



Policy 804

Subject

FIRST AMENDMENT PROTECTED ACTIVITY

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By Order of the Police Commissioner

PURPOSE

The purpose of this policy is to ensure that BPD members protect the rights guaranteed by the First Amendment to the United States Constitution, including the rights to freedom of speech and expression, freedom of assembly, and freedom to observe and record the actions of law enforcement officers. The exercise of First Amendment rights promotes the free exchange of ideas, which is fundamental to democratic governance. The preservation and protection of First Amendment rights foster transparency and accountability in government functions, including police functions, which are vital to maintaining public trust in the rule of law.

POLICY

BPD members shall respect and protect the First Amendment rights of all persons. The First Amendment protects:

1. **The right to free speech and expression**, which includes the right to criticize law enforcement or otherwise engage in protected expression in the presence of law enforcement officers without being subject to retaliation.
2. **The right to freely organize and participate in lawful assemblies and protests** in parks, on sidewalks, in streets, and in other public forums, including public forums near the object of the assembly or protest so that those assembled may be seen and heard.
3. **The right to observe and record the actions of law enforcement officers** in the public discharge or their duties in all public spaces (including sidewalks, parks, and other locations for lawful public protest), as well as all other areas in which persons have a legal right to be present (including a person's home or business and common areas of public and private facilities and buildings), without being subject to retaliation.

DEFINITIONS

Civil Disturbance/Unrest — A breach of the peace by a gathering of persons where there is a threat of collective violence, destruction of property, or other unlawful acts. Such a gathering may also be referred to as a riot or unlawful assembly.

Counter-Protestor — A participant in a protest that opposes an existing protest.

First Amendment Assembly/Demonstration — An assembly of persons engaging in First Amendment protected activity. These may be scheduled events that allow for law enforcement planning, but also may include spontaneous gatherings. They include, but are not limited to, marches, protests, and other assemblies.

Incident Action Plan (IAP) — An oral or written plan containing general objectives reflecting the overall strategy for managing an incident.

Incident Commander (IC) — The person responsible for overseeing the response to First Amendment Assemblies or Demonstrations and Civil Disturbances, including the development of strategies and tactics and the ordering and release of resources. If no IC has been designated, the most senior ranked member on scene shall act as the IC until relieved.

Inciting Imminent Unlawful Action — Urging other persons to engage in criminal activity that will occur immediately. Inciting Imminent Unlawful Action does not include urging others to engage in criminal activity that might occur at some point in the future; it only includes urging criminal activity that is about to happen.

Safety Officer — A member designated by command staff responsible for monitoring incident operations and advising the IC on all matters relating to operational safety, including the health and safety of emergency responder personnel.

True Threats — Statements that threaten or intimidate, when the speaker communicates a serious intent to commit an act of unlawful violence or harm to a particular person or group of persons and those persons are aware of or are present to observe the communication.

DIRECTIVES

Protecting the Exercise of the Rights to Free Speech and Assembly

Required Actions Regarding Speech and Assembly

1. BPD members shall allow persons to speak and express themselves freely, including by using criticism, insults, profanity, name calling or obscene gestures directed at law enforcement or by expressing disagreement.
2. BPD members shall allow all persons to gather at or near the object of the assembly or protest and shall allow persons to assemble on sidewalks and streets and in parks and other public spaces, so that they may be seen and heard.
3. BPD members shall make all reasonable efforts to protect protestors and preserve their right to protest.
4. BPD members shall enforce restrictions on the time, place, and manner of an assembly or protest only for the purpose of maintaining public safety and shall restrict no more speech than is necessary to further this purpose.
5. BPD members shall make every effort to separate protestors and Counter-Protestors to maintain order and avoid any potential confrontation.

6. For any event for which there is an IAP, BPD members shall adhere to the IAP, including enforcing reasonable time, place, and manner restrictions in the IAP, unless otherwise directed by supervisors.
7. BPD members shall adhere to the following policies: Policy 414, *Less-Lethal Munitions and Chemical Agents*, Policy 1115, *Use of Force*, and Policy 1118, *Oleoresin Capsicum Spray* when confronting First Amendment Assemblies that have become Civil Disturbances.
8. In order to de-escalate the potential for disorder and avoid mass arrests, BPD members shall endeavor to accommodate assemblies and protests that may temporarily block traffic or otherwise obstruct public streets by regulating or rerouting traffic as much as practical.

Prohibited Actions Regarding Speech and Assembly

1. BPD members shall not restrict the rights of any person to criticize law enforcement through speech, unless the person is endangering a BPD member or another person, or is physically interfering with law enforcement action.
2. BPD members shall not take any action in retaliation against any person who exercises their First Amendment rights to comment on or protest any police activity. This includes retaliation by ordering persons or groups to disperse, or by stopping, detaining, searching, arresting, issuing a citation to, or threatening to stop, detain, search, arrest or issue a citation to any person or group.
3. BPD members shall not conduct activity beyond the IAP without supervisory approval unless criminal activity is identified.
4. BPD members shall not use force in response to a person engaging in legally protected speech or a lawful assembly unless the person poses an imminent threat to the safety of a BPD member or others.
5. BPD members shall not engage in intimidation or harassment toward persons participating in assemblies or protests. Such prohibited intimidation and harassment include, but are not limited to, verbal threats and profanity, use of video recorders to harass, and displaying a weapon for the purpose of intimidation.
6. BPD members shall not arrest a person engaged in First Amendment activity unless there is *individualized* probable cause to believe that the person has committed a crime. This means that a BPD member may not arrest any person unless the member has sufficient objective facts based on the member's own knowledge, or reliable and trustworthy information provided by other members or third parties, to establish probable cause that the person committed a crime. BPD members may not arrest any person engaged in First Amendment activity based on the fact that other persons engaged in the same First Amendment activity also engage in violent or otherwise unlawful conduct.

EXAMPLE: A group of 300 persons march together in the streets and on the sidewalks engaged in political protest. Five persons break from the group, smash several storefront windows, and then rejoin the group. BPD members may identify and arrest the five persons who smashed windows based on their personal conduct. BPD members may not arrest others in the group based on their association with the five persons who broke the window, because there is no *individualized* probable cause that the other members of

the group committed a crime or did anything other than engage in First Amendment protected activity.

7. BPD members may not interrupt a speaker, except in the following limited circumstances:
- 7.1. Speech Incites Imminent Unlawful Action: BPD members may interrupt speech when the speech incites imminent unlawful action. Members may only take action when a statement:
- 7.1.1. Threatens or encourages imminent unlawful violent action or destruction of property; and
 - 7.1.2. Has a substantial likelihood of producing imminent unlawful violent action or destruction of property; and
 - 7.1.3. Is intentionally stated by the speaker to clearly and objectively direct at least one other person to engage in imminent unlawful violent action.

NOTE: The mere advocacy of the use of force or violence sometime in the future is still constitutionally protected under the First Amendment, and the person speaking cannot be arrested simply because they advocate for violence sometime in the future.

EXAMPLE: During a demonstration, the crowd moved into the street, disrupting traffic. The police successfully directed the protesters out of the street and back onto the curb, when a person yelled "We'll take the street later!" or "We'll take the street again!" The person may *not* be detained or arrested for his statements.

- 7.2. There is a Risk that the Speech Will Provoke an Audience into Using Illegal Force against the Speaker: BPD members may interrupt speech when it provokes violence or threats of imminent violence against the speaker after BPD has attempted to control the crowd and made a reasonable effort to protect the speaker.

NOTE: BPD members shall use all lawful efforts to control the crowd before interrupting the speaker.

EXAMPLE: Demonstrators march through the city until they are met by a growing number of onlookers with an opposing viewpoint. The onlookers become increasingly unruly and tension rises between the two groups. The law requires that BPD members must first attempt to manage the unruly onlookers before ordering any demonstrators to disperse. Even if BPD members have difficulty controlling the unruly onlookers, they may not arrest anyone who is lawfully exercising their First Amendment rights; they may only arrest those who are violating the law.

- 7.3. True Threats: BPD members may interrupt a speaker who makes True Threats of imminent violence that would result in harm to a person or substantial harm to the property of another person.

NOTE: Only the highest ranking member on the scene may interrupt or restrict speech for the above-mentioned reasons (7.1-7.3). If the highest ranking member *does* interrupt or restrict speech, they shall do so using the least restrictive means possible and **only** after all other alternatives to interruption or restriction are exhausted.

8. BPD members shall not terminate or disperse any protest or assembly unless the protest or assembly has turned into a Civil Disturbance or threatens to turn imminently into a Civil Disturbance, and a dispersal order has been given in accordance with this policy and Policy 413, *Mobile Field Force*.

8.1. Only a BPD command member ranked Major or above may declare an assembly unlawful. If no commander of the rank Major or above is available, the declaration may be made by a Lieutenant or Captain who is serving as the Shift Commander or District Commander. Any declaration that an assembly is unlawful must be subsequently documented in writing.

NOTE: The highest ranking member at the scene will always assume the role of Incident Commander until relieved by a superior commander or other person designated as Incident Commander based on the nature of the incident.

8.2. An assembly shall not be deemed unlawful unless the BPD command member deeming it unlawful determines that there is a threat to public safety (e.g., collective violence, destruction of property, or other injury).

8.2.1. The failure to obtain a permit is not a sufficient basis to declare an assembly unlawful.

8.2.2. The fact that some of the persons involved in an assembly or protest have engaged in unlawful acts on prior occasions is not a valid basis for declaring an assembly unlawful.

NOTE: The decision to declare an assembly unlawful will be rare. It requires clear justification and extensive documentation detailing the facts that lead to the decision. The report documenting the reasons for declaring an assembly unlawful will include BWC footage from members at the scene.

8.3. Orders to disperse may not be issued except following a declaration that an assembly is unlawful. Orders to disperse may only be made by a Lieutenant or above, following receipt of a declaration that an assembly is unlawful. Any order to disperse must be subsequently documented in writing.

8.3.1. Absent exigent circumstances, orders to disperse shall not be issued until after BPD has attempted to communicate with the leaders, organizers, or other participants in the protest or demonstration and resolve the situation so that the unlawful activity decreases and the First Amendment Assembly or Demonstration can continue.

8.3.2. If a crowd disperses following a declaration of unlawful assembly and reconvenes at a different location where the participants engage in a lawful First Amendment Assembly or Demonstration, no order to disperse shall be issued unless it is established that the assembly is unlawful and adequate warnings are rendered per Policy 413, *Mobile Field Force*.

8.4. BPD members must obtain supervisory approval, to be documented as soon as practicable, before issuing any citations or making arrests related to a refusal to obey a

dispersal order or related to any other public protest activities, unless those activities pose a threat of imminent harm to persons or property and violate a state or local law.

- 8.5. The supervisor also must be present to approve an arrest for refusal to obey a dispersal order during a public protest prior to the arrestee's transport to a holding facility, absent exigent circumstances to be documented as soon as practicable.
 - 8.6. In dispersing a public assembly, BPD members shall adhere to the following policies: Policy 414, *Less-Lethal Munitions and Chemical Agents*, Policy 1115, *Use of Force*, and Policy 1118, *Oleoresin Capsicum Spray*.
 9. BPD members shall not substantially surround or enclose persons participating in or observing an assembly or protest and prevent them from leaving the area unless warnings to disperse have been given and the persons have been provided an opportunity to disperse in accordance with Policy 413, *Mobile Field Force*.
- EXAMPLE:** A group of persons gathered in a public park is ordered to disperse and exit the park. The persons promptly attempt to comply with the order by walking down an alley that intersects the park. BPD members may not form lines at the beginning and end of the alley and close off all exit routes. BPD members may not arrest everyone thus gathered within the alley that intersects the park.
10. BPD members shall not treat protesters differently based on the content or viewpoint of their legally protected speech, nor based on the race, national origin, gender identity, gender expression, disability or illness (physical or mental), sexual orientation, religion, political ideology or affiliation, social status, veteran status, economic status, familial status, HIV status, immigration status, homelessness, language ability, age, or any other protected class under state, federal, and local laws. See Policy 317, *Fair and Impartial Policing*.
 11. BPD members shall not target the leaders or organizers of an assembly or protest by singling out such persons for harsher treatment. BPD members shall not single out persons for video recording solely because the persons appear to be the leaders or organizers of an assembly or protest. This does not prevent a member from taking enforcement actions in the event that the member has probable cause to believe that a person, whether a leader/organizer or not, is inciting violence or has committed a crime.
 12. BPD members shall not allow personal beliefs and opinions to interfere with their duties as a law enforcement officer.
 13. BPD members shall not express personal, political, or religious views during a public assembly while on duty.

Coordinated Response to Protests and Assemblies

Preparation for Protests and Assemblies

1. Incident Action Plans (IAPs) direct and coordinate response operations. An IAP shall be developed by the IC or designee prior to all known significant pre-planned or anticipated public protests or assemblies (more than 50 anticipated participants). This allows for a clear mode of communicating the overall incident objectives in the context of operational and support activities.

2. As outlined in the Incident Command System, all IAPs must answer the following four questions:
 - 2.1. What do we want to do?
 - 2.2. Who is responsible for doing it?
 - 2.3. How do we communicate with each other?
 - 2.4. What is the procedure if someone is injured?
3. The IAP developed for significant pre-planned or anticipated public protests or assemblies shall include the following details:
 - 3.1. An effective traffic control plan for streets and sidewalks;
 - 3.2. A protocol for the role of Safety Officer, which shall include:
 - 3.2.1. Health and safety guidance during pre-deployment briefings;
 - 3.2.2. Ensuring the availability of mental health and medical professional(s) to provide health care to members;
 - 3.2.3. Ensuring the close monitoring and periodic affirmative checks of members' well-being by supervisors;
 - 3.2.4. Close monitoring of member fatigue and indications of stressors; and
 - 3.2.5. During prolonged periods of demonstrations or unrest, the deployment of police counselors or psychologists to provide individual counseling to members and their family members.
 - 3.3. To the extent possible, a plan for public information sharing before, during and after significant public assemblies.

Cooperation with Persons Seeking to Exercise Their First Amendment Rights

1. In anticipation of a First Amendment Assembly or Demonstration, BPD will strive to establish contact and communication with the organizers or leaders of the assembly or protest. BPD recognizes that the involvement of all stakeholders is critical to upholding First Amendment rights while promoting public safety.
2. If BPD becomes aware that a First Amendment Assembly or Demonstration is or will be occurring, BPD members shall make reasonable attempts to establish communication and cooperate with the organizers of the assembly or protest, regardless of whether a permit has been applied for or issued.
3. The commanding officer responsible for monitoring a First Amendment Assembly (the IC, if an IC has already been designated) will consult stakeholders when planning for and responding to First Amendment Assemblies and Demonstrations. Upon establishing contact, the commanding officer responsible for monitoring a First Amendment Assembly (or their designee) shall request that the organizers or leaders of the assembly or demonstration designate a primary police

liaison and that the primary police liaison maintain continuous contact with the commanding officer (or their designee).

- 3.1. Whether or not a group responds to BPD's attempts to establish communication before an assembly or protest, BPD shall attempt to identify a primary police liaison for the assembly or demonstration and foster cooperation with the group as early as possible during the assembly or protest. Further, no retaliatory action will be taken against a group for failure to designate a primary police liaison or communicate with BPD.
- 3.2. The assigned BPD member should continue to communicate with the primary police liaison throughout the duration of an assembly or demonstration, even if BPD ultimately begins to effect arrests or take other enforcement measures.

Mobile Field Force

1. BPD maintains a specially-trained and equipped Mobile Field Force (MFF) that is utilized for large events, both pre-planned events and spontaneous events. See Policy 413, *Mobile Field Force*. The MFF serves several functions, including:
 - 1.1. Ensuring the safety of event participants, observers and bystanders;
 - 1.2. Ensuring the respect and protection of First Amendment rights;
 - 1.3. Assisting in managing Civil Disturbances/Unrest in the rare event that a breach of the peace occurs.
2. The Special Operations Division Commander or designee has the authority to deploy the MFF for pre-planned events.
3. In the event that a spontaneous assembly or protest occurs, the District Commander will contact the Special Operations Division Commander or designee to request the deployment of the MFF.
4. Upon deployment of the MFF, the IC has control and command of the MFF's efforts.
5. Members of the MFF must follow the guidelines outlined in any Standard Operating Procedures for the MFF and Policy 413, *Mobile Field Force*, as well as the directives in this policy, including but not limited to the following:
 - 5.1. MFF members shall engage in de-escalation techniques if specific persons or a group becomes hostile or threatens imminent unlawful violent action or destruction of property.
 - 5.2. MFF members shall utilize crowd management tactics, if necessary, to facilitate safe environments for public speech or as a response to Civil Disturbances/Unrest.

Protecting the Right to Observe and Record Officer Conduct

1. BPD members shall respect, and shall not infringe, the right of all persons to observe and record the actions of law enforcement officers in the public discharge or their duties in all public spaces (including sidewalks, parks, and other locations for lawful public protest), as well as in all other areas in which persons have a legal right to be present (including a person's home or business and common areas of public and private facilities and buildings), so long as the

observation or recording does not threaten the safety of any BPD member or any other person and does not physically interfere with the performance of any BPD member's duties.

2. See Policy 1016, *Public Observation/Recording of Officers*, for complete guidance on how to address the public's observation and recording of police actions.

Training, Compliance and Assessment

1. Each BPD member shall receive training consistent with this policy. Such training shall include periodic instruction regarding the key requirements of the policy. Evidence of each BPD member's training – including the member's attendance, dates of training, and test scores or other proof that the member successfully completed the training – shall be documented by the Education and Training Academy.
2. Annual assessments shall be conducted of the BPD's practices related to First Amendment protected activities. These will include:
 - 2.1. A review and analysis of complaints alleging misconduct related to First Amendment protected activity;
 - 2.2. An analysis of law enforcement responses to public protest or assembly; and
 - 2.3. Identifying deficiencies and opportunities for improvement.
3. As a part of the assessment process, BPD will implement any appropriate corrective actions or improvement measures identified and will document measures taken.

ASSOCIATED POLICIES

Policy 317, *Fair and Impartial Policing*
Policy 413, *Mobile Field Force*
Policy 414, *Less-Lethal Munitions and Chemical Agents*
Policy 1016, *Public Observation/Recording of Officers*
Policy 1115, *Use of Force*
Policy 1118, *Oleoresin Capsicum Spray*

RESCISSION

Remove and destroy/recycle Policy 804, *First Amendment Protected Activity*, dated 1 July 2016.

COMMUNICATION OF POLICY

This policy is effective on the date listed herein. Each employee is responsible for complying with the contents of this policy.