



The Police Commission

CITY AND COUNTY OF SAN FRANCISCO

February 2, 2023

Chief William Scott
Chief of Police

Dear Chief Scott:

At the meeting of the Police Commission on Wednesday, February 1, 2023, the following resolution was adopted:

RESOLUTION 23-14

APPROVAL OF REVISED DEPARTMENT GENERAL ORDER 5.07, "RIGHTS OF ON-LOOKERS," INCLUDING ONE (1) NON-SUBSTANTIVE AMENDEDMENT, FOR MEET-AND-CONFER WITH THE EFFECTED BARGAINING UNITS, AS REQUIRED BY LAW AND WITH DIRECTIONS SET FORTH BY THE COMMISSION;

RESOLVED, that the Police Commission hereby approves revised Department General Order 5.07, "Rights of On-Lookers," For Meet-And-Confer with the effected bargaining units, as required by law;

FURTHER RESOLVED, that a non-substantive Amendment shall be made to Page 2, 5.07.02 A (6) to read "See 5.07.02.F" not "See 5.07.02. E".

FURTHER RESOLVED, that The Commission hereby directs that the San Francisco Police Department and urges that San Francisco Department of Human Resources:

- Set clear boundaries to the meet and confer process with the effected bargaining units to ensure that there are no unreasonable delays on any items within the scope of representation
- Meet and confer with the effected bargaining units only on matters related to working conditions subject to collective bargaining under California law, and not meet and confer with the effected bargaining units on any part of the general order that constitute management matters that are not subject to collective bargaining under California law

AYES: Commissioners Walker, Benedicto, Yanez, Byrne, Yee, Vice President Carter-Oberstone

ABSENT: President Elias

Very truly yours,

Sergeant Stacy Youngblood
Secretary

San Francisco Police Commission

1211/ks

cc: Deputy City Attorney Cabrera
Director L. Preston/SFPD Labor Relations
Captain D. Toomer/PSPP
Lieutenant E. Altorfer/PSPP
Isabelle Choy/SFPD Labor Relations
Gloria Rosales/WDU

CINDY ELIAS
President

MAX CARTER-OBERSTONE
Vice President

LARRY YEE
Commissioner

JAMES BYRNE
Commissioner

JESUS YANEZ
Commissioner

KEVIN BENEDICTO
Commissioner

DEBRA WALKER
Commissioner

Sergeant Stacy Youngblood
Secretary

Rights of Onlookers

5.07.01 PURPOSE

The purpose of this policy is to protect the rights and safety of onlookers, detained or arrested persons, and the safety of Department members while maintaining the integrity of a crime scene, restricted area, and/or investigation.

5.07.02 POLICY

The San Francisco Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Members shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department recognizes that onlookers have a First Amendment right to observe, photograph, and record members during the performance of their duties in public as well as other areas (such as a person's home, business, or common areas of public and private buildings) where an individual has the right to be present, so long as the observation, photography, or recording does not threaten officer or public safety nor interfere with a member's performance of duties.

Onlookers may observe, record activity, and express themselves (including making comments critical of a member's actions) so long as an onlooker's conduct or presence does not unlawfully interfere with an investigation or compromise the safety of members or others. Onlookers also have a Fourth Amendment right to retain a recording they have made without government seizure unless otherwise noted.

The term "members" refers to sworn members unless otherwise indicated.

A. Onlookers Witnessing or Recording Contacts by Members

Members shall allow onlookers not involved in an incident to remain in the vicinity to observe, photograph, or record (video or audio) members in the performance of their duties including but not limited to, detentions and arrests that occur in public areas or private areas where the person has the right to be present (e.g., a person's home, business, or common areas of public and private buildings).

Members shall allow the onlooker to remain in proximity to the interaction to overhear and record the encounter between the suspect and the member, except when one or more of the following occur:

1. The member has specific and articulable concern(s) that officer or public safety could be jeopardized.
2. An onlooker obstructs or delays a member lawfully exercising their duties or violates the law.
3. An onlooker, by words or actions, threatens violence or illegal activity by words or attempts to incite others to violate the law.
4. A member determines there is a specific and articulable need for a confidential conversation.
5. A member has a specific and articulable concern that evidence will be destroyed.
6. An onlooker is inside a restricted area not normally available to the public (e.g., inside a crime scene, restricted areas of a police station, etc. *See* 5.07.02.E).

B. Guidance During Vehicle Stops

Members have the authority during traffic stops to control the movements of all vehicle occupants for safety purposes. This authority does not preclude a passenger from recording law enforcement during the stop provided the passenger does not pose a safety risk (e.g., by suddenly reaching into a backpack, a purse, pockets, where a weapon could be stored) or obstructs or delays the member in the performance of their duties.

C. Violations / Compliance / Arrests

1. As an alternative to arresting an onlooker who is in violation of Penal Code sections 148, 647c, or other related offenses (e.g., 22 SF Municipal Police Code), members may warn and order onlookers to relocate to a position no further than necessary to end the violation or ensure scene safety.
2. If a member determines that an onlooker should be arrested for obstructing or delaying law enforcement while recording police activity and there are no other charges, the officer shall request a supervisor respond to the scene. The supervisor shall assess the situation and approve any subsequent enforcement action.
3. Onlookers shall be allowed to record their interactions with the police if there is no specific and articulable safety issue or violation of the law. However, if an onlooker is to be arrested, members may order the arrested person to cease recording.

D. Onlooker Recordings

1. Onlookers will commonly record police activities and interactions to include police arresting, citing, detaining, or contacting members of the public in addition to recording police during demonstrations. Onlookers have a First Amendment right to record police officer actions except as noted in 5.07.02A. Recording, in and of itself, does not constitute a violation of law and does not establish reasonable suspicion to detain or probable cause to arrest.
2. Generally, onlookers have a Fourth Amendment right to retain a recording they have made. Members may obtain the onlooker's recording with consent or warrant (see DGO 5.16).

If a member develops probable cause to believe an onlooker's recording (not an arrestee) has evidence that may be important to the prosecution of a crime, the member may request, in a non-coercive manner, that the onlooker voluntarily provide the recording. If the onlooker consents to provide a physical recording device or digital storage device, the member shall provide the onlooker with a property receipt (see DGO 6.15). The member must memorialize consent via body worn camera or applicable Department form (e.g., consent to search form).

E. Inquiries

1. Members shall permit onlookers, who are not in violation of any law, to exchange contact information with detained persons.
2. Members may also ask onlookers who are witnesses to a detention or arrest for their names and contact information. However, the onlooker has the right to refuse to provide this information.

F. Restricted Areas

1. Onlookers are not permitted in designated crime scenes.
2. Onlookers are not permitted to be in restricted areas, designated by signage, of Department facilities, station parking lots or areas, government buildings, and critical infrastructure. As it pertains to Department facilities, these restricted areas include non-public entrances/exits (e.g., booking area exterior door, exterior gun locker areas, etc.) of police stations and areas designated for marked police vehicles. Unless there is an articulable safety concern, members shall provide persons who are discovered in a restricted area with a warning and an opportunity to comply, prior to effecting an arrest.
3. Onlookers are permitted to observe or record restricted areas from a public place. In the absence of reasonable suspicion to detain, members are encouraged to engage onlookers recording a restricted area via a consensual encounter to assess the situation.

G. Body Worn Camera – Members shall comply with all applicable Body Worn Camera policies when interacting with onlookers.

References:

DGO 5.03, Investigative Detentions
DGO 6.01, Crime Scene Log
DGO 6.02, Physical Evidence
DGO 6.15, Property Processing
DGO 8.10, Guidelines for First Amendment Activities
DGO 10.11, Body Worn Cameras
DGO 5.16, Search Warrants

RIGHTS OF ONLOOKERS

~~This order establishes policies regarding when~~ **Rights of Onlookers**

5.07.01 PURPOSE

The purpose of this policy is to protect the rights and safety of onlookers, detained or arrested persons, and the safety of Department members while maintaining the integrity of a crime scene, restricted area, and/or investigation.

5.07.02 POLICY

The San Francisco Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Members shall demonstrate this principle in their daily interactions with the community they are permitted sworn to protect and serve. The Department recognizes that onlookers have a First Amendment right to observe, photograph, and record members during the performance of their duties in public as well as other areas (such as a person's home, business, or common areas of public and private buildings) where an individual has the right to be present, so long as the observation, photography, or recording does not threaten officer or public safety nor interfere with a member's performance of duties.

Onlookers may observe, record activity, and express themselves (including making comments critical of a member's actions) so long as an onlooker's conduct or presence does not unlawfully interfere with an investigation or compromise the safety of members or others. Onlookers also have a Fourth Amendment right to retain a recording they have made without government seizure unless otherwise noted.

The term "members" refers to sworn members unless otherwise indicated.

A. Onlookers Witnessing or Recording Contacts by Members

Members shall allow onlookers not involved in an incident to remain as onlookers, their right in the vicinity to observe, photograph, or record (video or audio) members in the performance of their duties including but not limited to, detentions and arrests that occur in public areas or private areas where the person has the right to be present (e.g., a person's home, business, or common areas of public and private buildings).

~~Members shall allow the onlooker to remain in proximity to the interaction to overhear conversations and record the encounter between the officer and suspect, and their right to act as a witness, and the member, except when one or more of the following occur:~~

~~I. POLICY~~

~~A. WITNESSING STOPS, DETENTIONS, ARRESTS. It is the policy of this Department that persons not involved in an incident be allowed to remain in the immediate vicinity to witness stops, detentions and arrests of suspects occurring in public areas, except under the following circumstances:~~

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

~~B. OVERHEARING CONVERSATION. If the conditions at the scene are peaceful and sufficiently quiet, and the officer has stabilized the situation, persons shall be allowed to approach close enough to overhear the conversation between the suspect and the officer, except when:~~

- ~~1. The suspect objects to persons overhearing the conversation.~~
- ~~2. There is a specific and articulable need for confidential conversation for the purpose of police interrogation.~~

~~C. INQUIRIES~~

- ~~1. Persons shall be permitted to make a short, direct inquiry as to the suspect's name and whether the officer or the suspect wishes a witness. The suspect shall be allowed to respond to the inquiry.~~
- ~~2. If a citizen is a witness to the activity for which the suspect was detained or arrested, the officer may request his/her name; however, the citizen is not compelled to disclose such information.~~

~~DGO 5.07
Rev. 02/22/95~~

~~D. BYSTANDER FILMING OF OFFICER SUSPECT CONTACTS. It is increasingly common for bystanders, who are not involved in any criminal activity, to record contacts between officers and citizens, during which officers are detaining, citing or arresting a suspect or engaging in crowd control at a demonstration. Bystanders have the right to record police officer enforcement activities by camera, video recorder, or other means (except under certain narrow circumstances as set forth in Sections A and B above).~~

- ~~1. An officer shall not seize, compel or otherwise coerce production of these bystander recordings by any means without first obtaining a warrant. Without a warrant, an officer may only request, in a non-coercive manner, that a bystander voluntarily provide the film or other recording. These requests should be made only if the officer has probable cause to believe~~

~~that a recording has captured evidence of a crime and that the evidence will be important to prosecution of that crime. If a bystander refuses to voluntarily provide the recording, an officer may request the person's identity as provided in section C,2., above.~~

- ~~2. If a bystander voluntarily provides his or her recording and /or equipment, the officer shall provide the bystander with a receipt (SFPD 315). The receipt shall contain a written statement verifying that the recording and/or equipment has been voluntarily provided to the Department and shall be signed by the bystander.~~
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VIOLATIONS/COMPLIANCE.

1. The member has specific and articulable concern(s) that officer or public safety could be jeopardized.
2. An onlooker obstructs or delays a member lawfully exercising their duties or violates the law.
3. An onlooker, by words or actions, threatens violence or illegal activity by words or attempts to incite others to violate the law.
4. A member determines there is a specific and articulable need for a confidential conversation.
5. A member has a specific and articulable concern that evidence will be destroyed.
6. An onlooker is inside a restricted area not normally available to the public (e.g., inside a crime scene, restricted areas of a police station, etc. See 5.07.02.E).

B. Guidance During Vehicle Stops

Members have the authority during traffic stops to control the movements of all vehicle occupants for safety purposes. This authority does not preclude a passenger from recording law enforcement during the stop provided the passenger does not pose a safety risk (e.g., by suddenly reaching into a backpack, a purse, pockets, where a weapon could be stored) or obstructs or delays the member in the performance of their duties.

C. Violations / Compliance / Arrests

1. As an alternative to arresting an onlooker who is in violation of Penal Code ~~Section~~sections 148, 647c, or other related offenses (e.g., ~~647 c.P.C., 22 SF~~ Municipal Police Code) ~~officers~~, members may warn and order onlookers to "move-on"; however, the person shall not be ordered to move any farther distance relocate to a position no further than is necessary to end at the violation or ensure scene safety.
2. If a member determines that an onlooker should be arrested for obstructing or delaying law enforcement while recording police activity and there are no other charges, the officer shall request a supervisor respond to the scene. The supervisor shall assess the situation and approve any subsequent enforcement action.

3. Onlookers shall be allowed to record their interactions with the police if there is no specific and articulable safety issue or violation of the law. However, if an onlooker is to be arrested, members may order the arrested person to cease recording.

D. Onlooker Recordings

1. Onlookers will commonly record police activities and interactions to include police arresting, citing, detaining, or contacting members of the public in addition to recording police during demonstrations. Onlookers have a First Amendment right to record police officer actions except as noted in 5.07.02A. Recording, in and of itself, does not constitute a violation of law and does not establish reasonable suspicion to detain or probable cause to arrest.
2. Generally, onlookers have a Fourth Amendment right to retain a recording they have made. Members may obtain the onlooker's recording with consent or warrant (see DGO 5.16).

If a member develops probable cause to believe an onlooker's recording (not an arrestee) has evidence that may be important to the prosecution of a crime, the member may request, in a non-coercive manner, that the onlooker voluntarily provide the recording. If the onlooker consents to provide a physical recording device or digital storage device, the member shall provide the onlooker with a property receipt (see DGO 6.15). The member must memorialize consent via body worn camera or applicable Department form (e.g., consent to search form).

E. Inquiries

1. Members shall permit onlookers, who are not in violation of any law, to exchange contact information with detained persons.
2. Members may also ask onlookers who are witnesses to a detention or arrest for their names and contact information. However, the onlooker has the right to refuse to provide this information.

F. Restricted Areas

1. Onlookers are not permitted in designated crime scenes.
2. Onlookers are not permitted to be in restricted areas, designated by signage, of Department facilities, station parking lots or areas, government buildings, and critical infrastructure. As it pertains to Department facilities, these restricted areas include non-public entrances/exits (e.g., booking area exterior door, exterior gun locker areas, etc.) of police stations and areas designated for marked police vehicles. Unless there is an articulable safety concern, members shall provide persons who are discovered in a restricted area with a warning and an opportunity to comply, prior to effecting an arrest.
3. Onlookers are permitted to observe or record restricted areas from a public place. In the absence of reasonable suspicion to detain, members are encouraged to engage onlookers recording a restricted area via a consensual encounter to assess the situation.

G. Body Worn Camera – Members shall comply with all applicable Body Worn Camera policies when interacting with onlookers.

References:

~~E. DGO 5.03, Investigative Detentions and DGO 6.11, Obstruction of Streets and Sidewalks). Persons who believe that an officer did not comply with the provisions of this order shall be referred to an appropriate supervisor or to the Office of Citizen Complaints.~~

DGO 6.01, Crime Scene Log

~~References~~

~~DGO 5.03, Investigative Detentions~~

~~DGO 6.02, Physical Evidence~~

~~DGO 6.11, Obstruction of Streets and Sidewalks~~

~~DGO~~

~~6.15, 15, Property Processing~~

DGO 8.10, Guidelines for First Amendment Activities

DGO 10.11, Body Worn Cameras

DGO 5.16, Search Warrants

Working Group Recommendation and Department Response

#	DPA Recommendations for DGO 5.07 (Rights of Onlookers)	Date recommendation received	SFPD response	SFPD explanation	Open/Closed
R1	<p>Update DGO to include First Amendment protections that protect individuals' rights to observe, photograph and record the police and the Fourth Amendment right to retain the recorded material free from government intrusion. During the past 20 years, federal courts, including the Ninth Circuit, have recognized that the First Amendment protects an individual's right to observe, photograph and record matters of public interest including activities of police officers. (See, e.g., <u>Askins v. U.S. Dep't of Homeland Sec.</u> (9th Cir. 2018) 899 F.3d 1035, 1044; <u>Fordyce v. City of Seattle</u> (9th Cir. 1995) 55 F.3d 436, 439.) "Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." (<u>Turner v. Lieutenant Driver</u> (5th Cir. 2017) 848 F.3d 678, 689) Like) Similar to all First Amendment claims, observing, photographing, and recording the police is subject to reasonable time, place, and manner restrictions. (<u>Id.</u> at p.690.) As the <u>Turner</u> court stated, those restrictions must be "narrowly tailored to serve a significant governmental interest." (<u>Ibid.</u>) DPA suggests that DGO 5.07 be updated to address the public's right to observe, photograph and record officers, include reference to the First and Fourth Amendments, and provide examples of appropriate time, place, and manner restrictions.</p>	5/18/20	Recommendation has been included in draft DGO	Approved	
R2	<p>Update section "Bystander Filming of Officer-Suspect Contacts" to address the right of all persons to observe, photograph, and record the actions of officers during the discharge of their duties in public as well as other areas (such as a person's home, business or common areas of public and private buildings) where an individual has the right to be present, so long as the observation, photography, or recording does not threaten officer safety and does not interfere with the performance of the officer's duties.</p>	5/18/20	Recommendation has been included in draft DGO	Approved	
R3	<p>Update the DGO to state that officers shall allow a person to record their own actions with the police. Include a provision that states that when an officer is placing a person under lawful arrest and that individual is recording their own interaction with police, the officer may instruct the person to cease recording and put away the recording device. (See e.g. Baltimore Police Department's "Public Observation/Recording of Officers." September 2018, Policy 1016.</p>	5/18/20	Recommendation has been included in draft DGO	Approved	

Working Group Recommendation and Department Response

#	DPA Recommendations for DGO 5.07 (Rights of Onlookers)	Date recommendation received	SFPD response	SFPD explanation	Open/Closed
R4	Require the officer to document through their Body Worn Camera recording and incident report any instance in which they order a person to stop recording police activity and the reason for this order.	5/18/20	Recommendation has been included in draft DGO	Approved	
R5	Include a provision that states officers shall not block, obstruct, or interfere with cameras and other recording devices.	5/18/20	Recommendation has been included in draft DGO	Ok if adding '..not intentionally block..' - DPA agrees insertion.	
R6	Include a provision that states officers shall not demand that a person state a reason why the person is observing, photographing or recording police activity.	5/18/20	Recommendation has been included in draft DGO	Ok to add w/ modification. May not demand, but may for investigative purposes inquire - DPA/PD agreement SPARKS I 10/22	
R7	Include a provision that states officers shall not retaliate against any person who lawfully exercises the lawful rights to witness, observe, record, comment on, criticize, or peacefully protest police activity and shall not take any other type of police action in retaliation for the exercise of any of those rights.	5/18/20	Recommendation will not be included in draft DGO because not warranted or reasonable	Will not add - DPA/PD agreement SPARKS I 10/22	
R8	Include a provision that states that In the event that an officer determines that a person should be arrested solely for obstructing or hindering law enforcement while recording police activity, the officer shall request a supervisor's approval for the arrest and/or request the supervisor to come to the scene. Supervisor's consultation and presence can assist in a more successful outcome. See Baltimore Police Department's Policy on Public Observation/Recording of Officers.	5/18/20	Recommendation has been included in draft DGO	Modified version agreed to SPARKS I 10/22 (see cell b9)	
R9	Update the Violation/Compliance section to state that "[p]ersons who believe that an officer did not comply with the provisions of this order shall be referred to an appropriate supervisor or and to the Office of Citizen Complaints also senior ranking officer shall provide an informational brochure about the Department of Police Accountability and complaint form to the person.	5/18/20	Recommendation has been included in draft DGO	Modified version agreed to SPARKS I 10/22 (removing brochure section) DPA/PD	