purpose is required for the installation of security cameras, as well as requiring a strict comparison of and balancing exercise against privacy violations.

On the other hand, the Study Group posits, in respect to the criteria for photographing by “crime prevention cameras in streets” on page 54 onwards in its “Final Summary Report”, that the judgment of April 27, 1994, rendered by the Osaka District Court determined that the following criteria such as (i) legitimacy of purpose, (ii) objective and concrete necessity, (iii) reasonability of the situation of installation, (iv) existence of effect by such installation and use, and (v) appropriateness of the method of use must be satisfied to install and use security cameras, and the police may install security cameras for constant

recording in public places if all such criteria is met.

However, the abovementioned judgment of the Osaka District Court conditionally allows such cameras on the premise that they provide monitoring images without recording, and clearly prohibits the installation by the police of security cameras which constantly “record” in public places.

9. Security Camera Installation Standards

(1) Restraint on Recommending the Installation of Security Cameras

From the perspective of mitigating and avoiding extensive violations of privacy for the purposes of arrest, the current policy of recommending installation of security cameras as an initiative of public authorities in areas with a large number of unspecified passers-by should not be promoted without restrictions by laws and regulations.

In this regard, the “Final Summary Report” of the Study Group states that installation of security cameras may be promoted without legislation, but such stance fails to give consideration to the violation of privacy rights, etc., and cannot be accepted.

(2) Prohibition of Installation

The installation standards must be predicated on the basis of balancing the privacy rights of individuals with the need and utility of the installation/operation which may violate such rights. From the perspective of protecting such rights that would be violated, security cameras that could infringe on the freedom of movement, expression, thought and conscience should not be installed.

It should also be prohibited to install security cameras with a facial recognition function to identify individuals as well as security cameras capable of recording people’s speech and utterances.

(3) Roads, Parks and Other Public Spaces

Installation of security cameras in places where a large number of unspecified persons are allowed to pass through or stay freely, such as roads, parks, etc., (hereinafter referred to as “public spaces”) or towards such public spaces shall be limited to cases where the following three criteria are satisfied in accordance with the aforementioned Supreme Court judgments:

- (i) It is a place with a high probability of crime occurrences;
- (ii) It is highly expected that the installation of security cameras will have a preventive effect against the occurrence of crimes in relation to (i); and
- (iii) There are no alternative means that are less detrimental to privacy rights, etc., than the installation of security cameras.

Further, in order to ensure that there exist opportunities to assess the necessity of continuing to photograph and/or film a large number of unspecified persons, such

installation by public authorities should be discussed in advance with a third-party body independent from a public administrative agency, and installation by other entities shall be notified after such installation.

(4) Installation Standards for Facilities/Stores, etc.

As for areas such as facilities or stores, etc., where unspecified persons cannot freely pass through, the focus shall be on facility management rights over such areas, and installation of security cameras may be permitted at the discretion of those with facility management rights.

However, for areas where a large number of unspecified persons can freely pass through, a well-informed determination on balancing the privacy rights of such unspecified passers-by with the need and utility of the installation/operation will be necessary.

Hence, installation of security cameras in such areas shall be permitted only in the following cases:

- (i) It is deemed that there is a clear necessity, such as that there is considerable probability of crimes or trouble occurring;
- (ii) It is highly expected that such installation of security cameras will have a preventive effect against the occurrence of crimes or trouble in relation to (i); and
- (iii) Notification shall be given to the aforesaid third-party body after the installation of such security cameras.

(5) Installation Standards for Condominiums, etc.

Condominiums are divided into privately owned units and common shared areas. As for the privately owned units, the facility management rights of individuals is respected and the installation of security cameras is permitted at the discretion of those with facility management rights. When installing security cameras in the common shared areas, consideration should be given to the privacy rights of people who pass by or through such areas. Hence, the following criteria shall apply:

- (i) It is deemed that there is a necessity, such as that there is a considerable probability of the occurrence of crimes or trouble; and
- (ii) Such decision shall be made in accordance with the procedures stipulated by the condominium's management association, etc.

10. Security Camera Operational Standards

Security cameras lawfully installed based on the abovementioned criteria shall be used at the minimum level necessary to achieve their purpose by complying with the following operational standards.

(1) Collection of Image Information

The fact that image information is being collected by video recording and the purpose of such collection shall be clearly indicated so that people can opt out from being photographed or filmed. Further, the installer's name and contact information shall be included in such indication to enable the photographed/filmed persons to file a complaint or request for disclosure.

(2) Use of Image Data

Image data collected by security cameras should not be used for any purpose other than for the purpose of installation, and image data that is no longer necessary must be deleted immediately.

Further, it should be prohibited to analyze the image data collected by security cameras using a facial recognition system.

In addition, no images other than those relating to a crime committed in the area under one's authority, i.e., in the store, etc., where the security camera is installed, should be provided discretionarily to the police without a warrant.

(3) Access Rights of the Data Subject

The installer shall comply with any request by the photographed/filmed person for disclosure of his or her information.

Photographed/filmed persons must be guaranteed the right to receive notification in principle if his or her information is used or provided for unintended purposes.

11. Operational Standards for the Investigating Authority

In the case where the investigating authority could collect lawfully any images etc., captured by security cameras in compliance with the preceding two sections, the following operational standards shall be applied to prevent any deviation from the core principles governing warrants and to guarantee the right to due process in criminal proceedings.

- (1) Such images shall not be used, stored, or provided to a third party for any purpose (e.g., for the purposes of public order, public security, etc.) other than for use in the investigations and proceedings of a crime that has actually been committed.
- (2) When images are used as evidence in criminal proceedings, the investigating authority shall preserve all such images collected from the security camera in relation to the relevant crime until the completion of the criminal proceedings of the case and comply with any request by the defense counsel for disclosure of the same.
- (3) The investigating authority shall promptly delete the images except for such images required to be preserved as per (2) above.

12 Supervision by a Third-Party Body

A third-party body independent from a public administrative agency shall be established to supervise whether or not the security cameras impede the privacy rights of individuals

more than necessary, there are illegal or unjust elements in the process of collecting/using the images, there are illegal or unjust elements in the impeding of the rights of the data subject, and so on. And such third-party body should be allowed to be involved in the procedures for the security camera installation and granted authority to conduct investigations and issue recommendations and correction orders to the installers.

Such mechanisms to protect privacy rights and the right to control one's own information using a third-party body is implemented in most developed countries, except for the United States and Japan, and as such the EU member states are required to have one in place under the EU directives.

The Japan Federation of Bar Associations ("JFBA") has also been making recommendations repeatedly to institutionalize the protection of privacy rights and the right to control one's information through the establishment of a third-party body pursuant the Act on the Protection of Personal Information.

In light of the current circumstances where a large number of security cameras do actually exist, efforts should be made to protect the portrait rights and other privacy rights through the establishment of a third-party body at least in this context.

The "Final Summary Report" of the National Police Agency considers designating the public safety commissions as the supervisory organization for the installation and operation of security cameras, but in reality, it cannot be said that the prefectural public safety commissions or the National Public Safety Commission examines police activities as an objective and neutral third party on behalf of citizens. Giving credibility to such claim, a member of the National Public Safety Commission stated in one of its regular meetings that "the police and the public safety commissions have come to form a relationship similar to that of a board of directors and executive officers, which I find very good" and "I consider everyone in the police and public safety commissions as my allies."⁶

Under the current circumstances, it is unrealistic and should not be allowed that the public safety commissions assume the abovementioned role.

End.

⁶ Excerpt from the summary of proceedings of the regular meeting of the National Public Safety Commission on February 17, 2011. (<http://www.npsc.go.jp/report23/02-17.htm>)