



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:

JUNE 12, 2019

Related Policies:

1. General Order 18-15 – Searches With or Without a Search Warrant
2. General Order 63-26 – Consent to Search Form
3. General Order 65-14 – Department Press Relations and Issuance of Press Cards
4. General Order 18-25 – Complaint Intake and Investigation Process
5. General Order 18-24 – Property and Evidence Division
6. General Order 18-23 – Property and Evidence Management

This order contains the following numbered Sections:

- I. PURPOSE**
- II. POLICY**
- III. RESPONSIBILITY FOR COMPLIANCE**
- IV. DEFINITIONS**
- V. PROCEDURES**
- VI. RESPONSIBILITIES OF THE FIELD SUPERVISOR**
- VII. RESPONSIBILITIES OF THE INVESTIGATIVE SUPERVISOR**
- VIII. 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; freedom of religion, freedom of speech, freedom of the press, 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 a person's exercise of her/his First Amendment and Article I, Paragraph 6 rights, except in the limited circumstances outlined in Section V of this Order. Additionally, Division members violate Fourth and Fourteenth Amendment rights when they seize, search, and/or 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*, 862 F.3d 353 (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."



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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. DEFINITIONS

- A. **BYSTANDER:** a member of the public who is present but not taking part in a situation or event.
- B. **EXIGENT CIRCUMSTANCES:** A compelling urgency or true emergency that a member can specifically describe not using vague terms or boilerplate language. Circumstances that cause a reasonable person to believe that prompt action is necessary which can be an immediate threat to public safety, an active attempt by a suspect to destroy evidence of a crime or escape, or in instances of community caretaking.
- C. **FIELD SUPERVISOR:** A Lieutenant or Sergeant assigned to the field to supervise field personnel.
- D. **INVESTIGATIVE SUPERVISOR:** A Lieutenant or Sergeant assigned to an investigative unit to supervise investigative personnel.
- E. **MEDIUM:** The storage source for visual and/or audio recordings, whether by film, analog, or digital means.
- F. **PROBABLE CAUSE:** Specific, and articulable facts to permit a reasonable person to believe that a subject committed a violation of the law or that evidence of a crime would be found in a search. Probable cause is a higher standard of evidence than having reasonable suspicion, but is less than the beyond a reasonable doubt standard needed for conviction. Probable cause is a practical, non-technical probability.
- G. **PUBLIC SETTING:** An indoor or outdoor area, whether privately or publicly owned, to which the public has access by right or by invitation, expressed or implied, whether by payment of money or not.
- H. **RECORDING:** Capturing of images, audio and/or video by means of a camera, cell phone, audio recorder, or other device.



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V. PROCEDURES

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 Division officers in the public discharge of their duties.

A. A Bystander's right to record an Officer's conduct.

1. A bystander has the same right to 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. Public settings include parks, sidewalks, streets, 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, including a bystander's home or business.
3. 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.
4. As long as the 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**:
 - a. Tell or instruct a bystander that the recording of police officers, police activity, or persons who are the subject of a police action; is not allowed; that recording police activity requires a permit; or that recording requires the officer's consent.
 - b. Subject a bystander to a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)) or arrest solely on the basis that the bystander is recording police conduct;
 - c. Order the bystander to cease such activity;
 - d. Demand that bystander's identification;
 - e. Demand that the bystander state a reason why he or she is taking photographs or recording;



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- f. Detain, arrest, or threaten to arrest bystanders based on activity protected by the First Amendment, including the bystander's verbal criticism, questioning police actions, or gestures;
- g. Intentionally block or obstruct cameras or recording devices; or
- h. 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.

B. Limitations on a Bystander's Right to Record an Officer's Conduct

- 1. Nothing in this General 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 a crime or incite others to violate the law.
- 2. Officers are reminded that a person commits an offense under N.J.S.A. 2C:29-1 if the person purposely (a) obstructs, impairs or perverts the administration of law or other governmental function, or (b) 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.
- 3. If a bystander is recording police activity from a position that materially 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 recording.
- 4. Credentialed media personnel may be granted closer access to incident scenes or be allowed to cross police lines with the approval of the public information officer and the highest investigative supervisor on the scene, refer to **General Order 65-14 - Department Press Relations and Issuance of Press Cards**. This right does **not** extend to a bystander.

C. A Bystander's Right to Complain about or Criticize an Officer's Conduct

Newark Police Officers shall not use or threaten to use force or their arrest authority in response to mere criticism or gestures so long as that expression neither gives rise to an objectively reasonable fear of harm to the officer(s) or others, violates the law or incites others to violate the law.



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D. Seizure of a Bystander's Recording Device or Medium

1. An officer's seizure of a recording device, without a warrant, is not permitted and is presumed to be illegal under the Fourth Amendment, except in the narrowly defined exceptions outlined below.
2. An officer may seize a bystander's recording device incident to the lawful arrest of the bystander. However, the seizure of a recording device incident to a lawful arrest does not allow an officer to search or view the contents of the recording device without a warrant (e.g. Communications Data Warrant).
3. If an officer has probable cause to believe that a recording device contains images or sounds that are evidence of a crime (i.e., First, Second, and Third degree), the officer shall immediately notify a Field Supervisor and request that the recording bystander, where possible and practical, and in the presence of the officer, voluntarily consent to transmitting the recording via electronic mail to the officer's official city electronic mail account. If the bystander cannot or will not transmit the recording via electronic mail, the officer should request that the recording party voluntarily consent to providing the device or recording medium (e.g., the memory chip) to the officer.
4. Consent to take possession of a recording device or medium must be given voluntarily. A Field 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).
5. If the person voluntarily consents to providing the recording device to the officer, the officer shall:
 - a. Contact the On-Call Detective responsible for the highest charge (i.e., most serious crime) and the Field Supervisor and notify them of the evidence; and
 - b. Submit the recording device into evidence, consistent with **General Order 18-24 – Property and Evidence Division** and **General Order 18-23 – Property and Evidence Management**.
 - c. Absent the exigent circumstances outlined below in VI.E.3, officers **shall not** attempt to download, or otherwise access any material contained within the device without a warrant.



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6. If the bystander refuses to consent to providing the recording device, the officer may seize the recording device without a warrant under certain “exigent circumstances.” Specifically, it is appropriate for an officer to seek the warrantless seizure of a bystander’s recording device when the officer has:
 - a. probable cause to believe that a serious crime involving violence that may result in serious bodily injury or death has been committed;
 - b. a good-faith belief that there is evidence of that crime on the recording device or medium; **and**
 - c. a good-faith belief that evidence will be lost or destroyed absent seizure.
7. When an officer reasonably believes that these exigent circumstances exist, the officer may request the recording bystander remain on the scene **voluntarily** with the recording device, for a reasonable amount of time, until a Field Supervisor arrives on the scene. If the bystander refuses to wait to speak with the Supervisor then they must be allowed to leave the scene unless the officer reasonably believes the bystander has committed, is committing, or is about to commit any crime or has incited others to violate the law. If an officer seeks to seize a recording device without a warrant and requests the recording bystander to remain on the scene, the officer must request the assistance of a Field Supervisor. Once on the scene, the Field Supervisor will determine if a warrantless seizure of the recording device is necessary.

All Division members are reminded, however, that the detention of a bystander without proper supporting justification is a violation of the 4th Amendment to the United States Constitution, Article 1, Paragraph 7 of the New Jersey Constitution and **General Order 18-14 - Consensual Citizen Contacts and Investigatory Stops**.
8. 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. (See **General Order 18-24 – Property and Evidence Division** and **General Order 18-23 – Property and Evidence Management**). Information shall be provided to the owner concerning where, when, and how to recover the property.



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E. Searching a Bystander's Recording Device or Medium

1. An officer's search of a recording device or medium is not permitted and presumed to be illegal under the warrant requirement of the Fourth Amendment to the U.S. Constitution and Article I, Paragraph 7 of the New Jersey Constitution, except in the narrowly defined exceptions outlined below.
2. If an officer has probable cause to believe that a recording device contains images or sounds that are evidence of a Crime (First, Second, and Third degree), the officer shall immediately notify a Field Supervisor and request that the recording bystander, where possible and practical, and in the presence of the officer, voluntarily consent to transmitting the recording via electronic mail to the officer's official city electronic mail account. If the bystander cannot or will not transmit the recording via electronic mail, the officer should request that the recording party voluntarily consent to providing the device or recording medium (e.g., the memory chip) to the officer.
3. Recordings obtained by consent shall be viewed by the Detective responsible for investigating the crime believed to be captured on the device. Otherwise, an officer shall obtain a search warrant before viewing photographs or listening to recordings on a camera or memory chip that has been seized as evidence.
4. However, if it is objectively reasonable for an officer to believe information contained in a recording device or medium could **prevent imminent death or serious bodily harm**, an officer **shall** contact the highest ranking Investigative Supervisor available to receive authorization to immediately review recordings that have been seized without a warrant. If the Investigative Supervisor grants authorization, the officer may immediately search the recording device or medium for photographs and recordings that are related to the exigent purpose.
5. 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. Recordings that have been seized as evidence that are not directly related to the exigent purpose shall be reviewed by the Detective responsible for investigating the crime believed to be on the device after a warrant has been secured.



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7. Any recording devices or recording medium taken into custody shall be returned as soon as practicable.
- F. 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 or medium 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.
- G. Recordings that may contain evidence of Police misconduct.
1. It is the policy of the Newark Police Division to accept and investigate all complaints of alleged Police misconduct from any individual or organization including complaints that have accompanying recorded evidence. Refer to **General Order 18-25 Complaint Intake and Investigation Process** (Section IX-F), for more information on the handling of recordings that may contain evidence of police misconduct.
 2. If a complainant expresses fear or concerns about turning over recordings that may contain evidence of Police misconduct when making a complaint about a member of the Newark Police Division directly to the Newark Police Division, he or she should be referred to the Essex County Prosecutor's Office, Professional Standards Bureau. Refer to **General Order 18-25 Complaint Intake and Investigation Process** (Section IX-O), for more information on complaint referrals.

VI. RESPONSIBILITIES OF THE FIELD SUPERVISOR

- A. A Field 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 or medium seized by officers based upon probable cause; or



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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 Field 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 it was necessary to detain the recording party before the Field Supervisor's arrival, review the facts and circumstances to determine if the detention was appropriate in that the officers reasonably believed the recording party has committed, is committing, or is about to commit any crime or incite others to violate the law.
 4. If responding to the scene because an officer believes exigent circumstances require that the recording device or medium be seized without a warrant, the Field Supervisor shall:
 - 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. A warrantless seizure is permissible only when there is:
 - i. probable cause to believe that a serious crime involving violence that may result in serious bodily harm or death has been committed;
 - ii. a good faith belief that there is evidence of that crime on the recording device or medium; **and**
 - iii. a good faith belief that evidence will be lost or destroyed absent seizure.
 - b. If there is no immediate law enforcement need to view the recording device and/or media, ensure that 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 the narrowly defined exigent circumstances outlined above in VI.B.4., immediately



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return the recording device and/or media to the owner. The Field Supervisor shall contact the Detective responsible for the highest charge (most serious crime) and his or her Supervisor (i.e., Investigative Supervisor) with all pertinent information for the assigned detective to begin an application for a search warrant.

5. If responding to a scene where any media or recording device or medium was voluntarily provided to the police, the Field 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 18-15 Searches with or without a Search Warrant**.
6. 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 purpose.

VII. 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 at the discretion of the Investigative Supervisor, based on the facts and circumstances, whether a search warrant (e.g. Communications Data Warrant) will also be obtained.
- B. Upon being notified by a Field 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 Police, the Investigative Supervisor, shall nonetheless, assign a Detective to apply for a search warrant (e.g. Communications Data 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 purpose.



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VIII. EFFECT OF THIS ORDER

This order shall become effective immediately. 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.

BY ORDER OF

A handwritten signature in blue ink, appearing to be "AFA", written over a horizontal line.

ANTHONY F. AMBROSE
PUBLIC SAFETY DIRECTOR

AFA:BO/lc