

MEMORANDUM

To: Gender Equity, Safe Communities and New Americans Committee
From: Amy Tsai, Central Staff
Date: February 22, 2017
Subject: Council Bill (CB) 118761 Observer Bill of Rights – Second Substitute

CB 118761 is 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. A briefing on a prior substitute version was held in the Gender Equity, Safe Communities and New Americans Committee (GESCNA) on August 17, 2016. This memo discusses a new proposed substitute bill (“Substitute CB 118761”) that streamlines content and modifies the causes of action (Attachment 1).

Background

The Seattle Police Department (SPD) policy on public observers of police officer interactions was created in 2008 (SPD Policy 5.160, Attachment 2). It provides that persons not involved in an incident may remain nearby so long as their presence is lawful and does not obstruct, hinder, delay, threaten the safety of, or compromise the outcome of legitimate police actions and/or rescue efforts. The policy was developed partially in response to recommendations from the Office of Professional Accountability (OPA) Auditor and OPA Director.¹

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 at times led to arrests, which in turn has generated First Amendment legal challenges to those arrests.

The Washington State Supreme Court recognized the First Amendment right of the public to observe and criticize law enforcement in the case of State v. E.J.J., 183 Wash.2d 497 (2015). In 2011, Seattle officers responded to a call about a fight between E.J.J.’s sister and mother. There was a heated verbal exchange between the officers and E.J.J. and he refused to leave the open doorway of his house and close the door. E.J.J., a 17-year old black man, was arrested for obstructing a law enforcement officer.

¹ In 2008, the OPA Auditor at the request of then Mayor Nickel reviewed police incidents from 2006 to 2008 where people were arrested and charged with “obstruction only,” i.e., hindering the police without any other charge resulting. One third of the 76 cases, or 24, involved arrests of bystanders for obstruction. While the Auditor did not find a pattern of abuse of discretion, the Auditor noted the existence of racial disparity in arrest patterns (over half were African-American) and also concluded that de-escalation training was important and not regularly occurring. Office of Professional Accountability Auditor’s Report on Obstruction Arrests: January 2006-July 2008, <http://www.seattle.gov/Documents/Departments/OPA/Auditor/AuditorObstruction.pdf>

The Washington State Supreme Court reversed E.J.J.'s juvenile conviction, concluding, "Where individuals exercise their constitutional rights to criticize how the police are handling a situation, they cannot be concerned about risking a criminal conviction for obstruction." Or as the Court cited from City of Houston v. Hill, 482 U.S. 451, 462-63, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."

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.

Substitute CB 118761

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.

Substitute CB 118761 includes the following provisions:

- **Public observation, recording, or expression in the vicinity of police actions**
 - A person not involved in a stop, detention, or arrest 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.² Slight inconveniences to officers such as minor delays do not count for purposes of this section.
- **Officer actions against public observers**
 - Officers may not use physical force to punish or retaliate against a person exercising their observer rights.³
 - When an officer is deploying less-lethal tools, the officer must seek to minimize harm to non-targeted bystanders.⁴
- **Public observer remedies**
 - If a person chooses to bring a tort claim under SMC Chapter 5.24, the Department of Finance and Administrative Services will conduct the investigation as it does for all tort claims, but the Chief of Police will issue a recommendation and a report made available to the claimant. Damages for a

² 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.

³ 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.

⁴ 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.

successful claim are set at the value of any damaged equipment plus \$500 for the value of any damaged or destroyed recording.

- The Chief's decision is appealable to the Hearing Examiner, who may also award up to \$5,000 if it is determined that the Chief's recommendation was made in bad faith.

The substitute bill differs from the original bill in the following main respects:

- Focuses on public observers at stops, detentions or arrests, by removing reference to other incidents occurring in public;
- Adds that if a public observer causes a slight inconvenience to an officer, that behavior does not rise to the level of obstruction, hindrance, or delay;
- Removes provision regarding obtaining recordings from the public;
- Changes less-lethal tools provisions to a general provision on proper use of less-lethal tools in the presence of bystanders;
- Changes the claim process to be consistent with SMC Chapter 5.24 tort claim requirements; and
- Upon denial of a claim, changes the right of civil action to a right of appeal to the Hearing Examiner.

Analysis

Comparison with SPD Policy

Substitute CB 118761 closely follows existing SPD policy in regards to protected and prohibited behaviors. Specifically:

- Protection of public observer rights follows SPD Policy 5.160;
- Prohibition against officer use of physical force for punishment or retaliation follows SPD Policy 8.200(2); and
- Minimizing harm to non-targeted persons in officer use of less-lethal tools follows SPD Policy 8.300(6).

One area of difference is that public observer protections in SPD policy apply to any stop, detention, arrest, or other incident occurring in public. The substitute bill does not cover "other incidents occurring in public." The effect of that change is to provide a defined universe of situations to which the claim rights of the substitute bill apply. Public observer protections for other incidents occurring in public would still exist under SPD policy.

The substitute bill clarifies that although a public observer must not obstruct, hinder, delay, or compromise police actions, this does not include slight inconveniences to officers. This distinction does not exist within the SPD policy, but was identified by the Washington State Supreme Court in State v. E.J.J. When an officer was eventually required to escort E.J.J. back to his home, thus delaying officers, the fact that his behavior may have caused a minor delay was of no import. Citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501-02, the Court

quoted that states cannot abridge Constitutional freedoms “to obviate slight inconveniences or annoyances,” and that in the First Amendment context, “we must be vigilant to distinguish between obstruction and inconvenience.”

Claim Against City

The substitute bill makes modifications to the original proposal that synchronize the claim provisions with the tort claim requirements of SMC Chapter 5.24. The public has a right to bring a separate complaint in a court of competent jurisdiction for state and federal constitutional violations and that right is not affected by this legislation.

Because the tort claim process already exists, the primary financial impact is that damages for damaged or destroyed recordings is set at \$500. The substitute bill also allows for a potential award of \$5,000 on appeal for a bad faith decision, but it is anticipated that bad faith awards would be rare; the main effect of the bad faith provision would be to incentivize good decisions.

Under the City’s tort claim process, discretionary reports gathered by FAS during the investigation process are privileged and protected from disclosure (SMC 5.24.005.B.). The substitute bill adds a level of transparency by requiring that the Chief of Police issue a separate report that is copied to the claimant, responding to the allegations in the claim and explaining the Chief’s decision. The ability to appeal the Chief’s decision is also a remedy that is not available under the standard tort claim process.

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)); the \$500 award for damaged recordings and creation of a bad faith provision are modeled after language in the Colorado law.

Codifying SPD Policies

If Substitute CB 118761 is adopted, codification of SPD policy has several benefits:

- It creates a more permanent statement 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, which can increase the likelihood that all parties will adhere to the terms;
- Members of the public would be more likely to be aware of their rights and to avail themselves of its protections; and
- The claim process adds a right of appeal.

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 claimant processes.

The case of State v. E.J.J. illustrates the tension 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. Substitute CB 118761 clarifies that when police need to make that call in a public observer situation, the "minor delay" type of behavior in State v. E.J.J. does not qualify as an obstruction that would supercede the public's fundamental, constitutional right to freedom of speech.

Legal

The proposed legislation may have labor implications that would require notification of, and possibly negotiations with, the collective bargaining representatives for police officers prior to affected provisions becoming effective. The fact that the protections and prohibitions closely follow existing SPD policy should facilitate implementation even under that circumstance.

Attachments

1. Substitute CB 118761
2. SPD Policy 5.160

cc: Kirstan Arestad, Central Staff Director
Ketil Freeman, Supervising Analysts

Amy Tsai
LEG Observer Bill of Rights ORD
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CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL 118761

..title

AN ORDINANCE relating to a public safety bill of rights for the Seattle public; renumbering Subchapter VI as Subchapter V and creating a new Subchapter VI in Chapter 3.28 of the Seattle Municipal Code.

..body

WHEREAS, the Seattle Police Department (SPD)'s policy since 2008, which recognizes the right of members of the public to observe and record police performing their duties in a public place, can be enhanced, strengthened, and made permanent through codification in the Seattle Municipal Code; and

WHEREAS, the rights of public observers, which courts have recognized as flowing from the First Amendment and various state constitutional rights that favor government transparency and protect the public's right to hold government officials accountable, transcend police policy; and

WHEREAS, the U.S. Supreme Court in *Houston v. Hill*, 482 U.S. 451, 461 (1987) recognized that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers"; and

WHEREAS, the need for stronger protections for public observers was evident in the 2011 arrest of a person in Seattle for exercising their right to observe the police in *State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815 (2015) and in past incidents identified by SPD's Office of Professional Accountability Auditor of obstruction charges against observers and those filing complaints with SPD's Office of Professional Accountability; and

1 WHEREAS, at times officer in-car video or body cams have not been turned on, have
2 malfunctioned, or provided an incomplete record of what happened, making videos
3 collected by the public of great value; and

4 WHEREAS, the need for and value of ~~public~~-video and audio recordings by the public is are
5 keenly evident from the ~~recent~~-recordings in 2016 of the deaths of Philando Castile in
6 Minnesota, Alton Sterling in Baton Rouge, Louisiana, and law enforcement officers in
7 Dallas and Baton Rouge;

8 WHEREAS, other states such as California, Colorado, and Oregon have passed legislation
9 protecting the right of members of the public to observe and record police activity; NOW,
10 THEREFORE,

11 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

12 Section 1. Subchapter VI of Chapter 3.28 of the Seattle Municipal Code is renumbered
13 Subchapter V as follows:

14 **Subchapter ((VI)) V Reserve Police Officers**

15 Section 2. A new Subchapter VI is added to Chapter 3.28 of the Seattle Municipal Code
16 as follows:

17 **Subchapter VI Public Observers' Bill of Rights**

18 **3.28.600 Purpose**

19 This Subchapter VI codifies the right of members of the public to hold police accountable
20 through observation and express themselves without fear of retaliation, within the bounds
21 permitted by law. Officers should assume that a member of the general public is observing, and
22 possibly recording, their activities at all times, and respect the public's constitutional rights ~~to do~~
23 so in that regard.

1 **~~3.28.610 Witnessing stops, detentions, arrests, and other police actions~~ Public observation,**
2 **recording, or expression in the vicinity of police actions**

3 A person not involved in an incident may remain in the vicinity of any stop, detention, or arrest,
4 ~~or any other police activity~~ occurring in a public place, and observe or record activity; and
5 express ~~oneself~~themselves, including making comments critical of an officer's actions, so long as
6 the person's conduct and presence ~~is~~are otherwise lawful. ~~, and~~ ~~†~~ The person's conduct and
7 presence doesmust not obstruct, hinder, delay, or compromise the outcome of legitimate police
8 actions or rescue efforts, threaten the safety of the officers or members of the public, or attempt
9 to incite others to violence; this does not include conduct that creates a slight inconvenience for
10 an officer, such as minor delay caused by escorting the person to a nearby location. An example
11 of obstruction includes, but is not limited to, a member of the public entering any established
12 marked and protected crime scene or a restricted area that is unavailable to the general public
13 unless permitted to do so by an officer or investigator who is authorized to determine who may
14 enter the secure scene.

15 **~~3.28.620 Public observer preservation of evidence~~**

16 ~~——— A. Officers should contact a member of the public at the scene to obtain recorded~~
17 ~~evidence when the officer believes the person has media of evidentiary value using the process~~
18 ~~identified in subsection 3.28.620.B. The officer shall not otherwise seize the recorded media or~~
19 ~~compel or coerce the person into giving the officer the recording or recording device.~~

20 ~~B. When recorded media is sought from a member of the public, the officer shall first request~~
21 ~~voluntary surrender of the media and document the request and the person's response.~~

22 ~~1. If the person surrenders the media, the officer shall give the person a case number and the~~
23 ~~requesting officer's name.~~

1 ~~2. If the person does not voluntarily surrender the media and the officer believes that it may be of~~
2 ~~value to an investigation, the officer shall advise the person that a court order may be sought for~~
3 ~~the media and that it may not be tampered with, altered, or destroyed because it may be evidence~~
4 ~~of a crime.~~

5 **3.28.6303.28.620 Officer ~~enforcement~~ actions against ~~third-party~~public observers**

6 A. No employee of the Seattle Police Department nor an agent thereof shall prevent a
7 person from ~~interfere with, detain, arrest, use physical force against, punish, or retaliate against a~~
8 ~~person on the basis of the person engaging in an activity~~ action ~~or activities described in actions~~
9 protected by Section 3.28.610 ~~if the person is doing so in compliance with the requirements of~~
10 ~~Section 3.28.610.~~

11 B. No employee of the Seattle Police Department nor an agent thereof shall use physical
12 force for the purpose of punishing or retaliating against a person engaging in an action or actions
13 protected by Section 3.28.610.

14 C. When an officer is using less-lethal tools in the presence of persons observing or
15 recording police activity, the officer shall seek to minimize harm to non-targeted persons. ~~If a~~
16 ~~person is engaging in an activity or activities described in Section 3.28.610 and is not doing so in~~
17 ~~compliance with the requirements of Section 3.28.610, the officer shall consider risks to the~~
18 ~~person when determining whether to deploy any less-lethal tools.~~

19 1. ~~If the person is elderly, apparently pre-adolescent, visibly pregnant, or visibly frail, the~~
20 ~~officer may only use less-lethal force when there is an exigency or an immediate threat to~~
21 ~~officers or other persons.~~

22 2. ~~When using oleoresin capsicum spray, an officer shall direct the spray at the specific~~
23 ~~subject who is posing a threat and shall attempt to minimize exposure to non-targeted parties.~~

1 ~~3. Beanbag rounds may only be used on an individual engaged in active aggression or to~~
2 ~~prevent imminent physical harm to the officer or another person.~~

3 ~~3.28.6403.28.630 Civil liability for destruction or unlawful seizure of recordings by a law~~
4 ~~enforcement officer~~ Public observer remedies

5 A. When a person has a reasonable, good-faith belief that the person has been aggrieved
6 by a violation of ~~the provisions of this Subchapter VI~~ this chapter, SMC Chapter 3.28, by an
7 ~~employee of the Seattle Police Department or agent thereof,~~ the aggrieved person may submit a
8 claim for damages under SMC Chapter 5.24, in which case the following terms shall apply:

9 1. The Department of Finance and Administrative Services (FAS) shall promptly notify
10 the Chief of Police (Chief) that a claim has been filed alleging a violation of this chapter, SMC
11 Chapter 3.28, and shall conduct an investigation and evaluation into the merits of the claim and
12 the extent of any damages.

13 2. FAS shall give the results of its investigation and evaluation to the Chief.

14 3. After reviewing the results of the investigation and evaluation by FAS and, to the
15 extent necessary, after conducting any additional investigation, the Chief shall issue a report
16 responding to the allegations and making a recommendation as to whether the claim should be
17 approved or denied. If recommending approval of the claim, the Chief shall award the claimant
18 compensation for any damaged equipment and the amount of \$500 for any damaged or destroyed
19 recording, and shall request that FAS authorize payment. If recommending denial of the claim,
20 the Chief shall explain the reasons for the denial. The report containing the Chief's
21 recommendation and the explanation therefor shall be provided to FAS, with a copy to the
22 complainant, may submit an affidavit to the Chief of Police setting forth the facts of the incident,
23 the damage done to the owner's property, and an estimate of the replacement cost for any

1 ~~damaged or destroyed device verified by an independent credible source. If a recording was~~
2 ~~damaged or destroyed, the owner may also claim \$500 as the value of the recording itself.~~

3 ~~Upon receipt of the affidavit by the Chief, the Chief shall approve in full, approve in part,~~
4 ~~or deny the request in writing within 30 days.~~

5 ~~B. If the request is approved, the Chief shall direct payment to the claimant.~~

6 ~~C. If the request is denied and the claimant disagrees with the denial, the claimant may~~
7 ~~bring a civil action in a court of competent jurisdiction against the City for actual damages,~~
8 ~~including the replacement value of the device, the amount of \$500 for any damaged or destroyed~~
9 ~~recording, punitive damages of up to \$5,000, and reasonable costs and fees associated with the~~
10 ~~filing of the civil action. The burden shall be on the plaintiff to establish a prima facie case of the~~
11 ~~extent of the damages by a preponderance of the evidence. If the finder of fact further finds that~~
12 ~~the denial of the request by the Chief was made in bad faith, the finder of fact may order~~
13 ~~additional punitive damages of up to \$5,000. If the finder of fact finds that an action brought by a~~
14 ~~person is frivolous and without merit, the court may award the City its reasonable costs and~~
15 ~~attorneys' fees.~~

16 ~~B. If the claimant disagrees with the disposition, the claimant may file an appeal with~~
17 ~~the Hearing Examiner within 30 days. The burden shall be on the plaintiff to establish a prima~~
18 ~~facie case of the extent of the damages by a preponderance of the evidence. If the Hearing~~
19 ~~Examiner finds that the recommendation by the Chief was made in bad faith, the Hearing~~
20 ~~Examiner may also order statutory damages of up to \$5,000.~~

21 ~~Section 3. The Seattle Police Department shall create and implement a policy on blast~~
22 ~~ball usage prior to May 2017.~~

1 ~~Section 4.~~ The provisions of this ordinance are declared to be separate and severable.
2 The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this
3 ordinance, or the invalidity of its application to any person or circumstance, does not affect the
4 validity of the remainder of this ordinance, or the validity of its application to other persons or
5 circumstances.

6

1 Section 54. This ordinance shall take effect and be in force 30 days after its approval by
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the ____ day of _____, ~~2016~~2017,
5 and signed by me in open session in authentication of its passage this ____ day of
6 _____, ~~2016~~2017.

7 _____
8
9 President _____ of the City Council

10
11 Approved by me this ____ day of _____, ~~2016~~2017.

12
13 _____
14 Edward B. Murray, Mayor

15
16 Filed by me this ____ day of _____, ~~2016~~2017.

17
18 _____
19 Monica Martinez Simmons, City Clerk

20
21 (Seal)

ATTACHMENT 2: SPD Policy 5.160

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.

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