



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO BOX 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-6500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANDREW J. BRUCK
Acting Attorney General

LYNDSAY RUOTOLO
Director

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2021-11

TO: All Law Enforcement Chief Executives and County Prosecutors

FROM: Andrew J. Bruck, Acting Attorney General

DATE: December 7, 2021

SUBJECT: First Amendment Right to Observe, Object to, and Record Police Activity

Freedom of speech is a foundational American principle. Fidelity to this right—embodied in the First Amendment to the U.S. Constitution and in the New Jersey Constitution—has distinguished our country throughout its history. Free speech protections have always intersected with many aspects of everyday life, including the role of law enforcement, but increasingly so with modern advances in communication technology.

In particular, given widespread ownership of smartphones over the past decade, civilian recordings of police activity are now routine. The First Amendment's protection of an individual's right to record "police officers conducting their official duties in public" is well-recognized. Fields v. City of Philadelphia, 862 F.3d 353, 355 (3d Cir. 2017). In order to continue building better relationships between communities and police, this Directive is necessary to ensure that the First Amendment's bounds are as clear as possible—to both civilians and law enforcement alike—with respect to the right to observe, object to, and record police activity.

Pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the state in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I hereby direct all law enforcement and prosecuting agencies operating under the authority of the laws of the state of New Jersey to comply with the following policies and procedures.



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I. Scope of the First Amendment Right

A. ***The right to record an officer's conduct.*** A member of the public who is present but not taking part in a situation or event, i.e., a "bystander," has the right to witness, observe, photograph, audio and video record, comment on, or complain about law enforcement officers conducting official duties in public or in private places where the person has a right to be present.¹

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 they are, (a) in public settings including but not limited to parks, sidewalks, streets, locations of public protests, common areas of public facilities and buildings, and (b) in private places where the bystander has the right to be present, including but not limited to common areas of private facilities and buildings, and a bystander's home or business.
2. 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:
 - i. Tell the bystander that the recording of police officers, police activity, or persons who are the subject of a police action is not allowed.
 - ii. Tell a bystander that recording police activity requires a permit or officer consent.
 - iii. Threaten, intimidate, order to cease, or otherwise discourage a bystander from remaining in the proximity of, recording, or verbally commenting on officer conduct directed at the officer's official activities.
 - iv. Perform an investigatory stop or arrest of the bystander solely on the basis that the bystander is recording police conduct.
 - v. Demand the bystander's identification.
 - vi. Demand that the bystander state a reason why the bystander is recording.
 - vii. Detain, arrest, or threaten to arrest a bystander based on activity protected by the First Amendment, including but not limited to the bystander's verbal criticism, questioning of police actions, lawful recording of the officers, or gestures.

¹ The use of the term "bystander" is not to the exclusion of the First Amendment rights of other civilians under the law.

- viii. Intentionally block or obstruct recording devices. Officers are not required to position themselves in a manner that gives individuals better angles or views while recording, but may not deliberately obstruct actions taken in public from the view of people who are recording.²

B. ***Limitations on the right to record an officer's conduct.***

1. Nothing in this Directive 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. The fact that a bystander has a 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.
 - i. Credentialed media personnel may be granted closer access to incident scenes or be allowed to cross police lines with relevant law enforcement agency approvals. This right does not extend to anyone who has not received such approval.
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, the officer shall not order the bystander to stop recording.
 - i. N.J.S.A. 2C:29-1 continues to prohibit conduct whereby a person purposely (a) "obstructs, impairs or perverts the administration of law or other government 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."

C. ***The right to complain about or criticize an officer's conduct.*** Law enforcement officers shall not use or threaten to use force or their arrest authority—or take any other action described in Section I.A.2 above—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.

² This provision is not intended (1) to prohibit law enforcement officers from protecting the privacy of people seeking medical assistance or experiencing a mental health crisis, or of the deceased, or (2) to prevent officers from establishing an appropriately sized crime scene perimeter for the purposes of evidence preservation.

II. Limitations on Seizing and Searching Recording Devices

A. ***Seizures and searches.*** Law enforcement must obtain a warrant in order to seize and search a recording device, except in the following narrowly defined circumstances:

1. Seizing a recording device during a search incident to lawful arrest of the bystander. However, mere seizure does not allow for a search of the device itself without obtaining a warrant.
2. Where the officer has probable cause to believe that a bystander's recording device contains a recording that is evidence of a crime:
 - i. The officer may request the bystander voluntarily transmit the recording to law enforcement. If electronic transmission is not possible, the officer may request that the bystander consent to voluntarily provide the recording device or its memory chip to law enforcement for the purpose of a search of the contents.
 - ii. If the bystander refuses, the officer may seize the recording device only under exigent circumstances, defined as (1) probable cause to believe that a violent crime resulting in serious bodily injury or death has been committed; (2) a good-faith belief that there is evidence of that crime on the recording device; and (3) a good-faith belief that the evidence will be lost or destroyed absent seizure. Mere seizure does not allow for a search without a warrant, unless necessary to prevent imminent death or serious bodily harm.

B. ***Seizure of recording devices from journalists is generally prohibited.*** Law enforcement should never seize a press member's recording device, except in the exceedingly rare case where it is necessary for public safety or the result of a search incident to a lawful arrest of the journalist. In addition, officers must never delete material from a journalist's recording device, and should obtain warrants to search such devices only after obtaining approval from the County Prosecutor or the Attorney General.

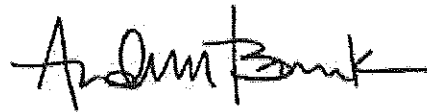
C. ***Return of seized devices.*** If a recording device is seized, due care must be exercised in its safekeeping and preservation, pursuant to established agency evidence retention protocols. No recording device should be seized without providing information to the bystander concerning where, when, and how to recover the property. Seized devices should be returned as soon as practicable.

III. Other Provisions

A. ***Non-enforceability by third parties.*** This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations

on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.

- B. ***Severability.*** The provisions of both this Directive shall be severable. If any phrase, clause, sentence or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the document shall not be affected.
- C. ***Questions.*** Any questions concerning the interpretation or implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice, or their designee.
- D. ***Effective date.*** This Directive shall take effect immediately and shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Andrew J. Bruck
Acting Attorney General

ATTEST:



Lyndsay Ruotolo
Director
Division of Criminal Justice

Dated: December 7, 2021