

GENERAL ORDER
FAIRFAX COUNTY POLICE DEPARTMENT



SUBJECT: INDIVIDUALS RECORDING POLICE ACTIVITY	NUMBER: 603.1
CANCELS ORDER DATE: NOT APPLICABLE	ISSUE DATE: 06-01-16

I. PURPOSE

With the development of new technologies, instances of individuals recording police activity have become more prevalent. As such, the Fairfax County Police Department (Department) has developed a specific policy to ensure that the rights of individuals recording police activity are protected and not infringed upon. Officers should assume they are being recorded at all times.

II. POLICY

Recording police activity is protected under the First Amendment. Recording police activity is a form of speech through which individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers in the public discharge of their duties. Individuals recording police activity are protected under the Fourth Amendment against illegal search and seizure of their recording device. In addition, individuals have a right to due process under the Fourteenth Amendment in advance of any deprivation of property, including recording devices, except under very limited circumstances.

It is the policy of the Department to respect and protect all activities protected under the First, Fourth, and Fourteenth Amendments. Therefore, while recognizing and preserving these protected activities, officers shall not prevent, prohibit, or interfere with any individual's ability to observe or record police activity from the public domain, except as provided in this General Order.

III. DEFINITIONS

- A. Probable Cause: Exists where the known facts and circumstances are such that a reasonable person in the same situation would believe evidence of a crime would be found.
- B. Public Domain: Places where an individual has a legal right to be present. This includes streets, sidewalks, public parks, homes, or businesses in which the individual is lawfully present, and common areas of public and private facilities and buildings.
- C. Recording: The actual images, audio, and/or video of events that have been captured on a recording device.
- D. Recording Device: A device that captures images, audio, and/or video of events in real time. This includes smart phones, tablets, computers, video

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cameras, cameras, digital cameras, tape recorders, and other similar items.

- E. Recording Medium: A data storage device where the images, audio, and/or video of events that have been captured by a recording device are stored. The most common form of data storage is a memory chip but may include any storage device where the recordings have been stored or downloaded to, including, but not limited to, a computer, a smart phone, cloud services, and a tablet.

IV. INDIVIDUALS RECORDING POLICE ACTIVITY

- A. Except as otherwise provided in this General Order, officers shall not prevent, prohibit, and/or interfere with any individual's ability to observe or record police activity from the public domain.
 - 1. Individuals have a First Amendment right to record police officers in the public discharge of their duties. The right to record is not limited to streets/sidewalks, but includes areas, such as any public or private facility, where individuals have a legal right to be present.
 - 2. Members of the press and members of the general public have the same rights in any area in the public domain. No individual is required to have or to display "press credentials" in order to exercise his/her right to observe, photograph, or record police activity in an area accessible to, or within view of, the general public. (Refer to General Order 401, Release of Public Information, for further information.)
 - 3. Officers shall not, under any circumstances, delete any recordings from any individual's recording device or recording medium, or damage the recording device.
- B. As long as the recording of police officers engaged in the public discharge of their duties takes place from a location where the individual has a legal right to be present and does not interfere with police activity, jeopardize safety, violate the law, or incite others to violate the law, officers shall not inform or instruct individuals that the recording of police officers or police activity is not allowed, or otherwise obstruct the recording of police activity.

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1. Officers shall not threaten, intimidate, or otherwise discourage any individual from recording police activity.
 2. Officers shall not detain an individual solely because the individual is recording police activity.
 3. Officers shall not intentionally block or obstruct any recording device being used to record police activity. For example, officers shall not place their hand over the recording device to block an individual from recording police activity. This does not preclude officers from protecting a crime scene. For example, officers using partitions to protect a crime scene is not a violation.
- C. Although the mere fact that an individual is recording police activity does not constitute a crime, individuals do not have the right to interfere with police activity, jeopardize safety, violate the law, or incite others to violate the law. Interference consists of actions that obstruct officers from the performance of their duties or pose a safety hazard which the officer must account for. Examples of such actions include, but are not limited to, the following:
- While in close proximity to an officer, intentionally distracting or attempting to distract an officer engaged in the public discharge of their duties, resulting in an officer's concern for their safety, or the safety of others.
 - Intentionally placing themselves between an officer and a subject that is being questioned and/or arrested, for the purpose of hindering the officer in the public discharge of their duties.
 - Inciting bystanders, involved parties, or witnesses to hinder or obstruct an officer in the public discharge of their duties.
 - Persistently engaging the officer in the midst of their duties in a way that hinders or obstructs the officer in the public discharge of their duties.
 - Crossing crime scene tape or jeopardizing the integrity of a crime scene.

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1. If an individual recording police activity is interfering with an officer's public discharge of their duties or jeopardizing the safety of officers, suspects, other individuals, or the integrity of a crime scene, officers should direct the individual to a location where the individual is no longer interfering or a safety hazard. For example, if the individual is in a street and recording police activity, the individual should be directed to a sidewalk or other safe location. Officers shall not, however, order the individual to stop recording the police activity.
2. An individual's expression of criticism of the police (or the police activity being observed), including the use of foul language, without any other action intended to interfere with officers performing their duties, shall not constitute obstruction of justice.
3. Where an officer makes a custodial arrest of an individual and it was known or learned that the person charged was recording an officer, recording the arresting officer, or recording police activity, the arresting officer shall immediately notify their supervisor via the radio. The supervisor shall respond to either the scene or a safe and convenient location to review the circumstances under which the individual was taken into custody.
4. Where an officer releases an individual on a criminal summons and it was known or learned that the person charged was recording an officer, recording the arresting officer, or recording police activity, the arresting officer shall immediately notify their supervisor via the radio. The supervisor shall respond to either the scene or a safe and convenient location to review the circumstances under which the individual was issued the criminal infraction summons. Once the criminal summons has been issued, the individual receiving the criminal summons is free to leave and should not be detained or requested to remain until a supervisor arrives on scene.
5. When an officer issues a traffic summons to an individual and it was known or learned that the person receiving the traffic summons was recording an officer, recording the issuing officer, or recording police activity, the issuing officer shall notify a supervisor. However, supervisors are not required to respond to the scene.

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6. When an officer makes an arrest of an individual who is recording police activity, the officer may, at their discretion, turn off the recording device and secure it incident to arrest. Officers should be mindful that they cannot search a cell phone incident to arrest without a search warrant, consent, or exigent circumstances.
7. Officers shall document on an incident report the facts surrounding the arrest of an individual recording police activity. Supervisors shall document on an incident supplement their review and forward the incident report to their commanders.

V. CIRCUMSTANCES WHEN RECORDING POLICE ACTIVITY ALSO CAPTURES EVIDENCE OF A CRIME

- A. The recording of police officers engaged in the public discharge of their duties does not necessarily mean the recording is or should be considered evidence of a criminal act or considered criminal case information. However, there are instances when an individual who is recording police activity also captures a recording that may document the commission of a crime.
- B. If an officer has probable cause to believe that a recording device or recording medium involving the recording of police activity contains recordings that are evidence of a crime, the following steps shall be taken:
 1. An officer shall request the individual to voluntarily provide the original recording device or original recording medium. If an individual agrees to voluntarily surrender the recording device or recording medium, the officer should take custody of the recording device or recording medium.
 2. An officer can request to have the individual voluntarily provide a copy of the recording. Officers should be mindful of possible computer viruses and shall take all the necessary precautions not to infect County computers or County phones.
 3. Officers shall not, by threat or intimidation, coerce an individual to provide consent to take possession of or provide any recording device, recording medium, or recordings. Voluntary consent must be voluntary, taking into consideration all of the facts and circumstances surrounding the encounter.

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4. If any individual voluntarily provides the recording device, recording medium, and/or recordings stored within the recording device, then the recording device, recording medium, and/or recordings shall be handled in accordance with SOP 04-018, Digital Imaging Procedures, General Order 501.7, Criminal Investigations Involving Personal Computers as evidence, and/or General Order 610.1, Custody of Property.
 5. Officers shall document on an incident report all the facts surrounding an individual's voluntary release of their recording devices and/or recordings. Supervisors shall ensure the recording device, recording medium, and/or recording was voluntarily released.
 6. Supervisors shall forward the incident report to the Commonwealth's Attorney, to the supervisor's commander, and to the Public Affairs Bureau.
- C. The following are the procedures for seizing a recording device without consent.
1. A recording device or recording medium may be seized and a search warrant obtained if an officer believes by articulable facts that:
 - a. Probable cause exists that a recording device or recording medium directly involved in recording police activity also contains evidence (recording) of a crime; and
 - b. There is probable cause to believe that the evidence (recording) is in immediate jeopardy of being tampered with, altered, deleted, or destroyed; and
 - c. The individual refuses to grant consent for the officer to obtain the evidence (recording).
 2. The officer should consult with a supervisor, if feasible, prior to seizing the recording device and/or recording medium that contains the evidence (recording).

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3. Prior to seizing the recording device and/or recording medium without consent, officers should consider the totality of the circumstances, including the severity of the crime captured, and whether seizing the recording device or recording medium is the most prudent way of obtaining the evidence (recording). In any case, only the least amount of force necessary shall be used in seizing the recording device or recording medium. A supervisor shall, without delay, respond and review the circumstances surrounding the seizure.
4. The seizure of a recording device or recording medium is a temporary restraint intended only to preserve evidence (recording) until a search warrant can be obtained.
5. Procedures after seizure of a recording device without consent:
 - a. Officers shall immediately contact the Computer Forensics Section for further guidance on securing the recording device to prevent the potential of remote access. In accordance with General Order 501.7, Criminal Investigations Involving Personal Computers as Evidence, and absent any exigent circumstances, officers shall not view, examine, or in any way manipulate the recording device or recording medium without first contacting the Computer Forensics Section. Contacting the Computer Forensics Section can be coordinated through the Police Liaison Commander.
 - b. Absent exigent circumstances, officers must first obtain a search warrant in accordance with General Order 610.3, Search Warrant Procedures, before viewing any recording on a recording device or recording medium that has been seized as evidence.
 - c. Even if exigent circumstances exist or if a search warrant was issued, officers shall undertake reasonable efforts to ensure only the recording(s) that constitute potential evidence are accessed. Officers will refrain from examining any materials not relevant to their investigation.

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- d. Officers shall not deprive the owner of their recording device or recording medium for longer than reasonably necessary for the officer, acting with diligence, to obtain a search warrant and seize the evidence contained therein.
- e. Officers shall maintain an individual's recording device or recording medium while in the Department's custody in the same condition as when it was seized, with all recordings intact.
- f. Officers shall document on an incident report the facts surrounding the seizure of a recording device or recording medium. Supervisors shall document on an incident supplement their review of the seizure.
- g. Supervisors shall forward the incident report to the Commonwealth's Attorney, to the supervisor's commander, and to the Public Affairs Bureau.

VI. GENERAL ORDER APPLICABILITY

This General Order only applies to circumstances in which an individual is recording police activity. This General Order does not apply when the recording device or recording medium has been used only as a means of committing or recording a criminal offense. If an officer has probable cause to believe that a recording device that has not been used to record police activity contains evidence of a crime, refer to GO 501.7, Criminal Investigations Involving Personal Computers as Evidence, and/or 610.1, Custody of Property, for further information.

VII. LEGAL REFERENCES

Statement of Interest of the United States, Sharp v. Baltimore City Police Dept., et al., No. 1:11-cv-02888 (D. Md. Jan. 10, 2012).

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Illinois v. McArthur, 531 U.S. 326 (2001)

Riley v. California, 134 S. Ct. 2473 (2014)

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VIII. ACCREDITATION STANDARDS REFERENCE

VLEPSC

CALEA

ADM.02.02
ADM.22.01

1.2.3
54.1.3
83.2.5

This General Order becomes effective on June 1, 2016, and rescinds all previous rules and regulations pertaining to the subject.

ISSUED BY:

Chief of Police

APPROVED BY:

County Executive