

**MEMORANDUM**

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

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**CB 118761** relates to a bill of rights for public 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.

**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.<sup>1</sup>

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 citizen<sup>2</sup> observation of officers (SPD Policy 5.160). The policy was instituted in response to concerns about some past instances of "obstruction-only" arrests.<sup>3</sup> The policy identifies SPD's parameters for permissible public viewing or recording of police activity and specifies when and how officers should seek to obtain recordings that have possible evidentiary value. SPD Policy 5.160 is included as Attachment 1 to this staff memo.

The purpose of 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

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<sup>1</sup> [http://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html?\\_r=0](http://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html?_r=0)

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

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

retaliation. CB 118761 codifies SPD Policy 5.160 Citizen Observation of Officers as a new subchapter in the Seattle Municipal Code.<sup>4</sup> It imports some language from other SPD policies related to use of less-lethal force.<sup>5</sup> It also allows members of the public to make a claim for damages to the Chief of Police, and provides a civil suit remedy against the City in court if the claim is not successfully resolved with the Chief of Police. CB 118761 also directs SPD to create and implement a blast ball usage policy before May 2017.

Specifically, CB 118761 includes the following provisions:

- **Witnessing police actions**
  - Persons not involved in an incident may observe or record activity and express themselves, including making critical comments
  - The person’s presence must not “obstruct, hinder, delay, or compromise the outcome of legitimate police actions,” threaten safety, or attempt to incite others to violence.
- **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, advise the person that a court order may be sought and that the person should not tamper with, alter, or destroy the media.
- **Officer enforcement against third-party observers**
  - When a person is lawfully observing, recording, or expressing themselves under this subchapter, officers or their agents may not stop the person from doing so or arrest, detain, use physical force against, punish, or retaliate against the person.
  - If a person is not doing so lawfully, then the officer must consider risks to the person when determining whether to deploy any less-lethal tools against the person
    - only using less-lethal tools against elderly, frail, young or pregnant persons when there is an immediate threat,
    - minimizing exposure of pepper spray to non-targeted parties, and
    - only using beanbag rounds to prevent imminent physical harm or against an individual engaged in active aggression.
- **Civil liability**
  - An aggrieved person can submit a claim with the Chief of Police for the cost of the damaged or destroyed device plus \$500 as the value of the recording.
  - 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. If the Chief previously denied a claim in bad faith, the fact finder can award an additional \$5,000 in punitive damages against the City.

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<sup>4</sup> Chapter 3.28 of the Seattle Municipal Code, is the Police Department chapter. It contains eight subchapters on the subjects of police department regulations, special police, police officers’ bill of rights for investigations, community service officer program, reserve police officers, the Office of Professional Accountability (OPA), OPA Auditor, and OPA Review Board.

<sup>5</sup> SPD Policy 8.200(2) – prohibiting officer use of physical force to punish or retaliate or against individuals who are verbally confronting them without impeding legitimate law enforcement functions and SPD Policy 8.300(6) – requiring officers to consider risks to the subject and third parties when determining whether to deploy any less-lethal tools, including SPD 8.300-POL-1 Use of Force – Beanbag Shotgun and SPD 8.300-POL-6 Use of Force – Oleoresin Capsicum (OC) Spray.

- SPD is also directed to create and implement a policy on blast balls prior to May 2017.

### **Analysis**

There are two main differences between 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 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 retaliation or use of force. 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 departmental claims process should also help lower costs by providing a cheaper alternative to court for both sides.

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 civil liability against law enforcement agencies for destruction or unlawful seizure of recordings by a law enforcement officer (C.R.S. 13-21-128 (2016)); the remedies in CB 118761 are modeled after some of the language in the Colorado law, although the Colorado law does not contain a punitive damages provision in the absence of bad faith by the law enforcement agency.

#### *Codifying SPD Policies*

If adopted, the proposed legislation likely would be the first time the City has codified an entire SPD policy. Codification 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 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 a 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. Further clean-up of provisions may also occur prior to Council action.

#### Attachments

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.

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