



NEWARK POLICE DIVISION GENERAL ORDER



SUBJECT: FIRST AMENDMENT RIGHT TO OBSERVE, OBJECT TO, AND RECORD POLICE ACTIVITY	GENERAL ORDER NO. 18-12
SUPERSEDES: NEW	DATED: 8/9/18

This order contains the following numbered Sections:

- I. PURPOSE**
- II. POLICY**
- III. RESPONSIBILITY FOR COMPLIANCE**
- IV. RELATED POLICIES**
- V. DEFINITIONS**
- VI. PROCEDURES**
- VII. RESPONSIBILITIES OF THE SUPERVISOR**
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- IX. EFFECT OF THIS ORDER**



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I. PURPOSE

This policy provides officers with guidance for dealing with situations in which members of the public (i) comment on or object to an officer's conduct and (ii) situations in which members of the public or press are observing and/or recording officer conduct, which includes photographing, videotaping, audiotaping, or any combination thereof.

II. POLICY

The First Amendment enshrines five of the most essential liberties guaranteed by both the United States Constitution and the Constitution of the State of New Jersey; General Order 18-12; the freedom of religion, the freedom of speech, the freedom of the press, the freedom of assembly and the right to petition government. Both the First Amendment to the U.S. Constitution and Article I, Paragraph 6 of the New Jersey Constitution are the core of all free speech and free association rights. As such, the Newark Police Division recognizes that members of the public have a constitutionally protected right to witness, observe, video record, photograph, audio record and comment on or complain about Newark Police Officers while they are conducting official business or while acting in an official capacity in any public setting. Division personnel are prohibited from interfering with this First Amendment and Article I, Paragraph 6 right except in limited circumstances. Additionally, Division Members violate Fourth and Fifteenth Amendment rights when they seize/destroy recordings without a warrant or due process. Division personnel should assume and comport themselves as if they are being recorded at all times when on duty.

In its decision, *Fields v. City of Philadelphia* (2017), the United States Court of Appeals for the Third Circuit decided that First Amendment's protections extended to two people who used their smartphones to record police interactions with another person. The Court ruled: "Simply put, the First amendment protects the act of photographing, filming or otherwise recording police officers conducting their official duties in public."

III. RESPONSIBILITY FOR COMPLIANCE

All Division personnel are responsible for complying with this Order. Supervisory and Command Officers shall ensure that subordinates are aware of, understand, and comply with this Order. All sworn officers will be subject to discipline for a violation of the contents of this Order.

IV. RELATED POLICIES

- A. GENERAL ORDER 18-15: SEARCHES WITH OR WITHOUT A SEARCH WARRANT
- B. GENERAL ORDER 63-26: CONSENT TO SEARCH FORM



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V. DEFINITIONS

- A. **Bystander:** a member of the public who is present but not taking part in a situation or event.
- B. **Exigent Circumstances:** circumstances that would cause a reasonable person to believe that a warrantless entry, search or seizure was necessary to prevent physical harm to police officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.
- C. **Medium:** The storage source for visual and/on or audio recordings, whether by film, analog, or digital means.
- D. **Public Setting:** An indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not.
- E. **Recording:** Capturing of images, audio and/or video by means of a camera, cell phone, audio recorder, or other device.

VI. PROCEDURES

Photography and videography includes visual recording of places, buildings, structures and events that are common and normally used for lawful activities. Photography and videography by itself does not constitute suspicious conduct.

- A. In public settings, officers shall allow bystanders the same access for photography and videography as is given to members of the press. Officers shall be aware that:
 - 1. A bystander has the same right to take photographs or make recordings as a member of the press, as long as the bystander has a legal right to be present where he or she is, such as on a public street or in public settings.
 - 2. A bystander has the right under the First Amendment and Article I, Paragraph 6 to witness, observe, record, photograph, audio record and comment on or complain about Newark Police Officers in the public discharge of their duties.
 - 3. Public settings include parks, sidewalks, streets, and locations of public protests, common areas of public and private facilities and buildings, and any other public or private facility at which the bystander has a legal right to be present. This protection extends to a bystander's home or business.



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4. The fact that a bystander has a camera or other recording device does not entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any area designated as a crime scene.
- B. As long as the photographing or recording takes place in a setting in which the bystander has a legal right to be present and does not interfere with an officer's safety or lawful duties, the officer shall not tell or instruct a bystander that photographing or recording of police officers, police activity, or persons who are the subject of a police action recording is not allowed; recording requires a permit; or recording requires the officer's consent.
- Additionally, under such circumstances, an officer is not permitted to subject a bystander to a *Terry* stop or arrest.
- Furthermore, officers shall **not**:
1. Order that bystander to cease such activity;
 2. Demand that bystander's identification;
 3. Demand that the bystander state a reason why he or she is taking photographs or recording;
 4. Detain, arrest, or threaten to arrest bystanders based on activity protected by the First Amendment, including verbal criticism, questioning police actions, or gestures;
 5. Intentionally block or obstruct cameras or recording devices; or
 6. In any way threaten, intimidate, or otherwise discourage a bystander from remaining in the proximity of, recording or verbally commenting on officer conduct directed at the officer's enforcement activities.
- C. Nothing in this order prohibits officers from questioning or detaining for a reasonable period of time any individual they reasonably suspect has committed, is committing, or is about to commit any crime or incite others to violate the law.
- D. Officers are reminded that a person commits an offense under N.J.S.A. 2C:29-1 if the person purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.



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- E. If a bystander is photographing or recording police activity from a position that impedes or interferes with the safety of officers or their ability to perform their duties, or that threatens the safety of members of the public, an officer may direct the bystander to move to a position that will not interfere. However, an officer shall not order the bystander to stop photographing or recording.
- F. Newark Police Officers shall not use or threaten to use force in response to mere criticism or gestures so long as that expression does not give rise to reasonable fear of harm to the officer(s) or others nor violates the law or incites others to violate the law.
- G. Evidence on a Camera or Recording Device
1. If an officer has probable cause to believe that a camera or other recording device contains images or sounds that are evidence of criminal acts, the officer shall request that the recording party either:
 - a. Voluntarily provide the device or recording medium (e.g., the memory chip) to the officer; or
 - b. Where possible and practical, and in the presence of the officer, voluntarily transmit the images or sound via electronic mail to the officer's official city electronic mail account.
 2. Consent to take possession of a recording device or medium must be given voluntarily. A Supervisor must be present and a Consent to Search form must be completed. For additional information on Consent to Search forms refer to **General Order 18-15** Searches with or without a Search Warrant Section VI.
 3. If the person provides the device or recording medium to the officer, the officer shall:
 - a. Contact the On-Call Detective responsible for the highest charge and the Supervisor and notify them of the audio visual evidence; and
 - b. Submit the device or recording medium into evidence.
 - c. Absent exigent circumstances, officers shall not attempt to download, or otherwise access any material contained within the device.
 4. If the bystander refuses to provide the device or recording medium or to electronically transmit the sound and/or images where possible and practical, and the officer reasonably believes that exigent circumstances exist in which critical evidence of serious criminal activity will be destroyed, lost, tampered with, or otherwise rendered useless absent an immediate seizure of the device, the officer may temporarily detain the recording party.



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If the officer temporarily detains a person, the officer **must** request the assistance of a Supervisor.

A Stop Report (DP1:1388) shall be completed documenting the detention in addition to any other applicable reports (i.e. Incident Report DP1: 802, Continuation Report DP1:795).

5. If a recording device or medium is seized, due care must be exercised in its safekeeping. It should be properly identified by serial number or other identifier on a Property and Evidence Receipt (D.P.1: 152), with a copy given to the owner when feasible. Information shall be provided to the owner concerning where, when, and how to recover the property.

H. Viewing/Listening to Evidence on a Camera or Recording Device

1. Evidence obtained by consent shall be viewed by the Detective responsible for the highest charge of the investigation.
2. Division members shall obtain a search warrant before viewing photographs or listening to recordings on a camera or memory chip that has been seized as evidence.
3. In exigent circumstances, where there is reason to believe that an immediate search of the seized material is necessary, Division members shall contact the highest ranking investigative Supervisor available for authorization to review photographs or recordings that have been seized without a warrant and to determine what photographs and recordings are related to the exigent purpose .
4. Review of photographs or recordings that have been seized as evidence and are directly related to the exigent purpose shall be reviewed by the Detective responsible for the highest charge and the Supervisor.
5. Photographs or recordings that have been seized as evidence and are not directly related to the exigent purpose shall not be reviewed until a warrant has been secured.
6. Photographs or recordings that have been seized as evidence that are not directly related to the exigent purpose shall be reviewed by the Detective responsible for the highest charge after a warrant has been secured.
7. Any recording devices or recording medium taken into custody shall be returned as soon as practicable.



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- I. Safekeeping and Preservation of Recording Device or Recording Medium contained therein
 - 1. Officers shall not under any circumstances intentionally damage or destroy, or instruct any other person to damage or destroy any recording device being used to record police activity.
 - 2. Officers shall not, under any circumstances, intentionally erase or delete, or instruct any other person to erase or delete, any recorded images or sounds from any camera or other recording.

VII. RESPONSIBILITIES OF THE SUPERVISOR

- A. A Supervisor shall respond to the scene where any bystander recording of police officers engaged in the public discharge of their duties:
 - 1. has become confrontational, provoking, or otherwise adversarial with the officers,
 - 2. may possess evidentiary material,
 - 3. has her/his recording or recording device seized by officers based upon probable cause,
 - 4. has jeopardized the safety of the officer, the suspect or others in the immediate vicinity, violated the law, incited others to violate the law, or actually obstructed an officers official duties.
- B. Once on scene, the Supervisor shall:
 - 1. Consult with the on-scene officers and gather all available facts.
 - 2. Attempt to de-escalate or otherwise intercede to prevent the incident from escalating.
 - 3. If a detention of the recording party was necessary by the officer prior to the Supervisor's arrival, review the facts and circumstances to determine if the detention was appropriate.
 - 5. If responding to the scene because police have probable cause to believe that a member of the general public has recorded evidence of a crime in progress or other evidence of a crime and the individual refuses to voluntarily transfer the recording device or media to police custody or permit a copy of the media/evidence to be made AND police reasonably believe such evidence will be permanently lost without immediate action, the Supervisor shall:



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- a. In consultation with the highest ranking Investigative Supervisor available at that time, determine whether exigent circumstances permit the seizure of the device without a warrant. Warrantless seizure is permissible only when:
 1. there is probable cause to believe that the property holds contraband or critical evidence of a serious crime; and
 2. the exigencies of the circumstances demand it, or some other recognized exception to the warrant requirement is present.
 - b. If there is no immediate law enforcement need to view the recording device and/or media, ensure the recording device and/or media is not viewed by officers until a search warrant has been obtained.
 - c. If the immediate seizure was not based upon probable cause and there is no legitimate fear the evidence would be lost, the recording device and/or media shall be immediately returned to the owner. The Supervisor shall contact the Detective responsible for the highest charge and his or her Supervisor with all pertinent information for the assigned detective to begin an application for a search warrant.
6. If responding to a scene where any media or recording device was voluntarily provided to the police, the Supervisor shall review the circumstances of any consent provided confirming that the consent to search was made voluntarily and that the proper documentation of such consent was completed by the officer in accordance with General Order 18-XX "Searches with or without a Search Warrant".
 7. Ensure officers do not copy and/or disseminate any information or images from seized or provided devices or media that are not evidence of a crime or otherwise required for any official departmental purpose.

VIII. RESPONSIBILITIES OF THE INVESTIGATIVE SUPERVISOR

- A. Upon being notified that possible evidence of a crime was captured on a recording device and/or medium, which was voluntarily provided to police, the Investigative Supervisor shall assign a Detective to take the necessary actions to copy/preserve the evidence and return the recording device and/or media to the owner as soon as possible. While the evidence was voluntarily provided, it shall be the discretion of the Investigative Supervisor, based on the facts and circumstances, whether a search warrant will also be obtained.
- B. Upon being notified by a Patrol Supervisor that probable cause exists that evidence of a crime was captured on a recording device and/or media and the evidence was properly seized by



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Police, the Investigative Supervisor, shall nonetheless, assign a Detective to apply for a search warrant.

- C. Ensure Detectives do not copy and/or disseminate any information or images from such devices or media seized or provided that is not evidence of a crime or otherwise required for any official departmental purpose.

IX. EFFECT OF THIS ORDER

All previous Division orders and memoranda governing the First Amendment right to observe, object to, and record police activity, which are inconsistent or in conflict with this order are hereby rescinded. This order shall become effective immediately.

BY ORDER OF:

**ANTHONY F. AMBROSE
PUBLIC SAFETY DIRECTOR**

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