

FREQUENTLY ASKED QUESTIONS: RECORDING IN PUBLIC IN NEW YORK

Note: *This guide provides general information about the law as it pertains to New York City, and might not apply with respect to other jurisdictions. This guide addresses the law as it exists in October of 2011; if you find yourself returning to this document at a later time, please note that the law may have changed. Specific facts and circumstances often alter outcomes in specific cases. This document is not a substitute for legal advice specific to your situation and does not create an attorney-client relationship between you and the Citizen Media Law Project.*

Q. 1: Do I have the right to record police action or protesters?

Yes, so long as you do not violate other generally applicable laws in the process. See Q. 6. You have a right under the Fourth Amendment to the U.S. Constitution not to be arrested for recording the police or protesters unless the police have probable cause to believe that you have committed a crime.

New York's wiretap law only protects oral communications in which the participants in the communication have a reasonable expectation of privacy. Thus, New York permits you to openly record conversations (including oral statements by protesters or the police) with the consent of a party to the conversation or if you are physically present at the conversation. You might violate the law if you make a secret recording (for example, by leaving a recording device running and then leaving the area) or record someone talking on a cellular phone or other electronic device.

New York does not prohibit the publication of private facts about individuals, and so you cannot be sued in civil court for publishing such facts (although you could still be sued or arrested for trespassing, assault, or other torts or crimes committed in the course of gathering information; see Q.6).

You might also have a specific First Amendment right to record the activities of the police in public. This right has been recognized in jurisdictions outside of New York, and would trump any state law that would otherwise prohibit such recording. However, no New York court has ruled on the existence of this right.

Q. 2: May the police record me?

As part of their normal function to preserve the peace and investigate crime, the police are generally allowed to record activity occurring in public in which you have no legitimate expectation of privacy. The police ordinarily may not record your activity on private property without either a warrant or the permission of the owner or tenants of the property, unless your activity is in plain view from a public location without the aid of electronic devices.

Although the police are entitled to record activity in public, they are not entitled to intimidate you from the exercise of your rights in the guise of recording you. You should seek legal assistance if you believe that the police are using cameras as a tool for harassment or intimidation (for example, if an officer follows you closely without reason to believe you are engaged in unlawful activity).

Q. 3: May the police search me? May the police seize my camera and view its contents?

The police may ask you if they can search you or the contents of your camera. Unless you are placed under arrest (which the police may not do unless they have probable cause to believe you have committed a crime), you are not required to agree to their requests; if you do agree, you will likely waive any objections to their search.

Absent your consent, the Fourth Amendment and Article I, § 12, of the New York State Constitution generally prohibit the police from stopping and frisking you unless the police have reason to believe that you may be carrying a weapon. If the police do have reason to suspect that you are armed, they may pat you down to search for a weapon, but without a warrant they

may not ordinarily search your pockets, etc., once they determine that you are unarmed.

With respect to your camera, the Fourth Amendment and Article I, § 12, prohibit the police from seizing your property without first obtaining a search warrant unless you are placed under arrest. In addition, the federal Privacy Protection Act might prohibit the police from seizing your film or video recordings, with or without a warrant, except in certain specific circumstances. A key exception to these rules is that the police may seize your recordings if:

1. they have probable cause to believe that the recordings constitute evidence of a crime (for example, if you have recorded others in the act of breaking the law), and
2. they have reason to believe that you would destroy the recordings if they leave the recordings in your possession until they can subpoena you to bring the recordings to a trial or obtain a warrant.

The police are not obliged to accept your statement that you will preserve the recordings, although it cannot hurt to tell them that. It might also help to display press credentials if you have them, on the theory that members of the press are unlikely to delete their work product.

At least one New York case has held that if the police seize expressive materials without a warrant, they must promptly ask a judge to confirm that the seizure was proper in order to avoid violating your First Amendment rights.

The Fourth Amendment also generally prohibits the police from reviewing the content of your camera or other recording device (or the content of recorded media) without a warrant, even if the police seize those recordings without a warrant. While you might lack an expectation of privacy in a recording made in a public place with the police present, it is likely that a court would find that the police need a warrant to search your device for that recording and do not have a right to access other files (such as e-mail or call records

on a smartphone, or unrelated photos and other recordings). However, it is unclear in New York whether the police may search the contents of your recording device without a warrant if they seize your device after arresting you.

If it is important for you to be able to use the material that you record without delay, or if you are concerned that your recordings may be deleted or lost while in police custody, you should consider using a recording device or program that streams content to the Internet in real time. At the very least, you should regularly upload your recordings to another (preferably remote) device or service so that you have a copy available for your use.

Q. 4: If the police tell me to do something, do I have to do it?

As discussed above, if the police ask for your permission to search your person or belongings, you may refuse unless you are under arrest. The police may also ask you questions about your activities or for your identity, and in general you are free to refuse to answer. However, see Q. 5.

If the police order you and all of the people around you to move from a location, it is generally advisable to follow police instruction. Under New York's disorderly conduct law, a person may violate the law if they congregate with others and ignore a police officer's lawful order to disperse. The order has to be clear, and more than a mere advisory statement that a person's actions are likely unlawful. The law does not extend to persons who are not part of the group that is creating a public disturbance and ignoring the order to disperse. For that reason, if you are merely present at a gathering as a journalist and not as a participant, the police might allow you to remain if you explain the situation and show press credentials (if you have them).

While you cannot be lawfully punished for disobeying an order that is itself a violation of the constitution, the exact constitutionality of a particular order to disperse is often a close call and unlikely to be resolved in the field. If you think a particular police order is unlawful, it is wise to

comply with the order while simultaneously documenting the order and your response. You may then consider seeking legal assistance.

Q. 5: If the police ask for my identity, do I have to provide it?

Several states, including New York, have adopted "stop and identify" laws. These laws allow an officer who has reasonable suspicion that a particular person has committed or is committing a crime to stop the person and demand the person provide his or her name, address, and explanation of their conduct. These laws have been upheld by the Supreme Court, at least where the officer has reasonable suspicion to believe the person has committed a crime.

New York's law allows an officer to stop a person reasonably suspected of a felony or certain misdemeanors and ask for the person's name, address, and an explanation of their behavior. The police do not need to give you *Miranda* warnings (i.e., "You have the right to remain silent," etc.) before asking for this information.

Q. 6: Does reporting on the Occupy Wall Street event give me the right to enter into private property without permission? To obstruct police activity? To block the sidewalk? To shove a cop?

Reporting on an event does not give you the right to violate generally applicable laws, including laws prohibiting trespassing, violence to others, obstruction of justice, or disturbing the peace.

Q. 7: Who should I call if I get in trouble?

Organizations that have indicated that they will provide legal support to those arrested or confronted by police while covering the #Occupy protests include:

- The Reporters Committee for Freedom of the Press: (800) 336-4243
- National Lawyers Guild: (212) 679-5100
- Society for Professional Journalists, Legal Defense Fund: (317) 927-8000

Q. 8: Where can I turn for more information?

More information on New York law can be found on the Citizen Media Law Project Legal Guide at:

<http://www.citmedialaw.org/state-guide/New%20York>.

Citations for the legal principles set forth in this document are available on the Citizen Media Law Project website at:

<http://www.citmedialaw.org/blog/2011/citizens-guide-reporting-occupywallstreet>



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