

TOPEKA POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL
2.10 RECORDING OF LAW ENFORCEMENT ACTIVITY

SUBJECT: Recording of Law Enforcement Activity		
2.10	EFFECTIVE: 10-09-2023	<i>Bryan Wheelles</i> Bryan Wheelles, Chief of Police
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2.10.1 PURPOSE

Technology and recording devices are everywhere. This policy will direct Department members to the proper and lawful response to citizens who are recording officers.

2.10.2 POLICY

All Department members shall support the Constitution and individual rights of those documenting the conduct of members through audio/video recording.

2.10.3 RECORDING OF LAW ENFORCEMENT

A. In General

1. Members of this Department shall not prohibit the recording of law enforcement activity or take enforcement action under circumstances where the person making the recording is legally permitted to be in the area where they are located.
2. Recording law enforcement action from an area where the subject is lawfully present does not constitute an offense.
3. Officers shall not take enforcement action by way of intimidation or coercion to end the recording; by obstructing the ability to record from an area of lawful presence; or by discouraging the person from continuing the recording.
4. The First Amendment protects the right to observe and record law enforcement officers in the discharge of their public duties.
5. Recording law enforcement officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.
6. Members of this Department should be aware that the First Amendment allows members of the public the same rights to recording as would a member of the press.
7. If someone at a demonstration is filming officer conduct, no enforcement action will be taken irrespective of pre-established demonstration/safety zones unless it can be clearly established that they are a threat to security and the safety of officers or others present.

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8. The First Amendment also protects a person's right to verbally challenge and criticize an officer who is making an arrest. Such a challenge includes the right to document the officer's actions through audio and visual recording.
9. Obstruction / Hindering / Interference type charges against a person recording are generally inappropriate except:
 - a. When the person, through their actions puts the officer's safety, the suspect's safety, or the public's safety at risk. Some court decisions have indicated that without physical action or a threat toward an officer no arrest will be justified.
 - b. The recorder enters a clearly marked crime scene without authorization.
 - c. The recorder enters an area which is closed to the public and clearly marked due to an ongoing emergency, e.g., SWAT situation, fire scene, etc.
 - d. The recorder enters private property that is not open to the public without the authorization of the owner/occupier of said property. In such a case, the officer should determine the wishes of the owner/occupier before taking significant enforcement action such as an arrest. Where an arrest is justified, the officer must follow the legal mandates of arrest, for example a required warning in a trespass case.
10. When confronted with a person who the officer perceives as bordering on a lawful obstruction or hindering charge, the officer may, where practical and feasible, inform the subject that their actions are interfering with the officer's duties and ask them to move to a less-intrusive position where they can continue to record but will not interfere.
11. When an officer is considering taking enforcement action such as an arrest or the seizure of a recording device, the officer shall make all reasonable efforts to contact a supervisor to discuss the situation prior to taking enforcement action.
12. Seizing, manipulating, erasing, deleting or inspecting devices or recordings:
 - a. Officers and supervisors shall be advised that there is a heightened reasonableness requirement when officers seek to seize items protected by the First Amendment as is the case when dealing with recordings under this policy. Thus, more facts and circumstances and a greater government interest must be present before officers and supervisors should consider such a seizure.
 - b. Officers shall not erase, delete, or otherwise corrupt a recording held by an individual.
 - c. The seizure of a recording device or the recording itself constitutes a seizure under the Fourth Amendment and unless one of the warrant

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exceptions i.e. consent or exigency applies, the seizure must be supported by a warrant.

- d. If the officer has reason to believe that the person intends to publicly broadcast the recording, the seizure of the equipment and the tape even with a warrant may violate the Privacy Protection Act of 1980, which provides at 42 U.S.C. sec. 2000 (aa): "Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce..."
- e. In all cases prior to a lawful seizure, officers should consider seeking the consensual cooperation of the individual in possession of the recording and where possible record the consent or obtain the consent in writing.
 - 1) Consent must be voluntary on the part of the individual and must not be the result of duress or coercion.
 - 2) Officers should attempt to have the exchange in seeking consent recorded even if it is done on the recording device at issue.
- f. An officer considering such action shall notify a supervisor before such action is taken unless there is a life-threatening emergency.
- g. Exigency for purposes of this section shall be:
 - 1) Recordings of violent criminal acts where the recording is essential to the identification and apprehension of the criminals and law enforcement has no other immediate means of making the identification;
 - 2) The officer reasonably believes that a failure to immediately view or preserve the recording will lead to the destruction or loss of this evidence; and
 - 3) Cooperation through consent cannot be obtained from the subject in possession of the recording.

B. Supervisor Responsibility

Where resources allow a supervisor should respond to the scene where an officer is considering taking significant enforcement action against a person in possession of a recording of a law enforcement event.

- 1. As with an officer, a supervisor who reasonably believes that the person's conduct is approaching the level of a criminal offense, the supervisor shall seek the voluntary cooperation of the person to move to

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a location where their actions will not interfere but they shall still be able to record the event.

2. The supervisor shall seek the consent of the individual holding the recording/recording device to obtain a copy of the recording or to allow law enforcement to otherwise preserve this recording.
3. In cases where consent cannot be obtained and no life-threatening emergency is on-going, the supervisor shall contact the Department's Legal Advisor for advice if possible.
4. A warrant shall be obtained unless an exception to the warrant requirement can be met.
5. If the person holding a recording indicates intent to publicly broadcast the recording, the supervisor, in consultation with the Legal Advisor should consider the impact of the Privacy Protection Act upon any seizure of the recording.

C. Agency Responsibility

When a seizure of the device or recording is authorized by law the agency shall:

1. Only maintain custody of the device as long as necessary to seize the necessary recording from the device by a person who has the technical certifications to support the admissibility of the recording into evidence.
2. The items shall be returned to its lawful possessor within seventy-two (72) hours, unless otherwise ordered by the prosecutor's office and authorized by the court.
3. Upon return of the device to its rightful possessor, the recording itself shall be left intact.

D. Crimes Unrelated to Filming A Law Enforcement Event

This policy does not impact the ability of officers to seize recordings of evidentiary value when conducting investigations of criminal activities. For example: a subject is arrested for rape where the victim indicates the crime was filmed and when arrested the suspect has a video camera in his or her backpack. The rules of search incident to arrest or warrant related searches of this camera are unaffected by this policy.