

MEMORANDUM

To: Gender Equity, Safe Communities and New Americans Committee
From: Amy Tsai, Central Staff
Date: May 10, 2017
Subject: Council Bill (CB) 118761 Observer Bill of Rights – 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 (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.

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

¹ In 2008, the OPA Auditor at the request of then Mayor Nickels 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>

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 couple years, 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 hinder, delay, or compromise 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
- **Tort claim notice**
 - If a person chooses to bring a tort claim under SMC Chapter 5.24, the Department of Finance and Administrative Services must notify the Chief of Police and Director of the Office of Professional Accountability within 14 days of receipt of the claim.

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.

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;
- Removes the claim process and requires the Department of Finance and Administrative Services (FAS) to notify the Chief of Police and Office of Professional Accountability (OPA) Director when a tort claim is filed related to the provisions of this bill.

Analysis

Comparison with SPD Policy

Substitute CB 118761 is modeled after existing SPD policy in regards to protected and prohibited behaviors. Specifically:

- Protection of public observer rights generally follows SPD Policy 5.160;
- Prohibition against officer use of physical force for punishment or retaliation generally follows SPD Policy 8.200(2); and
- Minimizing harm to non-targeted persons in officer use of less-lethal tools generally 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,” so the bill would apply specifically to stops, detentions, or arrests. 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 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.”

Tort Claim Notice

The public generally has the right to bring tort claims under the process laid out in SMC Chapter 5.24. Those claims are investigated and evaluated by FAS. The public also has a right to file a

separate complaint in a court of competent jurisdiction for state and federal constitutional violations and that right is not affected by this legislation. When a tort claim is pursued, CB 118761 requires FAS to notify the Chief of Police and OPA Director of the claim. Presently, according to FAS, when FAS receives a claim pertaining to allegations of police misconduct, a copy is sent to SPD legal counsel.

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
- Tort claim notification to SPD ensures that potential issues of police misconduct in regards to public observers will come to the attention of those responsible for overseeing police misconduct claims.

One might 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. A counterargument is that this proposed policy codification can be distinguished from other SPD policies on several grounds:

- 1) It addresses a nationwide issue of constitutional significance; and
- 2) It codifies policy provisions that directly speak to the rights of the public, not just departmental procedures.

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 supersede 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
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