

 <b>Cambridge Police Department</b>	<b>POLICY &amp; PROCEDURES</b>		<b>No. 427</b>	
	<b>Subject/Title:</b> <b>Public Audio/Video Recordings of Police Actions</b>			
	<b>Issuing Authority:</b>  <hr/> <b>Robert C. Haas Police Commissioner</b>		<b>Review Date:</b> <b>February 12, 2014</b> <b>Issue Date:</b> <b>March 17, 2014</b> <b>Effective Date:</b> <b>June 6, 2014</b> <b>Rescinds:</b>	
	<b>References/ Attachments:</b>		<b>Accreditation Standards:</b>	

## I. PURPOSE:

As a foundational issue, it is essential that police departments gain the trust and spirit of cooperation of the public that they serve by ensuring that their normal police operations are completely transparent. In that spirit of providing transparency through effective and constitutional policing practices, it is imperative that police departments provide the appropriate level of direction and guidance through policy development on all important and sometimes emerging topics and conduct follow up training to ensure that all department personnel fully comprehend complex changes in the state of the law. The open audio and video recording of police officers is one such emerging and, oftentimes, complicated area. The recording of individuals in public, including police officers, has become the societal norm in recent times. Frequently, these recordings are even posted to the Internet on various public websites such as YouTube, FaceBook and Twitter.

The purpose of this policy is to provide all department personnel with clear guidance, direction and understanding of their specific duties, rights and responsibilities under the current state of the law with regards to the appropriate enforcement (or non-enforcement) of M.G.L. c.272, § 99 (Interception of Wire and Oral Communications).

## II. POLICY:

In order to adhere to recent court rulings addressing civilians publicly and openly video and/or audio recording police officers during the performance of their duties, members of the department will adhere to the following policy guidelines relative to this issue:

- As an initial matter, individuals have the **right** under the First Amendment to **openly record** police activity in public in a *peaceful* manner, and an officer is strictly prohibited under the Fourth Amendment to search for, seize (absent a warrant or consent), or delete such a recording. However, as discussed further in this policy, there are limited circumstances in which an officer may properly seize the recording

device and then seek consent and/or apply for a search warrant to obtain the actual recording.

- The right to openly audio/video record public officials is not limited to streets and sidewalks, but also includes areas where individuals have a lawful right to be present, including an individual's home or business, and common areas of public and private facilities and buildings.
- Officers shall not under any circumstances threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement of activities or operations, or intentionally block or obstruct cameras or recording devices, unless a specific privacy interest is at issue.
- Officers are strictly prohibited from destroying recording devices or cameras or deleting photographs or recordings under any circumstances.
- When an individual's conduct is approaching a specific criminal offense (e.g., Resisting Arrest, Witness Intimidation, or the common law crime of Interfering with a Police Officer), the officer should recommend a less-intrusive location to the bystander from where they may continue to peacefully observe or openly record the police activity so as not to interfere with the police.<sup>1</sup>
  - Officers should be familiar with and consult the materials provided during the 2013 and 2014 in-service trainings, regarding the common law crime of Interfering with a Police Officer. The elements of this crime are: (1) The suspect intimidated, hindered or interrupted; (2) a police officer; (3) in the lawful performance of his or her duty. By definition, this crime constitutes a breach of the peace in the presence of an officer. Therefore, police officers, in limited circumstances, may make a warrantless arrest when such conduct occurs. Arrests for this offense should be made sparingly and only after clear guidance and/or a warning has been provided to the individual and subsequently ignored.<sup>2</sup> Officers should never arrest an individual for "interfering" simply because he or she is verbally critical and/or audio/video recording an officer.
    - Unlike disorderly conduct, which requires "a risk of public inconvenience, annoyance or alarm," interfering with a police officer has no "public" requirement. Therefore, this offense may occur in a private home.
  - Individuals who are recording in public are prohibited from crossing an established clearly marked police line (delineated by yellow crime scene tape) at a crime scene and shall be directed to remain outside both the inner and outer marked perimeters where only authorized personnel are permitted.

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<sup>1</sup> "To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions." *Glik v. Cunniffe*, 665 F.3d 78, 84 (2011).

<sup>2</sup> The 2013 in-service manual provides examples of proper verbal direction: "Sir, you're too close. Go over to the sidewalk." Or, "excuse me, you cannot interfere with my interview. You must be no closer than the red car over there." Additionally, officers should provide a clear warning to the individual that he or she is "subject to arrest" for interfering with a police officer if they continue with the specified illegal conduct.

- To avoid any confusion or misunderstanding, officers shall, when feasible, seek guidance from a supervisor by calling a patrol supervisor to any scene to assist when questions and/or concerns arise while being recorded in public.
- It is important to note that the seizure of a recording device (i.e., cell phone) that may contain evidence of a crime is significantly different from the seizure of other evidence in that such seizure implicates the First, as well as the Fourth Amendment to the U.S. Constitution.
  - In some cases, officers may need to confiscate a recording device as evidence, however, this should be done sparingly and only after direct consultation with a supervisor.
    - As a general rule, seizing a recording device that contains evidentiary footage of a crime may be done without a warrant based on probable cause and exigent circumstances. Given the ease with which most modern day recording devices can be transported and any recordings contained within the device deleted, the exigency requirement will be met in most cases.
    - However, officers should be clear that even if probable cause and exigent circumstances exist to seize the recording device, that alone does **NOT** justify a search of the actual device.
      - Once a recording device is seized, the seizing officer may seek consent from the citizen to download/transfer and preserve **only** the relevant recording for evidentiary purposes. In these circumstances, officers should utilize a written consent form to properly document the interaction.
      - If the citizen refuses to consent to the search and seizure of the relevant recording, then officers should apply for a search warrant to retain and process the recording device to obtain the relevant recording.
  - An officer should only seize a recording device in these circumstances when the officer, in good faith, believes that the recording is critical to the investigation and only after direct consultation with a supervisor. Indeed, in most cases, the seizure of a recording device will be viewed by the citizen as retaliatory in nature and will likely invite a great deal of scrutiny for the officer.
    - If, after consultation with a supervisor, a recording device is seized, officers should be diligent about seeking consent and/or a search warrant to retrieve the relevant recording. Seizing a recording device from a citizen exercising his or her First Amendment rights and then taking no further action will be viewed by any court as a constitutional violation, likely subjecting the officer to civil liability. See *infra* Section V.B.5.

**III. GENERAL GUIDELINES & CONSIDERATIONS:**

With the advent of today’s technology, it is becoming more and more common for individuals to openly record police officers while in public in the performance of their official duties or while otherwise found in a public place. This can obviously be an uncomfortable or even intimidating situation and one that police officers are not particularly fond of. Nevertheless, officers must always perform their duties and responsibilities with the utmost degree of professionalism and understand what they can and cannot do in these particular circumstances. In our society, police officers are expected and even demanded to endure significant burdens caused by individuals in the exercise of their First Amendment rights.

It is a fact that police officers are being recorded daily now that the general public is readily equipped and carrying recording devices in their pockets and ready to record at a moment’s notice at the push of a button. Moreover, these changes in technology and society in general have made the lines between a private citizen and a professional journalist exceedingly difficult to draw and present clear challenges to law enforcement personnel in the field. The proliferation of electronic devices with video-recording capability means that many of the images of events transpiring in the field come from community bystanders who stand ready with a commonly possessed cell phone or digital camera rather than a traditional media crew, and news stories are now just as likely to be broken by a blogger at his/her computer just as a local reporter at a major newspaper or news station. Such developments make it clear why the news-gathering protections of the First Amendment cannot solely turn on professional credentials or status and are therefore available to all members of society.

**IV. RELEVANT DEFINITIONS FROM STATUTE [M.G.L. c.272, § 99]:**

**A. General Application of the Law:** It is important to note that the historical context of this particular statute is rooted in combating **Organized Crime** as defined in the statute.

An excerpt of the statute with the applicable language as it pertains to “intercepting” [*secretly recording*] an individual is outlined below:

*Except as otherwise specifically provided in this section any person who willfully commits an interception [**Secretly Records**], attempts to commit an interception, or; procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be [...] imprisoned in the state prison for not more than five years, [. . . .]*”

**B. Wire Communication:** The term “*wire communication*” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

- C. **Oral Communication:** The term “*oral communication*” means speech, except such speech as is transmitted over the public air waves by radio or other similar device.
- D. **Intercepting Device:** The term “*intercepting device*” means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.
- E. **Interception:** The term “*interception*” means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

V. **IMPORTANT POINTS TO REMEMBER:**

- A. **No Statutory Exception for Civilians to Secretly Audio Record Police Officers:** Under the wiretap statute, there is no statutory exception for civilians to secretly audio record police officers. Refer to the following Massachusetts case excerpts for guidance:
- In **Commonwealth v. Hyde, 434 Mass. 594 (2001)**, the Supreme Judicial Court relied on the plain language of G.L. c.272, § 99(C), which specifically prohibits secret recordings. The Court stated that the statute was unambiguous and has no exception allowing private individuals to secretly record public officials, even police officers. In this case a motorist secretly recorded police officers during a traffic stop utilizing a recording device hidden in his pocket.
  - In **Commonwealth v. Manzelli, 68 Mass. App. Ct. 691 (2007)**, the Appeals Court affirmed the conviction of the defendant for secretly recording the conversation of MBTA Police Officers at a political rally as they conversed outside the subway station. After the officers discovered the conversations were being recorded, the defendant fled the scene and threw an audio tape into the crowd of on-lookers. No tape was ever recovered. After trial, the jury

convicted the defendant of unlawful electronic interception of an oral communication under G.L. c.272, § 99. The defendant appealed his conviction, arguing the Commonwealth's proof was insufficient because no actual recording was introduced at trial. The Court disagreed, reasoning that for most crimes, indirect or circumstantial evidence is sufficient to prove any or all of the elements of an offense. The fact that the Commonwealth could not produce direct evidence - the tape itself - does not mean that its evidence was legally insufficient, as the circumstantial evidence in this case was sufficient for the Commonwealth to meet its burden of proof.

**Note:** Violation of this statute is a felony punishable by five (5) years of imprisonment in the state prison.

**B. Video and/or Audio Recording of Police Officers:** OPEN (non-secret) video and/or audio recording of police officers in the performance of duty is NOT ILLEGAL.

1. This means that if an individual openly records by any means (video recorder, cellular telephone, digital or tape recorder, etc.), it is **LEGAL** as long as it is done openly in "plain sight." Additionally, the person who is the specific subject of the recording does not need to be aware that he/she is being recorded, as long as it is being done openly. Once a recording device (i.e., a cell phone) is held in "plain sight," officers are considered on notice that they are being recorded.
2. Openly videotaping and/or audio recording of police officers in public, by itself, is not illegal and therefore not arrestable and police officers cannot order the recording individual to stop.
3. However, a person may be openly recording the police while simultaneously committing other acts or behaving in a way that does violate other statutes or common laws independent of the fact that they are recording (i.e., Resisting Arrest, Assault, Disorderly Conduct, Intimidation of a Witness, and Interfering with a Police Officer), which may subject them to arrest. As always, be sure to completely and properly articulate the specific justification for an arrest in your report while explaining that the recording was not a relevant factor.
4. Again, if someone is openly video and/or audio recording you, do not order them to stop or threaten them with arrest. Simply perform your duty in a professional manner as usual. Do not be intimidated.
5. Recent case law states that officers who improperly arrest someone for a wiretap violation (i.e., arrest for non-secret, open recording) may be personally liable in a civil suit. See recently disclosed settlements below:
  - In 2011 the City of Boston in Glik v. Cunniffe, paid the plaintiff a \$170,000 settlement.

- In 2012, the City of Boston paid \$1.4 million to Michael P. O’Brien, who filed a civil rights lawsuit after a Boston police officer knocked him to the ground, causing him to sustain brain trauma, while videotaping a traffic incident with his cell phone.
- In 2011, the City of Boston paid Maury Paulino \$33,000 to settle a civil rights action after Boston police officers arresting him for using his cell phone to videotape them performing their duties.

## VI. RECENT APPLICABLE CASE LAW:<sup>3</sup>

- A. Recording Police in Public is Permissible:** “It is firmly established that the First Amendment’s [protection] extends further than the text’s proscription on laws ‘*abridging the freedom of speech, or of the press,*’ and encompasses a **range of conduct** related to the gathering and dissemination of information.”<sup>4</sup> “As the Supreme Court has observed, ‘*the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.*’”<sup>5</sup> “An important corollary to this interest in protecting the stock of public information is that ‘**there is an undoubted right to gather news from any source by means within the law.**’”<sup>6</sup> “**The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles.**”<sup>7</sup> “Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘*the free discussion of governmental affairs.*’”<sup>8</sup>
- B. Public Recording furthers Purpose of Public Scrutiny of Police:** “Moreover, as the [U.S. Supreme] Court has noted, ‘[f]reedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.’”<sup>9</sup> “**This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.**”<sup>10</sup> Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary

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<sup>3</sup> Refer generally to *Glik v. Cunniffe*, 665 F.3d 78 (2011).

<sup>4</sup> *Id.* at 82.

<sup>5</sup> *Id.*, quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978).

<sup>6</sup> *Id.*, quoting *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, quoting *Mills v. Alabama*, 384 U.S. 214, 218, (1966)

<sup>9</sup> *Id.*, quoting *First Nat’l Bank*, 425 U.S. at 777 n. 11.

<sup>10</sup> *Id.*

effect on the functioning of government more generally.”<sup>11</sup> Indeed, “many governmental processes operate best under **public scrutiny**.”<sup>12</sup>

- C. **Public “Peaceful” Recording:** Notably, in *Glik v. Cunniffe*, “Glik ‘filmed the officers from a comfortable remove’ and ‘neither spoke to nor molested them in any way.’”<sup>13</sup> **Such peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.**<sup>14</sup>
  
- D. **Well Established Liberty:** “[T]hough not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a **public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.**”<sup>15</sup>
  
- E. **NOTICE – Presence of a Recording Device in “Plain SIGHT”:** The Supreme Judicial Court has held that a recording is “secret” unless the subject has “actual knowledge” of the fact of recording.<sup>16</sup> It has also made clear that “actual knowledge” can be proven by “**objective manifestations of knowledge**” to “avoid the problems involved in speculating as to the [subject’s] subjective state of mind.”<sup>17</sup> Moreover, the Court has noted that “actual knowledge” does not require that there be any explicit acknowledgment of or reference to the fact of the recording. “[T]he person recording the conversation [need not] confirm the [subject’s] apparent awareness by acknowledging the fact of the intercepting device.”<sup>18</sup> Thus, in *Hyde*, where the defendant was convicted of a wiretap violation for secretly recording a traffic stop, the Supreme Judicial Court explained that the “**recording would not have been secret” within the meaning of the statute if the defendant had simply “held the tape recorder in plain sight.**”<sup>19</sup> The unmistakable logic of *Hyde*, building on *Jackson*, is that the secrecy inquiry turns on **notice**, i.e., **whether, based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded.** As such, once a typical recording device (i.e., a cell phone) is held in “plain sight,” officers are effectively on notice that they are being recorded.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 83, quoting *Press-Enter., Co. v. Superior Court*, 478 U.S. 1 (1986).

<sup>13</sup> *Id.* at 84, quoting *Iacobucci v. Boulter*, 193 F.3d 14 (1999).

<sup>14</sup> *Id.* at 84.

<sup>15</sup> *Id.* at 85.

<sup>16</sup> Refer to *Commonwealth v. Jackson*, 370 Mass. 502, 506-507(1976)

<sup>17</sup> *Id.* at 507.

<sup>18</sup> *Id.*

<sup>19</sup> Refer to *Hyde*, 434 Mass. at 605 (Secret tape recording by private individuals has been unequivocally banned”).