



## IACP LAW ENFORCEMENT POLICY CENTER

# Recording Police Activity

### Concepts and Issues Paper

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## I. INTRODUCTION

### A. Purpose of the Document

This paper is designed to accompany the *Model Policy on Recording Police Activity* established by the IACP Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirement for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their communities and their law enforcement agencies.

### B. Background

*In June of 2000, an individual became concerned about the unsafe manner in which he believed state troopers were conducting truck inspections. That same day, he contacted his state representative to inquire about videotaping the inspections. The representative suggested that before he did so, he obtain permission from the adjacent landowner whose property he intended to use for this purpose. After receiving authorization from the landowner, he began videotaping the state troopers from a distance of approximately 30 feet. Shortly thereafter, troopers asked him for identification. After an exchange of words, if not some pushing and shoving, he was arrested for harassment.<sup>1</sup>*

<sup>1</sup> *Allen E. Robins v. Patrick V. Fetterman, et al.* NO. 04-3592. U.S. District Court for the Eastern District of PA.

Recording the actions and activities of police officers in the performance of their public duties is a form of speech through which individuals may gather and disseminate information of public concern.<sup>2</sup> The free discussion of public affairs in general is a fundamental right under the First Amendment. The ability to observe the functions of government in general, and agents of government in particular, is an essential component of the public's right under the First Amendment, whether it is simply observed or captured by video, photograph, or audio recordings. This right is extended to recording of any police activity performed in public, or where an individual otherwise has a legal right to be present. In effect, the public has the same rights to record police activities as the press.<sup>3</sup> In fact, in today's technological environment, it is often the case that individuals in the public are the first to make such recordings.

Recording of police conduct was first brought into focus with the events surrounding the arrest of Rodney King in March 1991. That and subsequent incidents have been the subject of news stories nationwide and, in numerous instances, have resulted in legal action against officers and their agencies for failure to follow, or failure to have, established legally sound department policies and procedures along with commensurate training that recognize and protect an individual's First Amendment right to record.

The proliferation of portable video recording capabilities in cellphones, smart phones, and similar

<sup>2</sup> See e.g. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

<sup>3</sup> See e.g. *Pell v. Procunier*, 417 U.S. 817 (1974). Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.

devices has made it easy for the public to record events and activities—including the actions of police officers performing their duties in public places. As technology advances, recording of police actions is likely to increase.

The motivation of individuals who choose to record the actions of police officers can range from simple curiosity to attempts to document what are felt to be unwarranted or inappropriate police actions, to intentional efforts to find and depict police in the worst possible light. Until recently, courts have not provided rulings of such consistency and uniformity that they could be relied upon to frame sound operational protocols that guide officers in protecting an individual's right to record.<sup>4</sup> In this vacuum, many law enforcement officers have simply been left to use their best judgment. And, that judgment has in many instances been clouded by a more or less natural aversion toward uninvited recording and scrutiny of their actions. Seizure of recording devices and destruction of audio or video media have been employed in some cases, as have charges lodged against recording parties in an attempt to terminate recordings, such as interference with police officers, violations of wiretapping statutes, loitering, failure to obey police instruction, and harassment, among others. Numerous legal challenges to these actions have resulted in a series of court decisions in recent years that have helped clarify the legal rights and limitations of both police and the public to both videotape and audiotape police officers performing their duties in public places.

### **C. First Amendment Right to Record**

As previously mentioned, individuals have a First Amendment right to record police officers in the performance of their public duties. This right extends to recording of police activity in public or where an individual has a legal right to be present.

Whether a place is considered “public” has been variously interpreted and, at times, misunderstood. For example, because a sidewalk is “owned” by the local government does not make it private property. It is purposefully constructed for use by the public. This also includes locations that are open and legally accessible to the public, such as parks, beaches, and streets. It also includes buildings designated for public use, such as libraries, and the open and common areas of government buildings. Although community shopping malls or other places of business are generally privately owned, they are accessible, open to the general public, and intended for public use. But, their use can be limited by property management if necessary. On the other hand, private residences and property are not open to the public unless

<sup>4</sup> See e.g., *Kelly v. Borough of Carlisle*, 622 F.3d 248 (2010) in which the court granted an officer qualified immunity in a lawsuit based on the fact that the right to film police was not a clearly established right of which the officer could reasonably have been aware.

the owner or resident has given permission to others to be present.

While the public has a broad-based right to record police activities, that right is not absolute and may be limited by reasonable time, place, or manner restrictions.<sup>5</sup> Those restrictions must be content-neutral, narrowly tailored to serve a significant governmental interest and leave open reasonable alternative avenues of communication. For example, requesting that someone filming move out of the street and onto the sidewalk for their safety is a reasonable time, place, and manner restriction that serves a significant governmental interest (public safety) and leaves open reasonable alternative avenues of communication (recording from a different, but safer location). However, ordering someone to stop recording and leave the area solely because they are a member of a particular group would be a First Amendment violation because it was not content neutral and did not leave open reasonable alternative avenues of communication. Additionally, a person's desire or intent to observe, photograph, or video record police activity does not entitle the recorder to trespass on private property; place himself, herself, or others in physical danger; enter a private dwelling or similar space; enter a marked crime scene; or otherwise enter any area not accessible to the general public.

Persons making recordings may not do so in a manner that materially interferes with police activities. Interference may be interpreted in various ways depending on individual officer perspectives. The simple act of recording has been improperly invoked by some officers as an act of interference in and of itself. This interpretation has in some instances led officers to direct involved parties to stop videotaping or leave the area, cite the individual for loitering or for committing other minor offenses, or even as the basis to seize recording devices or destroy recordings. The act of recording alone does not provide grounds for taking these or similar enforcement actions even if the officer considers the act of recording to be a distraction or annoyance.

To avoid causing actual or material interference, individuals who record police activities must abide by the following restrictions. The following are examples of reasonable time, place, and manner restrictions imposed to avoid material interference.

- A reasonable distance must be maintained from the officer(s) engaged in enforcement or related police duties. Persons may not physically position themselves in a manner that obstructs officers from performing their duties.

<sup>5</sup> See e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) in which the court stated that the right to record police is not absolute, but is subject to reasonable time, place, and manner restrictions.

- Recording parties may not intentionally or unintentionally take actions that unduly delay police attempts to conduct enforcement or emergency activities. Standing in the way of victims, suspects, witnesses, emergency responders; impeding traffic; or similar actions are forms of obstruction that are not acceptable. If reasonable to do so, officers may direct recording parties to permissible recording locations or provide them with other options for recording that will not prevent law enforcement officials from conducting their official duties. Failure to heed such police directives may subsequently provide the basis for physical removal, citation, or arrest.
- Public safety may not be jeopardized by allowing the public access to all areas in an effort to record police actions. Individuals can be restricted from certain areas or directed to move if necessary to ensure the safety of officers, victims, witnesses, and third parties. For example, police may restrict individuals from standing in close proximity to an investigative stop if that person's presence creates a potential hazard to the officer or others. Officers can also restrict the public's access to or recording of crime scenes and tactical operations by establishing a marked perimeter. Recording of tactical operations such as serving arrest or search warrants from too close a distance could jeopardize officer safety.
- Verbal criticisms or derisive comments made by recording parties or others from a position or location that has no direct impact on police actions does not constitute interference, even if the comments are unseemly or offensive. Officers should, in these and related circumstances, be attentive to the performance of their duties and avoid being baited by hecklers or others. Rather than risking a debate or verbal exchange, it is better not to engage with agitators. Officers should develop a routine response that will deflect provocative comments and questions, such as asking whether the criticizing individual would like to speak to a supervisor or a public information officer.

It should be noted that properly credentialed members of the press may be allowed greater access to crime scenes than the general public. This practice is subject to agency policy and supervisory approval. However, it is important to remember that members of the press are entitled to at least the same access as the general public and may not be restricted from areas in which the public is allowed access.

Finally, it is entirely reasonable for officers to want to protect the privacy of victims or witnesses from being recorded, but this should be accomplished only by shielding victims or by interviewing witnesses in private areas when possible. Despite the good intentions of officers, if interviews are conducted in a public space that is legally accessible to the public, they are open to recording by the public and the press. Intentional interference, such as blocking, obstructing, or harassing only those with cameras while allowing the public to view the scene, is a form of censorship and is not permissible.

Arrests of individuals who are recording police activities must be based on objective, articulable violations of the law that are unrelated to the act of recording alone. Recording of the police does not, of itself, establish legal grounds for arrest, issuance of citations, or taking other actions to restrict such recordings.

#### **D. Court Order/Warrant Requirements**

Nearly all confiscations and searches of recording devices require a court order or warrant in accordance with provisions of the Fourth Amendment. Several state court decisions set the stage for a 2014 ruling on this matter by the U.S. Supreme Court.

In January 2011, the California Supreme Court, in *People v. Diaz*,<sup>6</sup> ruled that the police are authorized to search any person's cellphone, without a warrant, following an arrest, under the principle of safeguarding evidence from destruction. In another case in California, police found indications of gang membership when they looked through the smartphone of David Riley. Following the precedent set in *Diaz*, video and photographs found in the phone were sufficient to convict Riley of attempted murder and other charges. The California Court of Appeal and the California Supreme Court upheld the conviction.

In another cellphone search case in Boston, police arrested Brima Wurie on suspicion of selling crack cocaine. The call log on his cellphone was examined to determine where he lived. With a warrant, police searched his house and found crack cocaine, marijuana, a firearm, and ammunition. A federal appeals court in this case, however, ruled that police must have a warrant before searching an arrestee's cellphone.

Both the *Riley* and *Wurie* cases were the subject of review by the U.S. Supreme Court in 2014.<sup>7</sup> The Court ruled that while officers may seize cellphones incident to arrest, police may not, with only minor exceptions, search the cellphones of people they arrest without first getting a search warrant. Modern cellphones and particularly

<sup>6</sup> *People v. Diaz*, 51 Cal. 4th 84, 101 (2011).

<sup>7</sup> *Riley v. California*, 573 U.S. \_\_\_\_ (2014) No. 13-132, decided June 25, 2014, together with *U.S. v. Wurie*, No. 13-212, on cert from the First Circuit Court of Appeals.

smartphones hold a vast assortment of personal and potentially sensitive information that does not compare with other personal items that an arrestee may carry on his or her person, such as a wallet, cigarettes, keys, or other items. The Court did not comment on one other possible exception to the warrant requirement related to situations where officers may fear for their lives or the lives of others, as noted in the following section.

## E. Seizures of Recording Devices and Media

The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>8</sup> A person’s “effects” are provided even greater security under the Fourth Amendment when they are also protected by the First Amendment, such as devices used to record in public. Attempts to seize recordings made legally in public spaces are justifiable only in very limited exigent circumstances. As such, the model policy states that “[a]bsent arrest of the recording party, recording equipment may not be seized.” In addition, the model policy warns that “officers may not order an individual to show recordings that have been made of enforcement actions or other police operations.”

Without exception, police may not destroy or delete audio and video recordings or order the person engaged in recording, or a third party, to delete or destroy such recordings, whether they are obtained with a warrant or through a bona fide exception to the warrant requirement. One such incident<sup>9</sup> resulted in a complaint against the police department in which the U.S. Department of Justice weighed in with a Statement of Interest<sup>10</sup> pursuant to 28 U.S.C. § 517. The plaintiff, Christopher Sharp, alleged to have witnessed officers arresting his friend forcibly and used his cellphone to video and audio record the incident. Twice Sharp refused officers’ demands to surrender his cellphone but subsequently conceded to the request of an officer who indicated he needed to review and possibly copy the recording as evidence. The officer left with the phone and upon its return, Sharp discovered that all recordings on his phone had been deleted to include personal photos and videos unrelated to the incident at hand. Sharp subsequently filed a complaint alleging violations of his First, Fourth, and Fourteenth amendments.

In its Statement of Interest, the government cited a significant body of case law that affirmed the rights of persons to video- and audiotape police during the course of

their duties under provisions of the Constitution, so long as the recording parties abide by the reasonable time, manner, and place restrictions. Additionally, the government made particular note of the fact that mere issuance of a policy on the rights of the public to record police is insufficient to properly inform and train officers on this issue. The rationale behind the rights of the public, specifically connected to provisions of the First, Fourth, and Fourteenth Amendments, need to be explained and made clear. For example, the meanings of such terms as “interference” with the police need to be clarified by case examples and with specificity so that potential loopholes can be avoided. Directions on how to address recording parties and, where necessary, to direct them to alternative acceptable locations for recording are important so as to avoid police-civilian confrontations.

Under certain circumstances, an officer may reasonably believe that a recording device contains evidence of a crime. To confirm this belief, the recording party should be asked if he or she will allow the officer to view the recording. If consent is given and it is determined that access to the evidence is important, the least intrusive first step is to ask the recording party whether he or she will consent to provide the recording medium—such as a memory chip—to the officer on a temporary basis so that it can be duplicated. Consent must be provided voluntarily; an officer cannot implicitly or explicitly threaten or coerce the individual. The owner may also choose to give qualified consent that permits viewing of only certain files or images and not others or may not permit any or all files, images, or sound recordings to be duplicated. As an alternative to taking possession of recording devices or recording medium, the owner may be asked if he or she would transmit images or sound recordings to the officer’s government email address. If the recording party refuses to comply with any of these requests, officers may not further pursue the matter or attempt in any manner to pressure, threaten, or intimidate the involved party to gain compliance. The assistance of a supervisor should then be sought.

However, if the officer believes that probable cause exists that evidence of criminal activity has been recorded *and* that failure to seize the recording device prior to the issuance of a warrant will result in the loss or destruction of such evidence, the officer may temporarily detain the recording party and request the assistance of a supervisor. If the supervisor establishes that the seriousness of the crime and exigency of circumstances support immediate seizure of the recording device, the recording medium, or both, he or she should authorize that a warrant be sought in order to examine photographic, video, sound recordings or other files. Only recordings related to the presumed crime may be viewed or downloaded.

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<sup>8</sup> U.S. Const. amend. IV.

<sup>9</sup> *Sharp v. Baltimore City Police Department*, United States District for the District of Maryland, Civil No. 1:11-cv-02888-BEL.

<sup>10</sup> Statement of Interest by Jonathan M. Smith, Chief, Special Litigation Section, U.S. Department of Justice, Civil Rights Division, May 14, 2012, [http://www.justice.gov/crt/about/spl/documents/Sharp\\_itr\\_5-14-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_itr_5-14-12.pdf)

In exigent circumstances, where there is probable cause to believe that the immediate seizure and search of a recording device without a warrant is necessary to prevent death or serious bodily injury, the recording party may be temporarily detained and a supervisor contacted to determine whether the seizure and search will be authorized without a warrant.

It should be emphasized that a court order or warrant is always preferable prior to conducting a search or seizure. Warrantless searches and seizures are presumptively illegal and, in the case of those under the Fourth Amendment to the Constitution, solid grounds must be established prior to taking such actions. Should a warrantless search produce evidence, the government may be prevented from using it under the “exclusionary rule” which applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment.<sup>11</sup>

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 and a departmentally authorized property receipt completed, with a copy given to the owner. Information should be provided to the owner concerning where, when, and how to recover the property. Absent exigent circumstances, no effort should be made by the receiving officer to view or download information on the device. Rather, it should be submitted as quickly as possible to the designated departmental unit for examination once a warrant has been obtained to do so.

## F. Audio Recordings and Wiretapping Laws

Arrests of persons recording police activities have been based on a wide variety of violations. In addition to disorderly conduct, loitering, failure to heed an officer’s direction, obstruction of justice, and others, one of the more recent attempts to stop recordings involves alleged violations of state wiretapping laws—a statute invoked based on the fact that audio recordings normally accompany video recordings. Arrests for recordings based on allegations of violation of state wiretapping statutes have not received support by federal or state courts in the 12 states that have such legal restrictions.<sup>12</sup>

One case in particular that gained national attention was that of Anthony Graber, a motorcyclist who used a helmet camera to record his wild ride on a crowded highway. Using a helmet-mounted camera, Graber recorded himself weaving in and out of traffic at high rates of speed; actions that clearly created a danger to himself and others. He was eventually stopped by an off-duty officer who was recorded by Graber exiting his unmarked personal vehicle and approaching Graber with a drawn handgun. Following

<sup>11</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>12</sup> See e.g., *Glik v. Cunniffe*.

the stop, Graber posted both the audio and video recording of his ride and subsequent stop on YouTube.<sup>13</sup> Graber was arrested and, among other vehicular offenses, charged with violation of Maryland’s wiretapping statute for failure to obtain the officer’s consent to audio record him. The trial judge ruled that the recorded audio exchange between the arrestee and the officers was not a private conversation as intended by the provisions of a state wiretap statute. “There is no expectation of privacy concerning a traffic stop on a public street. The law is clearly established that a traffic stop is not a private encounter.” Charges concerning making and disseminating the recording were dismissed.<sup>14</sup>

Illinois has, perhaps, one of the most stringent laws regarding audio recording of others—requiring that all parties must agree to be recorded before such recordings can take place.<sup>15</sup>

In 2011, the Seventh Circuit Court of Appeals, blocked enforcement of the state’s eavesdropping statute as applied to audio recordings. The court stated that:

*Illinois has criminalized the nonconsensual recording of most any oral communication, including recordings of public officials doing the public’s business in public and regardless of whether the recording is open or surreptitious. Defending the broad sweep of this statute, the State’s Attorney relies on the government’s interest in protecting conversational privacy, but that interest is not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events.*<sup>16</sup>

On November 26, 2012, the U.S. Supreme Court, without comment, declined to hear an appeal to the Seventh Circuit ruling.<sup>17</sup> Following this, on March 20, 2014, the Illinois Supreme Court held that the state’s eavesdropping statute violated the First Amendment, as it prohibited the open recording of public conversations. In December 2014, then-governor Pat Quinn signed into law an amendment that limits the statute to the surreptitious recording of private conversations and electronic communications.<sup>18</sup>

<sup>13</sup> Natl. Guard Sgt. Anthony Graber’s [YouTube™ traffic arrest](#) (2010). *State v. Graber*, No. 12-K-10-0647 (Md. Cir. Ct. Harford Cnty., Sept. 27, 2010).

<sup>14</sup> See “Video and Audio Taping Police Activity,” *AELE Mo. L. J.* 201, no. 7 (July 2012): 101–111.

<sup>15</sup> 720 ILL. COMP. STAT. 5/14-2(a)(1).

<sup>16</sup> *American Civil Liberties Union of Illinois v. Anita Alvarez*, No. 10 C 5235, (7th Cir. May 8, 2012).

<sup>17</sup> *Alvarez v. ACLU of Ill.*, cert denied.

<sup>18</sup> An Act Concerning Criminal Law, Ill. PA. 098-1142 (2014).

As exemplified in Illinois, the *Graber* case and others, police officers conducting their duties in public places do not normally have such expectations of privacy in their public conversations. Another lesson learned from these cases is how easily and how often audio- and videotapes of police activities enter and rapidly spread through the social media. As such, it has been suggested that officers always should assume that their actions are being recorded.

**Note**

This document was updated as part of the IACP’s Public Recording of Police (PROP) Project. This project was supported by Cooperative Agreement Number 2013-CK-WX-K005 awarded by the Office of Community Oriented Policing Services, U.S. Department of Justice. The opinions contained herein are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. References to specific agencies, companies, products, or services should not be considered an endorsement by the author(s) or the U.S. Department of Justice. Rather, the references are illustrations to supplement discussion of the issues.

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no “model” policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors. This document is not intended to be a national standard.

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