

MEMORANDUM

To: Gender Equity, Safe Communities and New Americans Committee
From: Amy Tsai, Central Staff
Date: August 17, 2016
Subject: Council Bill (CB) 118761 Observer Bill of Rights – **REVISED MEMO**

CB 118761 relates to a bill of rights for observers of police activities, codifying the right of the public to observe and record police activity and to express themselves lawfully without interference from the police. This memo provides background context, summarizes the terms of the bill, and analyzes potential impacts.

This memo has been updated to reflect language in a proposed substitute bill.

Background

Across the country, recordings of police activity by the public have increased the public's ability to witness police behavior and hold police accountable. However, the act of recording, observing, or verbally criticizing police has also at times led to arrests and legal challenges to those arrests on First Amendment grounds.

As recently as one month ago, as reported in the New York Times, an activist filed a lawsuit in July alleging violation of the First Amendment by the New York Police Department for interfering with people who try to film officer activity. The complainant had been arrested on charges of obstruction, disorderly conduct, and resisting arrest while filming an interaction with the police and another man.¹

The Times article interviewed David Pozen, a professor at Columbia Law School, who noted that by and large, lower courts have concluded that recording the police is protected by the First Amendment. In the past year, several states have passed laws explicitly recognizing the right of members of the public to observe and record police, including California, Oregon, and Colorado.

In 2008, the Seattle Police Department (SPD) created a policy regarding citizen² observation of officers (SPD Policy 5.160). The policy was instituted in response to concerns about some past instances of "obstruction-only" arrests.³ The policy identifies SPD's parameters for permissible public viewing or recording of police activity and specifies when and how officers should seek to

¹ http://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html?_r=0

² While the policy applies to all persons, the policy refers to members of the public as citizens.

³ Office of Professional Accountability Auditor's Report on Obstruction Arrests: January 2006-July 2008, <http://www.seattle.gov/Documents/Departments/OPA/Auditor/AuditorObstruction.pdf>

obtain recordings that have possible evidentiary value. SPD Policy 5.160 is included as Attachment 1 to this staff memo.

The purpose of Substitute CB 118761 is to codify the right of members of the public to observe and record police activity and to express themselves within the bounds permitted by law without fear of retaliation.

Specifically, Substitute CB 118761 would include the following provisions (where provisions are similar to SPD policy, the policy is footnoted):

- **Witnessing police actions**
 - Persons not involved in an incident may observe or record activity and express themselves, including making critical comments, if the person does not “obstruct, hinder, delay, or compromise the outcome of legitimate police actions,” threaten safety, or attempt to incite others to violence.⁴
- **Officer actions against third-party observers**
 - When a person is lawfully observing, recording, or expressing themselves under this subchapter, officers or their agents may not prevent the person from doing so or arrest, detain, use physical force against, punish, or retaliate against the person.⁵
 - When an officer is deploying less-lethal tools, the officer must seek to minimize harm to non-targeted bystanders in accordance with SPD less-lethal tool policies.⁶
- **Preservation of evidence**
 - If an officer believes a person has media of evidentiary value, the officer must first request voluntary surrender of the media, and then if the media is not surrendered, may advise the person that a court order will be sought and that the person should not tamper with, alter, or destroy the media.⁷
- **Civil liability**
 - A person can bring a civil suit against the City that can include punitive damages of up to \$5,000 and reasonable costs and attorney fees.
- SPD is also directed to have a blast ball policy that addresses the safety of persons engaged in activities protected by this subchapter by May 2017, so long as it does not conflict with the terms of the consent decree.

⁴ SPD Policy 5.160. Note that SPD Policy 5.160 refers to persons attempting to “incite others to violate the law.” CB 118761 refers to inciting others to violence, which is language from First Amendment caselaw.

⁵ SPD Policy 8.200(2) prohibits officer use of physical force to punish or retaliate, or use of physical force against individuals who only verbally confront them unless the vocalization impedes a legitimate law enforcement function.

⁶ SPD Policy 8.300(6) requires officers to consider risks to the subject and third parties when determining whether to deploy any less-lethal tools. For example, according to 8.300-POL-6(8), officers deploying oleoresin capsicum spray are required to direct the spray at the specific subject(s) posing a threat and to attempt to minimize exposure to non-targeted parties.

⁷ SPD Policy 5.160.

The substitute Council Bill differs from the original bill in the following respects:

- Reorders sections;
- Clarifies that a person's conduct as well as presence must be lawful;
- Narrows officer prohibited conduct from interference to prevention to make the prohibited behavior more clear;
- Changes less-lethal tools provisions to a more general provision on proper use of less-lethal tools in the presence of bystanders;
- Requires a blast ball policy to take into account public observers;
- Eliminates the SPD claims process and clarifies the scope of civil action;
- Makes the effective date of terms contingent upon compliance with the federal consent decree.

Analysis

There are two main differences between Substitute CB 118761 and SPD policy: the delineation of officer-prohibited conduct and creation of a cause of action against the City.

Officer-Prohibited Conduct

One main difference is that SPD Policy 5.160 directs officers to "recognize and obey" the right of persons to observe, photograph, and/or make verbal comments in the presence of police activity, whereas CB 118761 identifies prohibited officer conduct, including things such as use of physical force against someone lawfully observing or recording police activity (see footnotes 4 to 7 above for relevant SPD policies). As a policy matter, specifying prohibited officer conduct helps to protect the public from retaliatory police behavior. As a legal matter, it helps to clarify the types of officer actions that may give rise to the cause of action created by CB 118761. In practice, the tension in interpretation of the Seattle Municipal Code will be between what behavior by the public constitutes interference with legitimate police duties, and what behavior by the police constitutes interference with the public's right to legitimately observe, record, or criticize police.

Cause of Action Against City

The creation of a new cause of action against the City would have financial implications arising from the cost of paying for successful claims or the cost of litigation. It is unknown how often such claims might be filed and won by claimants. If the code provisions successfully deter inappropriate officer behavior, then claim costs would be low. The City requires that a claim for damages must be made to the City prior to commencing a lawsuit for damages against the City;⁸ this can also help lower costs by providing a cheaper alternative to court for both sides.

⁸ SMC 5.24.005 and RCW 4.96.020; see also, <http://www.seattle.gov/filing-a-damage-claim> for the standard tort claim form.

It is in the financial interests of the City not to create new causes of action against itself lightly. Creating a cause of action is, however, one means of discouraging City misconduct and thereby strengthening protections for the public. Colorado is one state that has created a civil cause of action against law enforcement agencies for destruction or unlawful seizure of recordings by a law enforcement officer (C.R.S. 13-21-128 (2016)); some of the remedies in CB 118761 are modeled after language in the Colorado law.

Codifying SPD Policies

If adopted, codification of an SPD policy has several benefits:

- It ensures more permanent protection of public observer rights, as the municipal code is less easy to change than a departmental policy;
- Its greater permanency makes it easier for the public to rely on it, as opposed to a policy where the public in any given year might not know whether the policy has been updated;
- It carries greater weight than a departmental policy, particularly when coupled with penalty provisions, which can increase the likelihood that all parties will want to adhere to the terms;
- Members of the public are more likely to expect their rights to be found in City code than in a departmental policy, so they would be more likely to be aware of their rights and to avail themselves of its protections.

Greater permanency can be a downside when improvements are desired, because a departmental policy is easier to change than City code. However, since the subject of the proposal pertains to constitutional rights of free speech, the likelihood of wanting or needing to change the protections would be less, and could be accomplished via future ordinances.

One might also argue that codification of SPD policy sets a precedent for future codification of other policies which could lead to a patchwork of partly codified policies and the erosion of management control over operations. This proposed policy codification, however, can be distinguished from other SPD policies on several grounds:

- 1) It addresses a nationwide issue of constitutional significance;
- 2) It codifies policy provisions that directly speak to the rights of the public, not just departmental procedures; and
- 3) As a practical matter, codification is necessary in order to create the proposed cause of action.

One of the driving forces behind the proposed legislation is the nationwide concern with the recording of police officer behavior. As SPD Policy 5.160 notes, "With the prevalence of digital cameras, cell phone cameras etc. in existence, it is common for police incidents to be photographed by citizens as well as the media." States such as Oregon have taken steps to

make it clear that such recordings do not violate other existing laws, such as state eavesdropping laws (Oregon Chapter 553, (2015 Laws)). Thus, laws on public recordings of police officers have been used to clarify the legality of such actions, which is something that cannot be done via departmental policy alone.

Legal

The proposed legislation may have labor implications that would require conversations with the collective bargaining representatives for police officers prior to affected provisions becoming effective. If the ordinance requires changes in SPD policies, the policies will be submitted to the Department of Justice and federal court for review under the *United States v. City of Seattle* Consent Decree; Substitute Ordinance 118761 also allows for a deferred effective date for any provisions that require Court approval. Further legal clean-up of provisions may occur prior to Council action.

Attachment

1. SPD Policy 5.160

cc: Kirstan Arestad, Central Staff Executive Director
Ketil Freeman, Supervising Analyst

Seattle Police Department Manual

Kathleen O'Toole, Chief of Police

5.160 - CITIZEN OBSERVATION OF OFFICERS

Effective Date: 6/6/2008

POLICY

It is the policy of the Seattle Police Department that people not involved in an incident may be allowed to remain in proximity of any stop, detention or arrest, or any other incident occurring in public so long as their presence is lawful and their activities, including verbal comments, do not obstruct, hinder, delay, or threaten the safety or compromise the outcome of legitimate police actions and/or rescue efforts. Officers should assume that a member of the general public is observing, and possibly recording, their activities at all times.

I. Witnessing Stops, Detentions, Arrests and other Police Actions

A. With the prevalence of digital cameras, cell phone cameras, etc. in existence, it is common for police incidents to be photographed by citizens as well as the media. Officer safety, the protection of the suspect or person being detained, including his/her right to privacy, and the safety of onlookers are the most important factors. With these factors in mind, officers shall recognize and obey the right of persons to observe, photograph, and/or make verbal comments in the presence of police officers performing their duties.

B. Citizens, regardless of their intent to video and/or audio record an activity, may not enter any established marked and protected crime scene or a restricted area that would normally be unavailable to the general public. Officers and follow-up investigators will determine who enters or leaves a secure scene.

C. In public areas, there is no distinction between citizens employed by news media organizations and those who are not. The existence of "press credentials" extends no special privileges to any citizen, nor does the absence of such credentials limit a citizen's free access to record law enforcement activities while in public, under most circumstances.

II. Bystander Filming of Officer-Suspect Contacts

A. It is increasingly common for bystanders, who are not involved in any criminal activity, to record contacts between officers and citizens. Bystanders have the right to record police officer enforcement activities, except when:

- 1 The safety of the officer or the suspect is jeopardized.
2. Persons interfere or violate the law.
3. Persons threaten others by words or action, or they attempt to incite others to violate the law.

B. Although a contact with citizens to obtain evidence is encouraged, officers will not detain citizens or seize their recorded media when that media contains video, still images or sounds associated with a crime.

C. When recorded media is being sought from an uninvolved citizen, the first course of action should be a request for voluntary surrender of the media. This request and the citizen's response should be documented. If the citizen surrenders the media they should be given a case number and the requesting officer's name.

D. If officers do not have sufficient authority to seize the media but think it may be of value to an investigation, then officers should advise citizens that a court order will be sought for the media and that it should not be tampered with, altered or destroyed, since it may be evidence of a crime.

Site Disclaimer: The Seattle Police Department's website was developed to provide general information. Data contained at this location is generally not reviewed for legal sufficiency. SPD documents displayed are for reference purposes only. Their completeness or currency are not guaranteed. Links or references to other information or organizations are for reference only and do not constitute an endorsement.

ADA Notice

Notice of Nondiscrimination

Privacy

© Copyright 1995-2016 City of Seattle