



NEW YORK CITY  
CIVILIAN COMPLAINT  
REVIEW BOARD

BILL DE BLASIO, Mayor • MAYA D. WILEY, Esq. Chair • JONATHAN DARCHE, Executive Director

## Worth a Thousand Words:

Examining Officer Interference  
with Civilian Recordings of Police

June 2017



# CCRB Mission and Values

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The New York City Civilian Complaint Review Board (the “CCRB” or the “Board”) is an independent agency, created by Chapter 18-A of the New York City Charter. The Board is empowered to receive, investigate, mediate, hear, make findings, and recommend action on complaints against New York City police officers alleging the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.

**In fulfillment of its mission, the Board has pledged:**

To report apparent patterns of misconduct, relevant issues and policy matters to the Police Commissioner and the public.

Published 2017 by the New York City Civilian Complaint Review Board  
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# Executive Summary

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In recent years, video footage has captured a range of police interactions with members of the public. For a civilian oversight agency like the New York City Civilian Complaint Review Board (CCRB), video is a crucial source of evidence and an invaluable component in the examination of police misconduct. In addition to the video evidence that CCRB investigators routinely obtain from public and private surveillance cameras, civilian witnesses to alleged police misconduct and, in many cases, complainants themselves, provide a growing amount of the video evidence received by the CCRB. Private citizens use mobile phones, cameras, tablets, and other devices not only to record video footage, but also to take photographs and create audio recordings of their encounters with law enforcement. Civilians' multimedia documentation of their experiences can corroborate their accounts of police misconduct and provide helpful details that are not ascertainable from witness testimony alone. However, as civilians continue to record police activity with greater frequency, complaints of officer interference with civilian recordings present a new and complex challenge. These complaints are of great concern to the CCRB because when police interference with civilian recording occurs, it violates core constitutional rights, and diminishes an important tool used to ensure police accountability.

The CCRB now presents one of the first statistical and qualitative assessments of police officers' interference with civilians' ability to record police activity. This report, which draws upon three full years of CCRB complaint data, first discusses the existence and impact of civilian-generated video evidence in police misconduct investigations, and then goes on to explore the quantity and nature of allegations involving police officers who have interfered with civilians' recording activity. Specifically, this report tracks a variety of circumstantial details surrounding interference-related complaints, including how officers were alleged to have interfered, why the officers initially came into contact with the recording civilians, and what explanations were offered by officers against whom such allegations were substantiated. The answers to these questions provide important statistical information about interference-related complaints that allow us to understand the ways in which such interference impacts individual civilians, as well as its effect on the larger relationship between police officers and the community members they serve.

In the three-year period from January 1, 2014 through December 31, 2016, the CCRB closed 257 complaints in which civilians reported that officers had interfered with their ability to record police activity. This police interference included, but was not limited to, officers instructing civilians to stop recording, searching civilians' phones for recordings of activity, deleting such footage, and damaging recording devices. These 257 complaints represented less than two percent of all 15,006 complaints reviewed and closed by the Board during this period.

The following are selected highlights of the findings contained in this report:

- The presence of video has enabled the CCRB to make more definitive findings on the merits of individual cases, leading to an increase in dispositions substantiating misconduct, exonerating misconduct, and finding claims of misconduct to be unfounded.
- The 257 complaints within the scope of this study included 346 allegations that directly addressed alleged officer interference with civilian recordings of police activity.
- In 149 interference-related complaints (58 percent), civilians recorded their own interactions with police officers. The remaining 108 complaints (42 percent) involved civilians who were bystanders recording or attempting to record police encounters with third parties.

- Of the 346 allegations that addressed police interference with a civilian’s recording activity, the CCRB substantiated 96 of these interference-related allegations (28 percent), found 144 of the allegations (41 percent) to be unsubstantiated, exonerated the actions of the officers in 39 allegations (11 percent), and determined that 21 (six percent) of the allegations were unfounded.
- Civilians in 61 interference-related complaints (24 percent) reported only verbal interference with recording activity. In 119 complaints (46 percent) civilians reported only physical interference by officers. In the remaining 77 complaints (30 percent) civilians reported that police officers interfered both verbally and physically with their ability to record police activity.
- Seventy-five percent of the New York City Police Department (NYPD) Members of Service alleged to have engaged in this misconduct (161 subject officers) held the rank of police officer.
- Eighty-four percent of the officers named in interference-related allegations (180 subject officers) had more than two years on the force at the time the alleged incidents occurred. Of those, 53 percent (113 subject officers) had between three and 10 years on the force when they were alleged to have interfered with civilian recordings and the remaining 31 percent (67 subject officers) had more than 10 years on the force.

Much of the statistical information in this report, including the points highlighted above, is presented through visualizations designed to contextualize the relevant data. The trends and patterns revealed through this data form the basis of this report’s recommendations, which include suggested adjustments to internal CCRB training protocols that will help streamline the Agency’s tracking of interference-related data and ensure that investigators are conversant in the laws governing such interference.

In addition, this report recommends that the New York City Police Department add a new Patrol Guide section dealing specifically and exclusively with guidelines to be followed by Members of Service who are recorded by civilians. It is the opinion of the CCRB that codifying these rules and providing relevant officer training will help to mitigate the problem of police interference with civilian recording.

Recordings of police conduct are critical investigative tools that also have broad social import. In recent years, stories of police misconduct have, at times, dominated the news both locally and throughout the country. These stories have sparked a dynamic national dialogue about police accountability, which lies at the core of the CCRB’s mission. However, many of the tragedies underlying these news stories may have never come to light had they not been recorded by civilians. These video recordings, while often painful to watch, facilitate discussions and debates over the substance and scope of police action, which are matters of public concern. Ensuring civilians’ ability to record police activity in contexts that do not impede officers’ performance of their duties is essential to ensuring police accountability. As the Supreme Court has noted, “[t]here is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”<sup>1</sup>

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<sup>1</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991).

# Section One: Recognizing a Right to Record Police— The Law and the NYPD Patrol Guide

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A civilian’s right to record police conduct flows from well-established principles embodied in the First Amendment to the United States Constitution recognizing the importance of free and open discussion of matters of public concern. Not only has this right been recognized by all federal appeals courts that have examined the issue, the New York City Police Department (NYPD) has clearly committed itself to these principles by instructing officers on the existence and scope of this right through internally-circulated guidance and within an existing Patrol Guide section.

## A. *The Right to Record Police Activity*

The First Amendment protects the right of individuals to observe and to record government officials engaged in public duties. Recording has been characterized as a form of speech that furthers the “cardinal First Amendment interest in protecting and promoting the ‘free discussion of governmental affairs.’”<sup>2</sup> Federal courts across the country have recognized an individual’s right to photograph, record, and videotape police officers as they carry out their law enforcement duties.<sup>3</sup> While the New York Appellate Courts and the Court of Appeals for the Second Circuit have yet to address this issue, the United States District Courts for the Southern and Eastern Districts of New York recently held that the right to record police activity exists under the First Amendment.<sup>4</sup>

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<sup>2</sup> *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214 (1966)).

<sup>3</sup> Although the Supreme Court has not addressed the issue of whether there is a right to film or otherwise record police activity, every circuit court that has addressed this issue has held that such a right exists and is subject only to reasonable time, place, and manner restrictions. See *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (“We agree with every circuit that has ruled on this question . . . the First Amendment protects the right to record the police . . . the filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within basic First Amendment principles.”) (internal citations and quotations omitted); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (holding that an Illinois eavesdropping statute could not prohibit audio recording of police officers engaged in their official duties in public places because such recording was protected by the First Amendment); *Glik*, 655 F.3d at 82-84 (1st Cir. 2011) (recognizing a constitutionally protected right to record police carrying out their duties in public); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the “First Amendment right . . . to photograph or videotape police conduct.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the “First Amendment right to film matters of public interest”).

<sup>4</sup> *Charles v. City of New York*, 12-CV-6180 (SLT)(SMG), 2017 U.S. Dist. LEXIS 17943, at \*64-65 (E.D.N.Y. Feb. 8, 2017) (recognizing a First Amendment right to film police but precluded from finding whether filming was protected in the case at bar due to questions of material fact); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015) (in denying a motion to dismiss, the Court agreed with all of the circuit courts that addressed the issue and found that the First Amendment protects the right to videotape police officers). Because the United States Court of Appeals for the Second Circuit has yet to address the issue, the United States District Court for the Southern District has found in a number of cases that police officers were entitled to qualified immunity without reaching the merits of whether a First Amendment right to record police officers exists. See, e.g., *Soto v. City of New York*, No. 13 CV 8474-LTS-JLC, 2017 U.S. Dist. LEXIS 31296, at \*13-14 (S.D.N.Y. Mar. 6, 2017) (granting police officers qualified immunity because the First Amendment right to record police officer activity is not clearly established law in the Second Circuit but not reaching the merits of whether the First Amendment protects the right to record police activity); *Basinski v. City of New York*, 192 F. Supp. 3d 360, 368 (S.D.N.Y. 2016); *Mesa v. City of New York*, 09 Civ. 10464 (JPO), 2013 U.S. Dist. LEXIS 1097, at \*75-76 (S.D.N.Y. Jan. 3, 2013) (“Though this Court is inclined to agree with the First, Seventh, Eleventh, and Ninth Circuits that the photography and recording of police officers engaged in their official duties ‘fits comfortably’ within First Amendment principles, Defendants here are nevertheless entitled to summary judgment on Flores’ First Amendment claim, as the right to photograph and record police is not clearly established as a matter of constitutional law in this Circuit.”). Notably, whether the right to record police officers is clearly established for the purposes of qualified

Individuals possess a constitutional right to record government officials engaged in their duties in all traditionally public spaces, including sidewalks, streets, other public property, and the locations of public protests.<sup>5</sup> Courts have also extended these First Amendment protections to civilians who record police conduct occurring on private property, such as the civilian's home or other private property where that civilian has a right to be present.<sup>6</sup>

Because the right to record video of police officers engaged in their official duties is rooted in the First Amendment, any police seizure of a civilian's recording device or any attempt to delete constitutionally protected video footage is a form of prior restraint.<sup>7</sup> Such actions amount to a constitutional violation and arguably qualify as censorship.<sup>8</sup> Accordingly, any such seizure of a recording device by police must be a "temporary restraint...where needed to preserve evidence until police c[an] obtain a warrant."<sup>9</sup> Seizure of equipment that has recorded police conduct, even if it may contain footage of a crime that is relevant to a police investigation, is a form of prior restraint because that footage is protected by the First Amendment. Therefore, the police must meet a high standard of reasonableness in order to justify a warrantless seizure of a cell phone or other recording device.<sup>10</sup>

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immunity is not the subject of this report and is a distinctly different question than whether the right to record exists under the First Amendment. In any event, every circuit court to decide the issue has found that the right to record police activity exists under the First Amendment and the district courts in the Second Circuit that have reached the merits of that issue have upheld the right to record. Further, in April 2016, the NYPD internally published a Legal Bureau Bulletin explicitly recognizing that these First Amendment rights and protections exist. *See* Office of the Deputy Commissioner, Legal Bureau Bulletin, Vol. 46, No. 2 (April 2016) ("Individuals have a First Amendment right to lawfully record police activity including, but not limited to, detentions, searches, arrests, or uses of force.") (attached hereto as Appendix D and hereinafter referred to as "Legal Bulletin"). Accordingly, the First Amendment unquestionably protects the right to record police officers and, to the extent that there remains any disagreement or confusion about the scope of this right, it only strengthens CCRB's recommendation for a new NYPD Patrol Guide section dealing with a civilian's right to record.

<sup>5</sup> *See Glik*, 655 F.3d at 83 (affirming the right to film officials in "public spaces"); *Smith*, 212 F.3d at 1333 (recognizing "the right to gather information about what public officials do on public property"); *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (holding that the filming of police "in a public area of a public building" was a protected exercise of a First Amendment right).

<sup>6</sup> *See Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (activist's posting of a video of "a warrantless and potentially unlawful search of a private residence" on her website was entitled to First Amendment protection); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (individual who videotaped state troopers from private property with the owner's permission was engaged in constitutionally protected speech).

<sup>7</sup> *See* U.S. Dep't of Justice, Statement of Interest of the United States, *Garcia v. Montgomery County, Maryland, et al.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), available at [https://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia\\_SOI\\_3-14-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia_SOI_3-14-13.pdf) (last visited June 23, 2017) ("For decades, the Supreme Court has recognized that government action intended to prevent the dissemination of information critical of public officials, including police officers, constitutes an invalid prior restraint on the exercise of First Amendment rights.") (internal citations omitted). *See also, e.g., Robinson v. Fetterman*, 378 F. Supp. 2d at 541 (holding that by restraining an individual from "publicizing or publishing what he had filmed," an officer's "conduct clearly amounted to an unlawful prior restraint upon... protected speech."); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding that an "unlawful prior restraint clearly occurred" where an officer confiscated the video camera of a journalist who recorded an arrest in public).

<sup>8</sup> New York City Police Department, FINEST Message re: Recording of Police Action by the Public (Aug. 6, 2014) ("Intentional interference such as blocking or obstructing cameras or ordering the person to cease constitutes censorship and also violates the First Amendment") (attached hereto as Appendix C and hereinafter referred to as "FINEST Message").

<sup>9</sup> *Illinois v. McArthur*, 531 U.S. 326, 334 (2001).

<sup>10</sup> *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).



The First Amendment right to record police activity is limited only by “reasonable time, place, and manner restrictions.”<sup>11</sup> In a recent, highly publicized case, the U.S. Department of Justice explained these restrictions, stating that a “person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law.”<sup>12</sup> Thus, video recording of the police by civilians may be prohibited where it violates a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose or in situations that raise heightened concerns about safety. For example, even though civilians have a right to film a traffic stop, certain stops, such as one involving an armed individual, may justify a safety measure such as a command by police officers that bystanders disperse, even if the bystanders are recording.<sup>13</sup>

Civilians in New York may only be arrested when their activity amounts to *actual* obstruction or interference with a police officer’s investigation. For example, a civilian who persistently attempts to engage an officer in the midst of performing her duties could be arrested and charged with Obstructing Governmental Administration (Penal Law § 195.05) or Disorderly Conduct (Penal Law § 240.20) regardless of the fact they are recording or photographing police officers.<sup>14</sup> Further, recording by a civilian of an undercover officer may also be a criminal offense if the civilian intends to actually interfere with or obstruct the undercover officer’s duties, or if such recording is for the purpose of witness intimidation or endangering the safety of the undercover officer being recorded.<sup>15</sup>

However, as the Justice Department has noted, “an individual’s recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference. Nor does an individual’s conduct amount to interference if he or she expresses criticism of the police or the police activity being observed.”<sup>16</sup> Moreover, to sustain a charge of Obstruction of Governmental Administration against a civilian recording a police officer, the police officer being recorded must be engaged in an official function that is “authorized or lawful.”<sup>17</sup> Thus, a

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<sup>11</sup> *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

<sup>12</sup> U.S. Dep’t of Justice, Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), available at [http://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/Sharp\\_SOI\\_1-10-12.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/Sharp_SOI_1-10-12.pdf) (last visited June 23, 2017) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)).

<sup>13</sup> See *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014).

<sup>14</sup> *Pesola v. City of New York*, 15-cv-1917 (PKC)(SN); 15-cv-1918 (PKC)(SN), 2016 U.S. Dist. LEXIS 42977, at \*38 (S.D.N.Y. Mar. 30, 2016) (court dismissed case alleging violation of plaintiff’s First Amendment rights because defendants possessed probable cause to arrest plaintiff for disorderly conduct.)

<sup>15</sup> In *Matter of Davan L.*, 91 N.Y.2d 88, 91 (1997), the Court of Appeals held that a juvenile’s conduct amounted to Obstruction of Governmental Administration (OGA) because his “actions coupled with words” tended to establish his intent to “intrude himself into [a confined] area of police activity and [to] direct his warnings toward a [suspected] criminal activity and assembly.” In *Davan L.*, a 15-year-old boy repeatedly rode his bicycle in front of an NYPD undercover narcotics “buy operation” at a storefront and yelled “cops, cops... watch out, Five-O, police are coming,” despite having been asked by an officer to leave the area. Although the case did not involve a civilian recording of police activity, it established that OGA sometimes hinges on whether the defendant has intruded into a defined area of police activity. While the defendant in *Davan L.* committed OGA when he sought to disclose the identity of an undercover officer as a means to avoid arrest, interference with police activity that is “attenuated by distance, time and technology” may not amount to OGA. See *Davan* at 91 (citing *People v. Case*, 42 N.Y.2d 98, 103 (1977) (a truck driver that relayed the location of a radar speed checkpoint by radio did not engage in the *physical* interference required to violate the OGA statute)); *People v. Hinkson*, 184 Misc.2d 496 (N.Y. Crim. Ct., Kings Cty. 2000) (merely stating out loud than an individual was an undercover officer did not meet the elements of OGA).

<sup>16</sup> See Ltr. of Jonathan M. Smith, U.S. Dep’t of Justice, to Mark. H. Grimes, Baltimore Police Dep’t, May 14, 2012, at 6, available at [http://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp\\_ltr\\_5-14-12.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf) (last visited June 23, 2017).

<sup>17</sup> See *People v. Lupinacci*, 191 A.D.2d 589, 595 (2d Dep’t 1993).

civilian who is arrested while recording a police officer engaged in unauthorized or illegal conduct, such as false arrest, excessive force, or other misconduct, may be able to have those charges dismissed.

### ***B. Police Search and Seizure of Recording Devices***

People possess a reasonable expectation of privacy in recording devices, such as cellular phones, cameras, or other recording equipment. As the Supreme Court recently noted, many cellular phones are “in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.”<sup>18</sup> Given the immense storage capacity of these devices and the many types of personal information such devices are capable of storing, individuals possess a heightened interest in maintaining the privacy of their cellular phones against unreasonable government intrusion.<sup>19</sup>

In the context of civilians who use cell phones and other electronic devices to record videos of police conduct, police interference is more than a prior restraint of protected speech that violates a civilian’s First Amendment rights. Warrantless searches and seizures of such devices by the police also have constitutional implications under the Fourth Amendment to the United States Constitution.

Under the Fourth Amendment of the United States Constitution, which protects “against unreasonable searches and seizures,” officers must generally obtain a judicial search warrant issued upon a finding of probable cause in order to seize personal property, such as a cell phone, camera, or other recording device.<sup>20</sup> However, as mentioned above, cell phones are unique, not only because of the breadth and volume of personal information they contain but also because of the ease with which their contents can be erased or destroyed.<sup>21</sup> Accordingly, officers may sometimes seize a cell phone for evidence preservation purposes while awaiting the issuance of a search warrant but only if probable cause exists to believe that the device “holds contraband or evidence of a crime.”<sup>22</sup> On the other hand, a police officer who grabs a civilian’s cell phone in order to stop that civilian from recording police conduct and has no reason to think the phone contains evidence of a crime is engaging in an unlawful warrantless seizure of the civilian’s property. Moreover, any search into the phone by the officer, including any attempt to erase the civilian’s recording, would be an unlawful search and a further constitutional violation.<sup>23</sup> Finally, police officers who intentionally destroy recording devices or delete recordings under such circumstances engage in retaliation against civilians for the exercise of their First Amendment rights.<sup>24</sup> These actions violate the Fourteenth Amendment’s procedural Due Process Clause.<sup>25</sup>

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<sup>18</sup> *Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

<sup>19</sup> *Id.*

<sup>20</sup> *See United States v. Place*, 462 U.S. 696, 701 (1983); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>21</sup> *Riley*, 134 S. Ct. at 2486.

<sup>22</sup> *See Riley*, 134 S. Ct. at 2485; *Place*, 462 U.S. at 701.

<sup>23</sup> *Riley*, 134 S. Ct. at 2495.

<sup>24</sup> *See Higginbotham*, 105 F. Supp. 3d at 378 - 381.

<sup>25</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (The plaintiff received notice from police only “after his personal property was allegedly discarded... [D]iscarding [plaintiff’s] personal property in this manner violated his procedural due process rights.”).

### ***C. NYPD Guidance on Civilian Recording***

The New York Police Department has advised officers repeatedly that civilians possess a right to record police activity and has further elaborated upon permissible limitations of that right. Patrol Guide section 208-03, which relates to “Arrest Processing,” contains a short section regarding civilian recording:

#### ***OBSERVERS AT THE SCENE OF POLICE INCIDENTS***

*As a rule, when a police officer stops, detains, or arrests a person in a public area, persons who happen to be in or are attached to the area are naturally in position to and are allowed to observe the police officer’s actions. This right to observe is, of course, limited by reasons of safety to all concerned, and as long as there is no substantive violation of law. The following guidelines should be utilized by members of the service whenever the above situation exists:*

*a. A person remaining in the vicinity of a stop or arrest shall not be subject to arrest for Obstructing Governmental Administration (Penal Law section 195.05), unless the officer has probable cause to believe the person(s) is obstructing governmental administration.*

*b. None of the following constitutes probable cause for arrest or detention of an onlooker unless the safety of officers or other persons is directly endangered or the officer reasonably believes they are endangered or the law is otherwise violated:*

- (1) Speech alone, even though crude and vulgar*
- (2) Requesting and making notes of shield numbers or names of members of the service*
- (3) Taking photographs, videotapes, or tape recordings*
- (4) Remaining in the vicinity of the stop or arrest[.]*

*c. Whenever an onlooker is arrested or taken into custody, the arresting officer shall request the patrol supervisor to the scene, or if unavailable, report the action to the supervisor where the person is taken.*

*This procedure is not intended in any manner to limit the authority of the police to establish police lines, e.g., crowd control at scenes of fires, demonstrations, etc.*

In August 2014, the NYPD issued the FINEST Message<sup>26</sup> regarding civilian recording. The Department reminded officers that members of the public are legally allowed to record police interactions and that intentional interference is impermissible, constitutes censorship, and violates the First Amendment.<sup>27</sup> The Department stated clearly that “mere recording” does not constitute interference, and that officers can take action against a recording individual only if the person interferes with the operation or the safety of officers or the public. The Department permitted officers to tell the public “not to get too close” in order to avoid interference.

Additional guidance was circulated among NYPD commands in April 2016 when the Department internally published the Legal Bulletin<sup>28</sup> discussing the rights of observers to record police officers. The goals of the Legal Bulletin are articulated as follows:

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<sup>26</sup> “FINEST” refers to the NYPD’s computer system which, among other things, allows messages to be promptly transmitted among and between NYPD commands.

<sup>27</sup> FINEST Message, *supra* (see Appendix C).

<sup>28</sup> Legal Bulletin, *supra* (see Appendix D).

*The purpose of this Bulletin is to provide guidance to police officers on:*

- *The First Amendment rights of individuals to record and/or criticize police action;*
- *How to respond when confronted with permissible First Amendment activities;*
- *How to determine when the activity amounts to interference with police duties and the recommended proportional response to such interference; and*
- *Under what circumstances it is permissible to seize recordings or recording devices, as well as guidance on supervisory review.*<sup>29</sup>

The Legal Bulletin discusses the First Amendment protections of the right to record police activity much more comprehensively than the above-mentioned 2014 FINEST Message. It also goes further than both the FINEST Message and the Patrol Guide by providing examples of how police are permitted to respond to recording civilians in various situations and clearly explaining what responses are prohibited. For example the Legal Bulletin states:

*Recognizing the affirmative right to record police action, **UNDER NO CIRCUMSTANCES** should a Member of the Service:*

- *Threaten, intimidate, or otherwise discourage an observer from recording the police officer's activities, assuming the observer is at a safe distance;*
- *Intentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so; or*
- *Delete any pictures or videos from the observer's camera, or order observer to delete such pictures or recordings.*<sup>30</sup>

In addition to addressing the First Amendment implications of police interference with civilian recordings, the Legal Bulletin also explains that “[a] police officer’s response to an observer’s recording can implicate... Fourth Amendment rights related to search and seizure.”<sup>31</sup> The Legal Bulletin advises officers that “[u]nder no circumstances should a Member of the Service seize a recording device merely because it has captured a law enforcement encounter.”<sup>32</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2 (emphasis in original).

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 4.

## Section Two: Scope of Study and Methodology

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To analyze the issue of police interference and misconduct related to a civilian's right to record police activity, the Civilian Complaint Review Board (CCRB) identified relevant complaints decided by Board panels between January 1, 2014 and December 31, 2016.<sup>33</sup> A complaint was considered to be relevant to this study if a civilian involved in the underlying incident reported to the CCRB that a police officer had engaged in any of the interference-related conduct defined below.

Complaints were deemed relevant if officers interfered with a civilian while the civilian was recording or attempting to record police activity. For the purposes of this report, "interference" refers to any verbal or physical action by an officer intended to prevent a civilian from recording police activity or to make a recording difficult to accomplish. Civilian recordings subject to police interference include audio files, video recordings, and still photographs.

Other relevant complaints included those where officers attempted to interfere with civilian recordings after the fact by searching civilians' recording devices, deleting civilians' recordings, or destroying the recording devices themselves. For instance, such interference occurred when an officer allegedly reviewed the contents of a civilian's recording device to determine whether it contained a recording of police activity. The Board also deemed it interference where a civilian found that his or her recording device no longer contained a recording of police activity, and the Board determined that an officer intentionally caused the recording's deletion. Finally, the Board found interference occurred when officers damaged or destroyed the physical recording device on which a civilian has recorded police activity.

A single complaint often includes more than one interference-related allegation. A "pleading" or "allegation" refers to a distinct form of misconduct that is analyzed in a CCRB investigation. For example, a civilian might allege that an officer grabbed her mobile phone while she recorded the officer arresting another person, and that the officer then broke the phone by throwing it to the ground. In that case, the complaint would include allegations covering the physical seizure of the civilian's phone and the damage to her property. The CCRB began using, or "pleading," the distinct allegation "interference with a civilian's ability to record" in March 2015 as a type of Abuse of Authority within the CCRB's jurisdiction. Prior to March 2015, police interference in civilian recording was reflected in a variety of allegation types that mirrored an officer's alleged actions. For example, if an officer said, "Put your phone away or I'll arrest you," the investigator would plead an allegation of "threat of arrest." Under the new approach, the investigator would now plead a second allegation of "interference with a civilian's ability to record," in addition to the "threat of arrest" allegation.

In order to capture all complaints in which civilians alleged interference-related misconduct, the CCRB created a text-based query using the search terms listed in Appendix B. That query was then applied to the closing reports for fully investigated complaints that were decided by a Board panel between January 1, 2014 and December 31, 2016.<sup>34</sup> The CCRB Policy Unit then reviewed each of the 2,778 complaints that contained one or more of the queried search terms. Of those results, the CCRB identified 257 complaints raising interference-related allegations that fell within the scope of this study.<sup>35</sup>

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<sup>33</sup> The CCRB had no way to store digital files in the database prior to 2012, although the Agency was collecting video evidence in some cases closed prior to 2012.

<sup>34</sup> The terms "phone," "footage," and "recording" were not used as individual search terms because they are commonly used in phrases that do not relate to interference with recording.

<sup>35</sup> A complaint's relevance to this study was determined by the factual allegations of the complaining civilian – not by the allegations pled by the assigned CCRB investigator. This is noteworthy because in reviewing the complaints that were responsive to the above-referenced text queries, 38 complaints were discovered in which a civilian had

In this report, the CCRB has focused upon police interference with recordings made by individuals using hand-held or body-worn devices such as mobile phones, film or digital cameras, audio recorders, and tablets. Although police may also interfere with recording devices that can be operated by civilians remotely, such interference is less common and does not typically involve any face-to-face confrontation between officers and recording civilians. Accordingly, complaints have been excluded from this study where the allegations of police interference involve surveillance camera recordings or recordings made with other stationary cameras that are affixed to walls or objects.<sup>36</sup>

Furthermore, the CCRB excluded three types of encounters from this study, though they raise closely-related issues regarding officer interference with and use of cellular phones. First, certain complaints were excluded in which officers allegedly photographed or video recorded civilians or their identification cards. These complaints were only included in this study if the civilian alleged that the officers' recording activity began in response to the civilian's recording of police activity, and was a form of physical intimidation meant to interfere with the civilian's recording.

Second, the CCRB excluded some complaints in which officers allegedly searched civilians' phones without a search warrant to view the civilians' call logs, photographs, and other content. Such cases were excluded from this study if the civilians' statements and the surrounding circumstances suggested that the motive for these searches was to obtain evidence of criminal activity (e.g., phone calls indicating involvement with narcotics sales) rather than to determine whether the civilian had recorded police activity. Although such warrantless searches are improper,<sup>37</sup> they do not implicate the primary topic of this study, which is police interference with civilians who record police activity.

This study also excluded complaints in which a civilian alleged that an officer took away his or her phone while the civilian was speaking on the phone or about to make a phone call. Such complaints did not constitute interference with civilian recording of police activity.

Finally, it must be noted that there are inherent limitations to performing a police misconduct analysis solely on the basis of CCRB complaint data. Although the CCRB tracks its data carefully and accurately, there is no way for the Agency to account for the experiences of New Yorkers who feel they have been subjected to police misconduct but choose not to file CCRB complaints. For that reason, it is important to remember that while the data included in this report paints an accurate picture of interference-related CCRB complaints, it may not paint a full picture of how this misconduct impacts the city at large.

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alleged officer interference with a recording but no interference-related allegation was pled by the assigned investigator. Such cases were deemed relevant complaints for the purposes of this study but none of the included allegations were deemed to be relevant. The reasons for these pleading errors are further discussed in Sections Six and Seven of this report.

<sup>36</sup> Although excluded from this study, one complaint closed in 2015 raised an allegation of officer interference with a civilian's surveillance system in his car. According to that complaint, officers stopped a man driving a luxury sports car with a temporary out-of-state license tag. The officers stated to the CCRB that the man had refused to provide the documentation necessary to verify his ownership of the car, so they placed him in handcuffs and transported him in their patrol car to the precinct. However, footage from the car's surveillance camera demonstrated that the man provided officers with requested documentation supporting his ownership. Time-stamped results of a DMV database search conducted by one of the officers also established that the officer was given information confirming the man's ownership of the car prior to his decision to detain him. Footage from the camera depicted one officer reaching towards the camera in the rearview mirror, after which the camera stopped recording. The complaint was unsubstantiated because the CCRB could not resolve the dispute between the man's claim that the officer had damaged his camera intentionally and the officer's statement that he had accidentally knocked some wires loose as he adjusted the mirror.

<sup>37</sup> See *Riley v. California*, 573 U.S. 783 (2014).

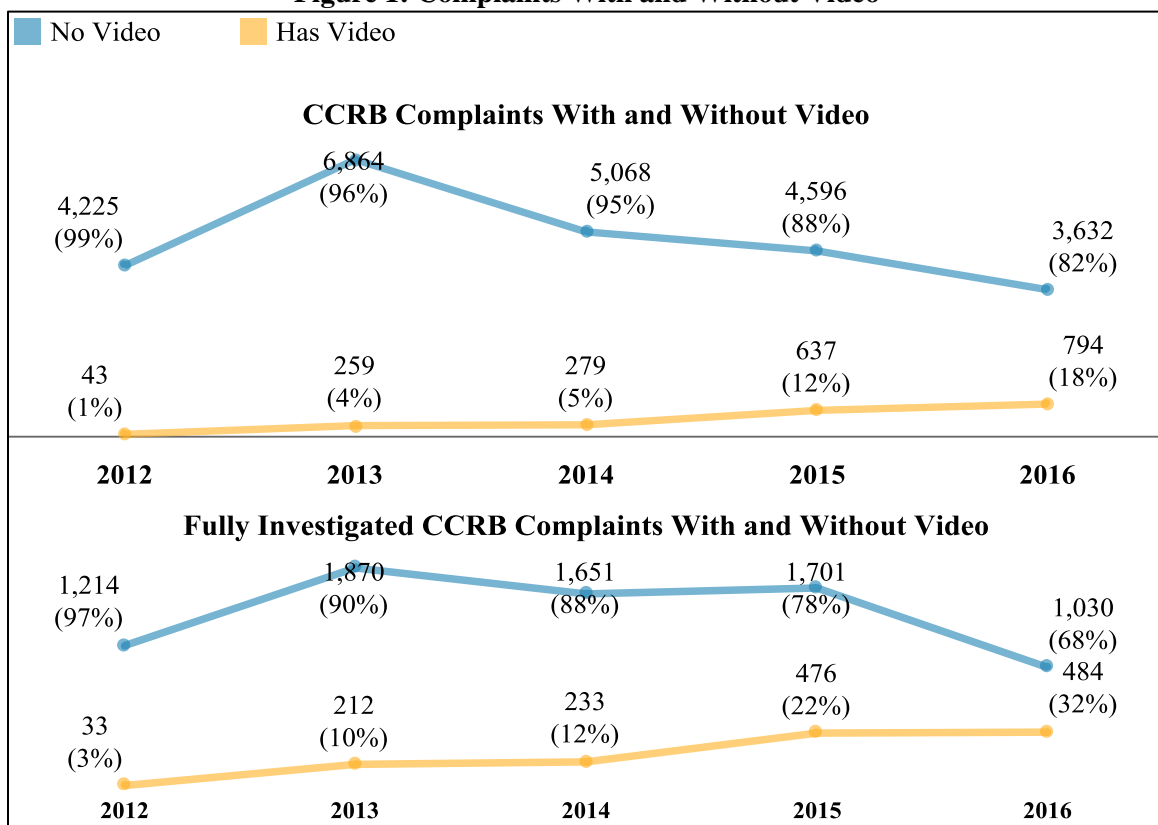
## Section Three: The Presence and Impact of Video on CCRB Investigations and Outcomes Overall

The availability of video evidence in Civilian Complaint Review Board (CCRB) investigations increased significantly over the last five years. Video evidence includes all types of video footage obtained from any source. In addition to the video footage provided by complainants, victims, and other civilian witnesses, the CCRB routinely obtains video evidence from New York City Police Department (NYPD) street cameras and from private surveillance cameras maintained by individuals and businesses.

Of the 4,426 complaints closed by the CCRB in 2016, approximately 18 percent included some form of video evidence. This figure is in stark contrast to the 43 complaints with video evidence closed in 2012, which made up only one percent of the CCRB's total complaint volume.

The prevalence of video evidence in NYPD misconduct investigations is even more apparent in the context of fully investigated CCRB complaints. Complaints that are fully investigated represent those in which civilian witnesses are available to be interviewed and cooperate with the CCRB's investigators. The CCRB closed 1,514 complaints last year after conducting full investigations, nearly 32 percent of which included video evidence of some kind. Again, this is an enormous increase from 2012 when video evidence was only present in three percent of the CCRB's closed, fully investigated complaints.

**Figure 1: Complaints With and Without Video**



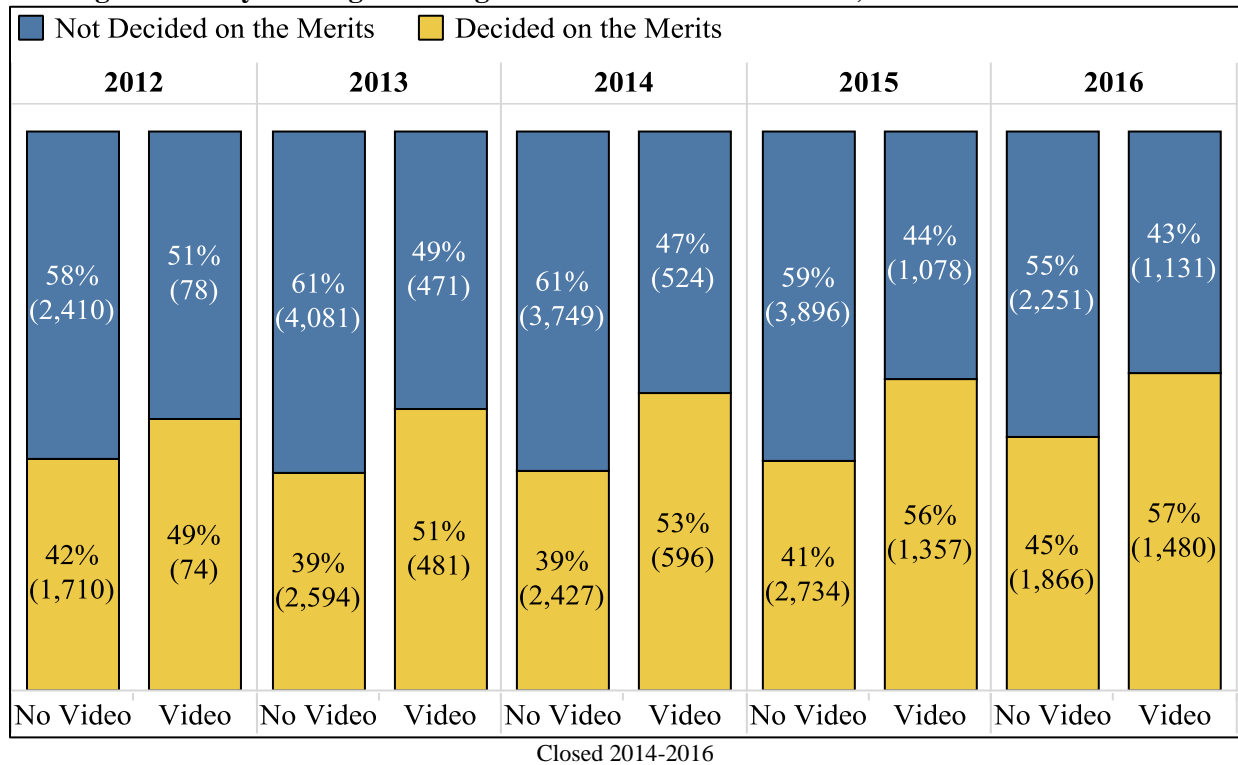
Closed 2014-2016

Video plays a material role in CCRB investigations, not only to substantiate misconduct by officers, but also to exonerate it, or demonstrate that a civilian's allegation is unfounded. One major impact of video in

CCRB investigations is that, overall, the presence of video evidence made CCRB dispositions more definitive.<sup>38</sup>

The CCRB considers an allegation to be closed on the merits when, based on a preponderance of the evidence, the Board reaches a disposition of substantiated, exonerated, or unfounded. These three dispositions indicate that the Board had enough information before it to determine whether the alleged misconduct was more likely to have occurred than not. On the other hand, when an allegation cannot be decided on the merits due to missing or conflicting evidence, it will receive a disposition of unsubstantiated.<sup>39</sup> In complaint allegations that have supporting video evidence, the Board is more likely to arrive at a disposition on the merits of the evidence.

**Figure 2: Fully Investigated Allegations Decided On the Merits, With and Without Video**



For instance, of the 2,611 fully investigated allegations that had video evidence and were closed by the CCRB in 2016, 57 percent were decided on the merits. The same year, only 45 percent of allegations without video evidence were disposed of on the merits. These numbers illustrate the important role that video evidence plays in helping the Board reach reliable and decisive dispositions.

<sup>38</sup> The data presented here cannot be used to determine causation—that is, whether video causes increased substantiation or exoneration.

<sup>39</sup> “Officer Unidentified” is another disposition that is not considered to be on the merits.

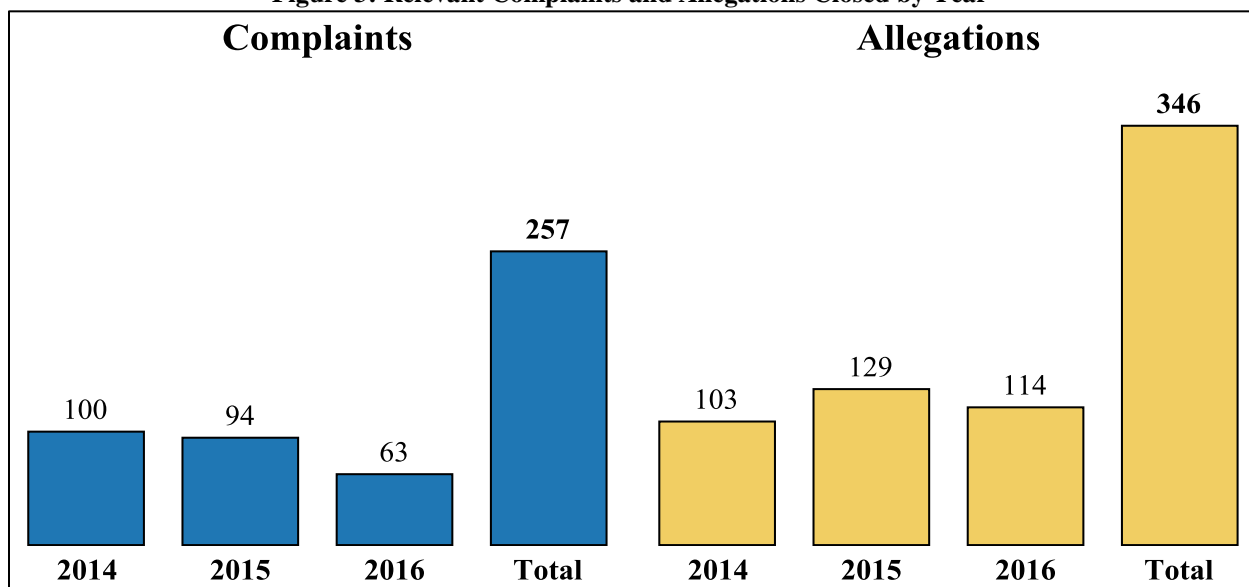


## Section Four: Police Interference in Civilian Recording—A Statistical Review of Complaints

The Civilian Complaint Review Board (CCRB) reviewed three years of closed complaints to determine how many contained allegations that officers interfered with civilian recording of police activity. After isolating 257 complaints containing these allegations, the CCRB examined various characteristics of these incidents, such as whether interference was physical or verbal, whether the recording civilian was a bystander or was part of the initial police encounter, and what led to the initial police contact in interactions that gave rise to the interference complaints. By examining these factors together we obtained a clearer picture of what police interference with civilian recording activity looks like.

**Relevant Complaint Activity.** The CCRB found that 257 fully investigated complaints decided between January 1, 2014 and December 31, 2016 related to police interference with civilian recording of police activity.<sup>40</sup> To put this number in context, the Board decided 15,006 fully investigated complaints between January 1, 2014 and December 31, 2016. The 257 complaints that fall within the scope of this report comprised less than two percent of the total complaints decided by the Board during this period.

Figure 3: Relevant Complaints and Allegations Closed by Year

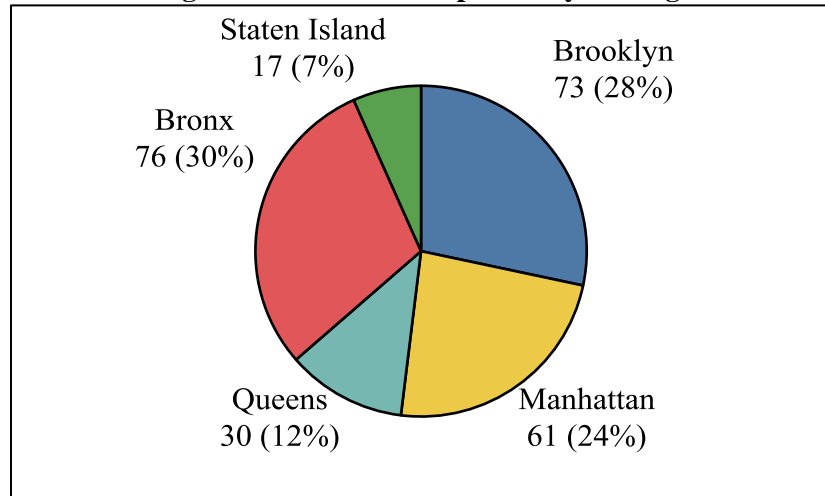


Closed 2014-2016

<sup>40</sup> Although this report tracks relevant complaint activity by the date each complaint was closed and limits its analysis to data from complaints decided by the Board between January 1, 2014 and December 31, 2016, the incidents underlying these 257 relevant complaints occurred as far back as September of 2011.

Between January 1, 2014 and December 31, 2016, the CCRB closed interference-related complaints that occurred in each of the five boroughs. The breakdown of relevant complaints by borough, which is illustrated in the figure below, generally mirrors the overall distribution among the boroughs of all types of complaints received by the CCRB.

**Figure 4: Relevant Complaints by Borough**



Closed 2012-2016

**Civilians Recording as Bystanders or Self-Interaction with Police.** The CCRB analyzed the issue of whether a civilian had recorded his or her own interaction with the police (self-interaction) or whether that civilian was a bystander who recorded the police interacting with other individuals. For the purposes of this study, a civilian’s status as a recording bystander was based on the civilian’s involvement in the police activity at the time he or she began recording. Using this metric, more than 42 percent of the 257 interference-related complaints involved civilians who recorded police as bystanders, while the remaining 58 percent of complaints involved civilians who recorded their own interactions with the police.

**Figure 5: Civilians Recording as Bystanders or Self-Interaction**

Bystander	108 (42%)
Self-Interaction	149 (58%)
<b>Total</b>	<b>257 (100%)</b>

Closed 2014-2016

It is important to note, however, that determining whether a recording civilian should be characterized as a “bystander” is not always a black-and-white issue. For example, many civilians who begin recording as bystanders become involved in the action they record once police officers try to interfere with their recordings. Additionally, many “bystanders” are not merely strangers who stumble upon a police conflict and begin recording. Rather, they are often friends or family members of those with whom the police are engaging. Although these civilians are not the direct targets of police action, they are frequently involved in the police encounter. One example of a civilian who falls within this bystander gray area is a car passenger who records a vehicle stop. Such a passenger did not commit the alleged moving violation that led the police to pull over the car, and he is not, strictly speaking, the target of the car stop. Still, the passenger recording this encounter is certainly more than an observing bystander.

**Types of Interference.** As discussed in Section Two above, police interference with civilian recordings can take many forms. For the purposes of this report, physical interference is defined to include the following:

- Using an asp, nightstick, pepper spray, or other means of physical force against a civilian to stop them from recording;
- Physically seizing or detaining a recording civilian; grabbing a civilian’s hand or the recording device itself;
- Knocking a civilian’s recording device out of their hand;
- Physically blocking the view of a civilian’s camera with one’s body, the light from a flashlight, or another object; and
- Recording the civilian as a means of intimidation.

Verbal interference, on the other hand, includes:

- Commands to stop recording;
- Commands to leave the area of police activity;
- Use of profanity toward a recording civilian;
- Threats to arrest or detain the recording civilian;
- Threats to seize or damage a civilian’s property; and
- Threats of physical force.

**Figure 6: Types of Interference**

Verbal	61 (24%)
Physical	119 (46%)
Physical and Verbal	77 (30%)
<b>Total</b>	<b>257 (100%)</b>

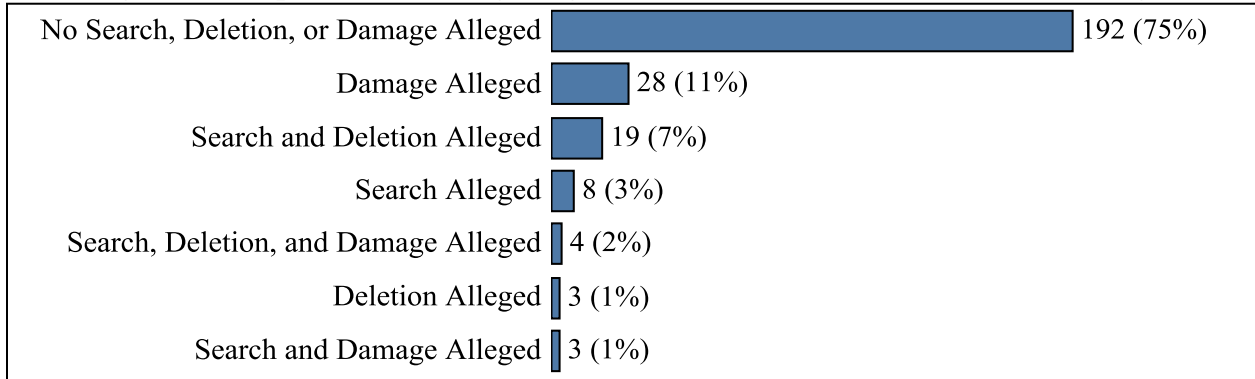
Closed 2014-2016

As illustrated above, of the 257 relevant complaints examined in this report, 24 percent of complaints included allegations of verbal interference, 46 percent included allegations of physical interference, and in the remaining 30 percent of relevant complaints, civilians alleged both verbal and physical interference.

**Allegations of Recording Device Searches, Record Deletion, and Device Damage.** Civilians who alleged that officers interfered with their recording activity on occasion also alleged that officers seized, searched, destroyed, or damaged their recording device, and even that officers deleted the recording (photographs, audio, video) from their device.

Of the 257 interference-related complaints that were closed by the CCRB between January 1, 2014 and December 31, 2016, 65 included allegations by civilians that officers had searched their recording devices, deleted recordings from their devices, and/or damaged their devices.

**Figure 7: Complaints Containing Allegations of Search, Deletion, and Device Damage**



Closed 2014-2016

The CCRB is unable to substantiate many of these cases because officers generally deny having searched the civilian’s phone and there is no additional evidence to verify whether or not a search or deletion has occurred. In such cases, the CCRB may lack the preponderance of evidence needed to make a finding of misconduct.

**Relevant Complaints With and Without Video Evidence.** Most interference-related complaints are supported by video evidence but a significant portion of them are not. Many civilians allege that the interfering officers were successful in their attempts to prevent recordings or destroy recordings after the fact.

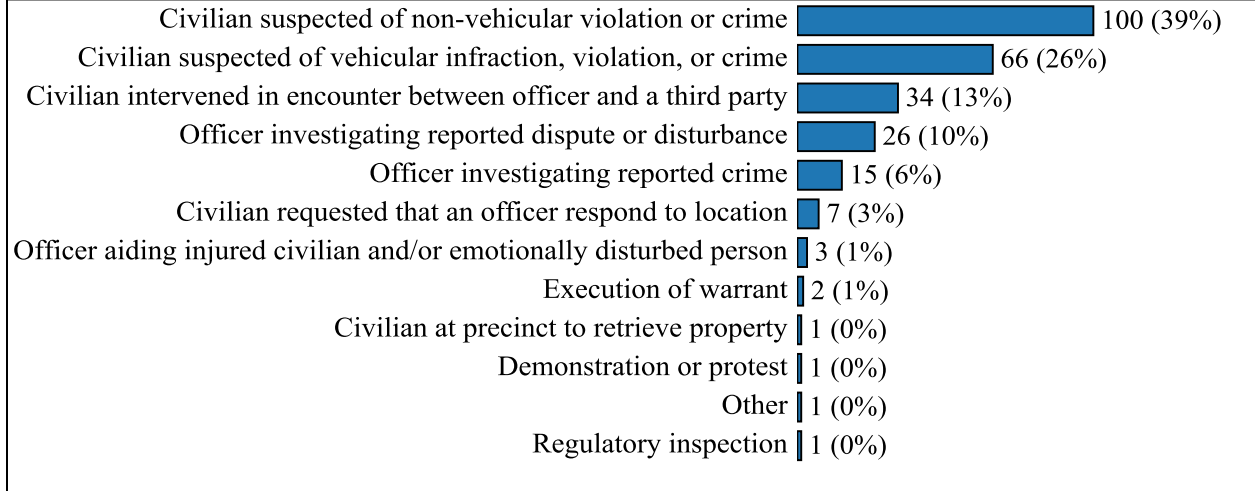
**Figure 8: Interference-Related Complaints with Video and Without**



Closed 2014-2016

**Underlying Reasons for Police Contact in Interference-Related Complaints.** Civilians recorded and attempted to record an array of police activity before officers allegedly interfered, searched phones, deleted footage, or damaged their devices. This police activity included, but was not limited to, officers arresting, summoning, questioning, or stopping civilians. In addition to examining the kinds of interactions between police and civilians that gave rise to interference-related complaints, the CCRB also analyzed why the accused police officers came into contact with these civilians in the first place.

**Figure 9: Reasons for Encounters Leading to Interference Allegations**



Closed 2014-2016

As shown in the figure above, in 100 of the 257 relevant complaints examined in this report (39 percent), civilians were in contact with police officers because the police suspected these civilians of committing non-vehicular violations or crimes. The second most common reason for contact was that the officer suspected the civilian of committing a vehicular infraction, violation, or crime. More specifically, in 66 of interference-related complaints, civilians were suspected of committing vehicular crimes, moving violations, parking infractions, and/or being involved in car accidents. The third most common reason for police contact in interference-related complaints was that the civilian complainant intervened in an encounter between the accused police officer and a third party. This third-party involvement accounted for the initial contact in 34 of the 257 relevant complaints we examined, showing again that a significant number of interference-related complaints arose from bystander involvement in third party police-civilian interactions.

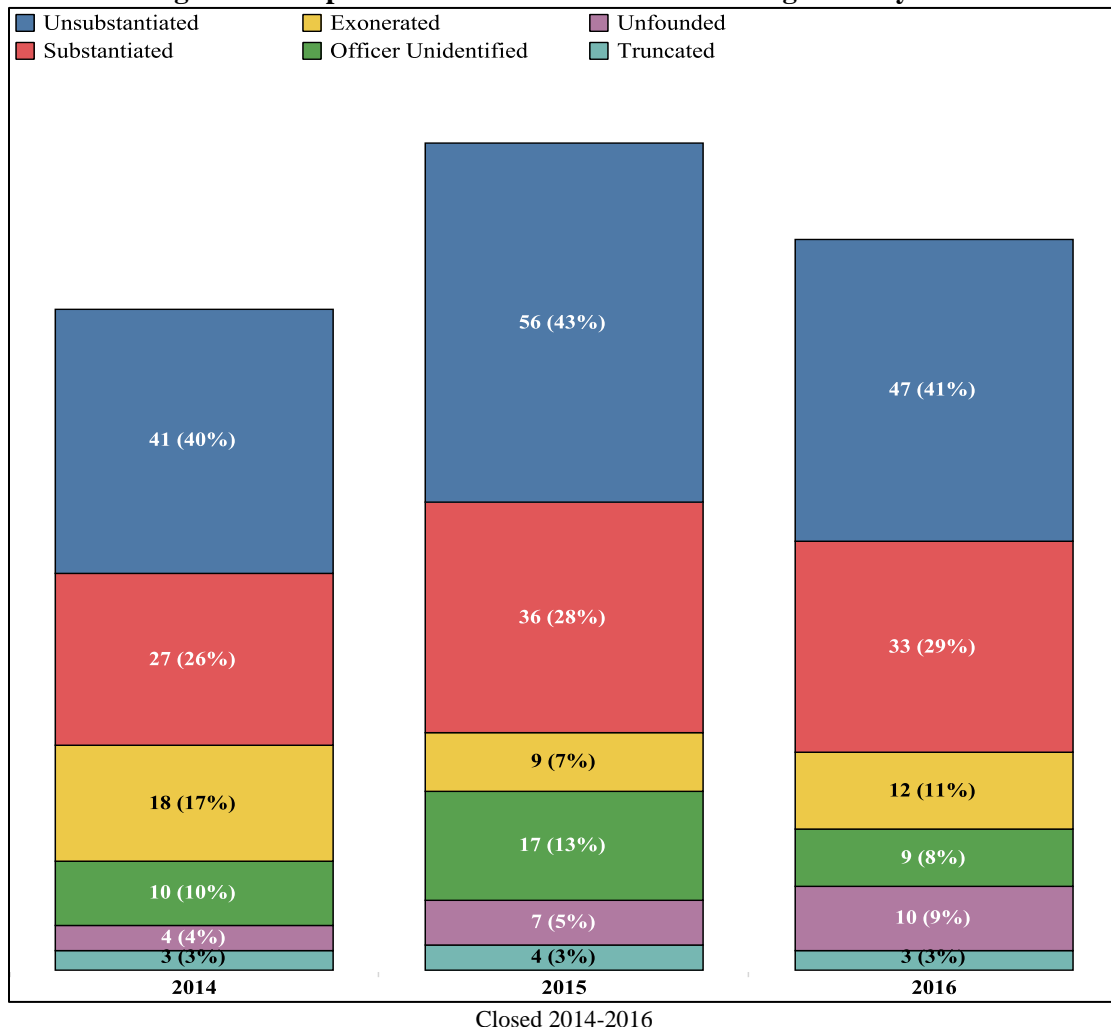
## Section Five: Disposition and Discipline in Interference Complaints

As previously noted, the 257 relevant complaints that fall within the scope of this study contain 346 allegations that specifically address police officers' interference with civilians who record or attempt to record police activity. In discussing certain factual aspects of these civilian-police encounters, it is helpful to look at the incident as a whole, which is why the data in the previous section was primarily calculated by complaint. However, dispositions and disciplinary recommendations are determined by allegation. Accordingly, it is more instructive to look at allegation-level data when discussing the outcomes of interference-related Civilian Complaint Review Board (CCRB) cases.

### A. Dispositions and Officer Demographics in Interference-Related CCRB Complaints

As discussed above, there were 257 complaints closed between January 1, 2014 and December 31, 2016 in which civilians told the CCRB that officers had interfered with their ability to record police activity. After identifying these 257 complaints, the CCRB analyzed the dispositions of the 346 allegations within those complaints that addressed police interference with a civilian's recording activity.

**Figure 10: Disposition of Interference-Related Allegations by Year**

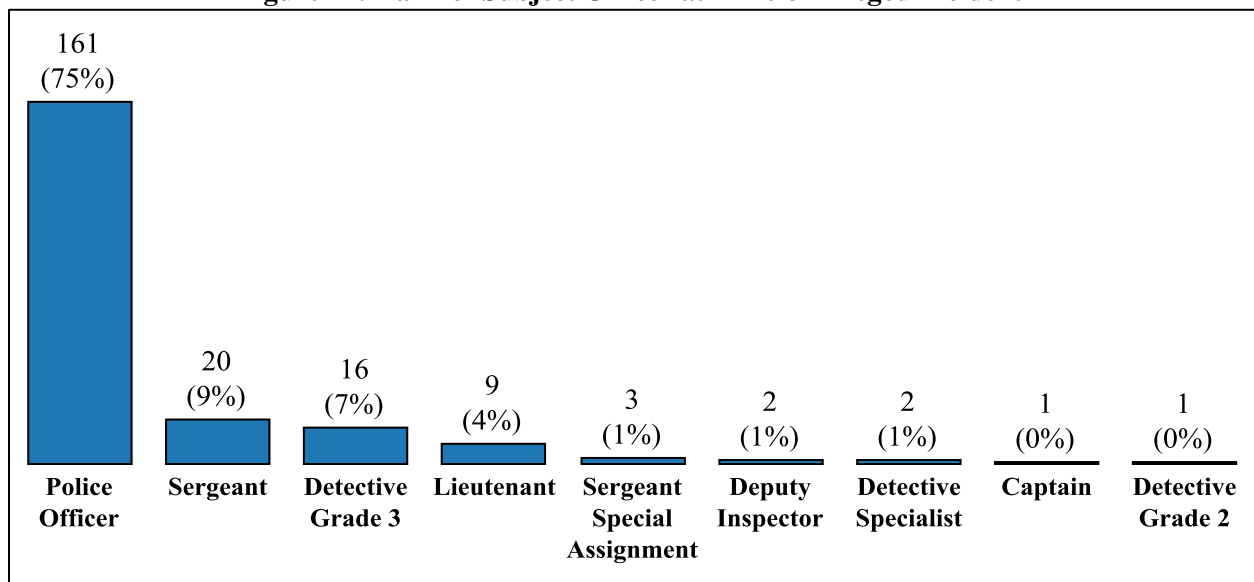


**CCRB Dispositions of Interference-Related Allegations.** As shown in the previous figure, over the past three years, the CCRB substantiated 96 interference-related allegations (28 percent); determined that 144 of the allegations (41 percent) were unsubstantiated; exonerated the actions of the officers in 39 allegations (11 percent); and found 21 (six percent) of the allegations to be unfounded. An additional 36 interference-related allegations (10 percent) were closed because the officer was unidentified and 10 allegations (three percent) were truncated due to the complainant’s lack of availability or cooperation.<sup>41</sup>

Notably, the CCRB has disposed of interference-related allegations with a somewhat steady rate of distribution over the past three years. Out of 346 interference-related allegations, the number of cases that have been found to be substantiated, unsubstantiated, unfounded, and exonerated, respectively, has not changed by more than 15 allegations from year to year.

**Rank and Tenure of Subject Officers.** The 346 allegations reviewed for this study involved 215 subject officers whom the CCRB could identify as having been involved in the allegations of interference, search, deletion, or destruction of a device. Many complaints contain allegations against more than one officer but only one officer can be named per allegation. The vast majority of New York City Police Department (NYPD) Members of Service who were alleged to have been involved in these complaints held the rank of police officer (75 percent).

**Figure 11: Rank of Subject Officer at Time of Alleged Incident**

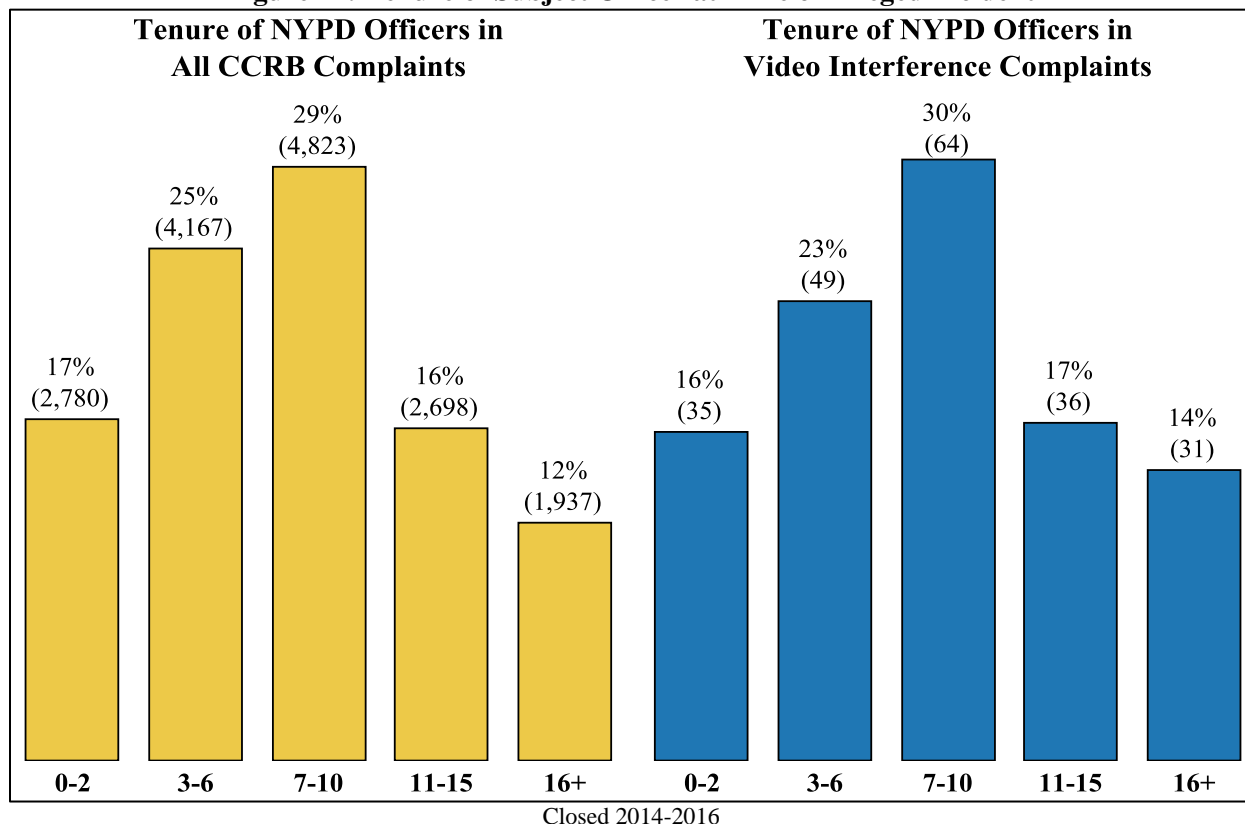


Closed 2014-2016

<sup>41</sup> Complaints containing interference allegations closed as victim uncooperative were included in this study because the victims provided a phone statement detailing the alleging interference by an officer.

In addition to looking at each officer's<sup>42</sup> respective rank, the CCRB also identified the tenure of these officers to analyze the overall level of experience possessed by those who were alleged to have interfered with civilian recordings.

**Figure 12: Tenure of Subject Officer at Time of Alleged Incident**



The tenure breakdown for officers whose interference-related CCRB complaints were closed between 2014 and 2016 closely mirrors the tenure of officers for all CCRB complaints closed during the same period. Of the 16,396 officers who were accused of misconduct during the relevant time frame, 17 percent had less than two years on the force when the alleged misconduct occurred. The figure was only slightly lower in interference-related complaints, where 16 percent of officers had less than two years on the force. The majority of officers in interference-related cases (53 percent) and in CCRB cases generally (54 percent) had been with the NYPD from three to ten years at the time of their alleged misconduct. Seasoned officers with more than 10 years on the force accounted for more than a quarter of misconduct allegations related to interference (28 percent) and for a similar proportion (31 percent) of misconduct allegations overall.

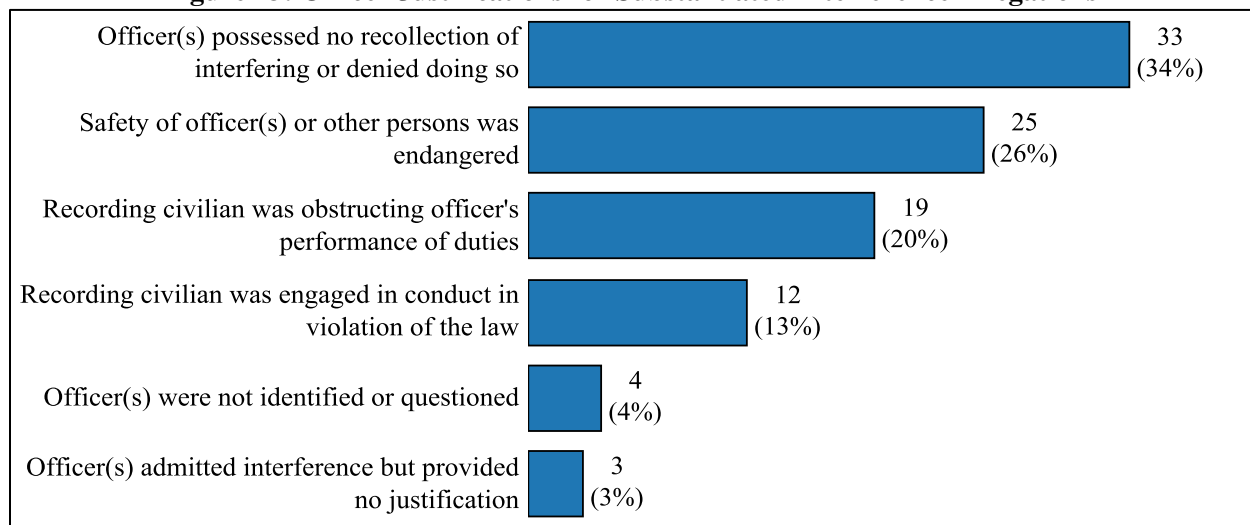
**Justifications Offered for Substantiated Interference Allegations.** As previously discussed, the 257 interference-related complaints examined for this report included 346 allegations directly pertaining to officers' interference with the ability of civilians to record police activity. From these 257 complaints, all of which were closed by the CCRB in 2014, 2015, and 2016, the Board substantiated 96 allegations related to such interference.

<sup>42</sup> Unless there is a specific reference to rank, the word "officer" is used as shorthand throughout this report to refer to all NYPD Members of Service.



The officers against whom interference-related allegations were substantiated denied such interference, claimed no memory of the alleged interference, or offered one or more justifications for their actions.

**Figure 13: Officer Justifications for Substantiated Interference Allegations**



Closed 2014-2016

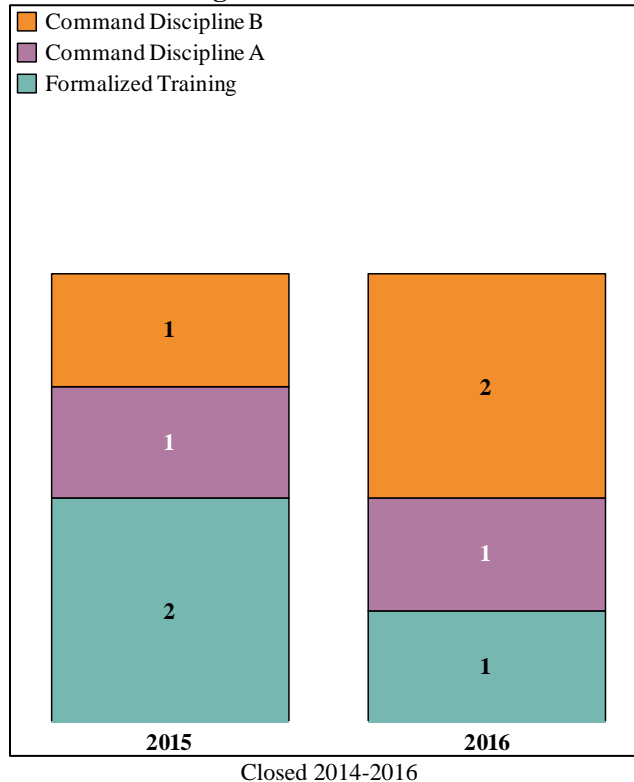
In 34 percent of the allegations in which interference was substantiated, officers told CCRB investigators that they could not recall engaging in the alleged interference or denied the interference all together. For the remaining 63 substantiated interference allegations, officers acknowledged that they had engaged in certain conduct but justified their actions with explanations that fell into at least one of the following categories: (1) the safety of the officers or other persons was endangered, (2) the recording civilian was engaged in conduct that violated the law (unrelated to the recording activity), and/or (3) the recording civilian was obstructing the officers' duties. These categories are consistent with the limited justifications provided in Patrol Guide § 208-03.

***B. Officer Discipline for Substantiated Allegations of Interference***

Any analysis of police misconduct would be incomplete without some discussion of the disciplinary data related to that misconduct. However, interference-related misconduct is unique in a number of ways and must be interpreted with a degree of caution. Because interference-related misconduct covers a wide range of officer behavior of varying degrees of seriousness, and because interference is usually accompanied by other types of misconduct, interference is rarely the sole basis for disciplinary determinations. As a result, data showing what level of discipline was recommended and imposed in complaints with substantiated interference allegations can sometimes be more reflective of the non-interference aspects that factor into a complaint's disciplinary determinations. To avoid presenting this data in a way that is misleading, this section's analysis of discipline recommended and imposed will focus solely on complaints where interference was the only substantiated allegation.

**CCRB Disciplinary Recommendations for Complaints in Which Interference Was the Only Substantiated Allegation.** Of the 257 interference-related complaints closed by the CCRB between January 1, 2014 and December 31, 2016, there were eight complaints in which interference with a civilian’s ability to record was the only substantiated allegation.

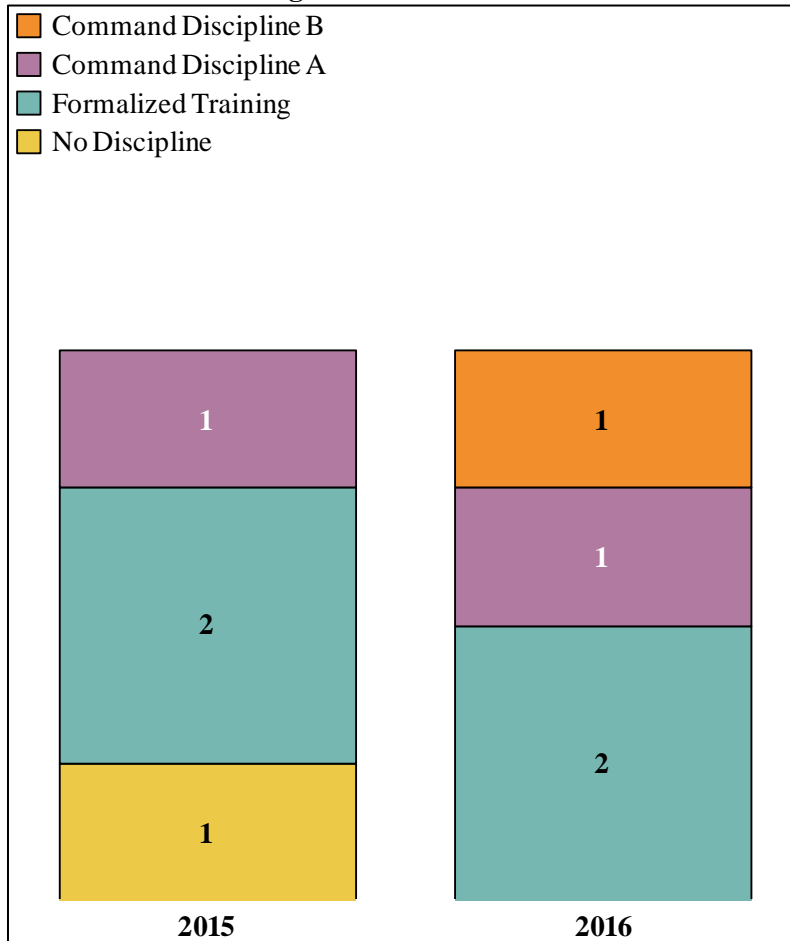
**Figure 14: Disciplinary Recommendations for Officers with Sole Substantiated Allegations of Interference**



During this three-year time period, the Board recommended Command Discipline B (a maximum penalty of forfeiture of up to 10 days of vacation) for three officers with single substantiated allegations of interference, and Command Discipline A (a maximum penalty of forfeiture of up to five days of vacation) for two officers with single substantiated interference allegations. The Board recommended formalized training for the remaining three officers.

***NYPD Disciplinary Decisions in Complaints Where Interference Was the Only Substantiated Allegation.*** Although the CCRB’s disciplinary recommendations are taken under consideration by the NYPD, the Police Commissioner is empowered to make all final disciplinary determinations.

**Figure 15: Discipline Imposed by Commissioner Upon Officers with Sole Substantiated Allegations of Interference**



Closed 2014-2016

As shown in the figure above, Command Discipline A or B was issued against three subject officers who had single substantiated interference allegations. As previously noted, Command Discipline may result in a loss of vacation days. The Police Commissioner ordered formalized training for four officers and one officer received no discipline from the Police Commissioner.

## Section Six: How and Why Police Interfere with Civilian Recording—A Qualitative Assessment

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In a discussion of police officers' interference with civilians who record and attempt to record police conduct, data alone does not paint a full picture of such interference, or of its impact upon New Yorkers. What follows is a qualitative analysis of the civilian complaints that fall within the scope of this study. Examining specific instances of alleged interference gives context to the data provided and illustrates how interference-related police encounters play out for the civilians involved.

### *A. Types of Police Interference with Civilian Recordings*

As discussed in the preceding sections, civilians alleged that police interference with their recordings took a number of forms. Some complainants alleged that officers gave verbal instructions to stop recording or threatened to arrest the civilians if they continued recording. Many other civilians alleged that officers grabbed their recording devices or knocked the devices out of their hands. In some cases, alleged physical interference consisted of officers shining a flashlight at the civilian's recording device or physically blocking the view of the device. In other cases, the physical interference alleged was much more violent.

***Verbal Interference.*** Verbal interference allegations consisted of instructions to put away phones, threats of force or arrest, use of profanity, negative comments about the recording activity, and other forms of verbal intimidation. In a 2015 incident, a civilian's video captures an officer telling the recording civilian, "Keep moving; we're not doing anything wrong." When the civilian notes that he is standing on a public sidewalk, the officer said, "If you're going to be a smartass, we could bring you in for harassment. Would you like that? You want to come in with us?" The verbal exchange escalated, although the civilian maintained his distance from the officer and did not raise his voice. The Civilian Complaint Review Board (CCRB) substantiated allegations that the officer improperly threatened to arrest the civilian, refused to provide a name and shield number, spoke rudely to the civilian, and interfered with the civilian's ability to record the incident.

***Physical Interference.*** Physical force or other types of physical actions were alleged in 76 percent of the relevant civilian complaints included in this report. One common way in which officers physically interfered with civilian recordings was by knocking civilians' recording devices out of their hands. In one 2016 case, officers conducting a vertical search of residential building stopped and frisked two individuals. Several bystanders began recording the incident with cell phones, at which point one of the officers grabbed the cell phone from one of the recording civilian's hands. Based on video evidence from the complainant and other bystanders, the CCRB substantiated allegations against the officer for physical force and interference with the civilian's recording.

Other instances of physical interference were alleged to be much more violent. In a substantiated 2014 incident, the complainant and his son were in the process of parking their car when officers pulled up behind them and approached their vehicle. Officers asked for the complainant's license and when he reached into the back to obtain it from a bag, the officers ordered the complainant out of the car. Officers also ordered the complainant's son out of the passenger side of the car, proceeded to frisk and search the son, and then allegedly punched the complainant's son as they arrested him. The complainant recorded the officers' use of force on his son from approximately five feet away. He alleged that after his son was handcuffed and placed in the police van, an officer turned towards him, used her asp to strike his left hand, seized his phone, and continued to strike his chest and body with the asp. This accounting of events was corroborated by two independent witnesses who watched the incident from an adjoining building. These two witnesses also confirmed that the complainant retreated when the officer approached him and

contradicted the officer's claim that the complainant had aggressively approached her. Medical records showed that the complainant suffered contusions to his arm and back. He was issued a Desk Appearance Ticket for criminal possession of a weapon (a folding knife on his key chain), and a summons for failure to wear a seatbelt. The Board substantiated the officer's use of force against the complainant, but the officer's alleged search or deletion of video footage from the complainant's phone was unsubstantiated.

Other complaints of violent physical interference could not be substantiated by the CCRB. In one such case, a civilian alleged that she recorded police officers arresting her son and escorting him to a police car, at which time another officer picked the civilian up from behind and slammed her onto a neighbor's car in order to prevent her from recording. No police officer admitted to the above conduct and there was no video of the incident, resulting in an unsubstantiated allegation.

***Blocking Recordings.*** In a number of complaints, civilians alleged that police officers physically blocked the view of cameras by standing in front of the civilians' camera lenses or shining flashlights into the lenses. In one such substantiated complaint, a civilian-recorded video shows an officer using his hat to block a cell phone camera and saying "get that phone away from me," after the complainant asked him for his name and badge number.

In another substantiated case, a number of male friends were talking on the sidewalk when several officers pulled up in a marked police car. Officers briefly spoke to one of the males and then handcuffed him, at which time the handcuffed male told his friends to record the incident. When one civilian began recording, an officer physically guided another individual to stand directly in front of the recording civilian. After reviewing the video footage, the Board determined it was self-evident that the officer's intent was to interfere with the civilian's ability to record and substantiated the interference allegation.

The CCRB also received multiple complaints of police officers pointing flashlights at civilians' recording devices to impede their ability to record. In one such case, the CCRB substantiated an interference allegation by a civilian and his wife who were walking down the street when they observed a police officer making an arrest. The civilian began taking photos of the arrest on his iPad and was instructed by the officer to stop taking photographs and to step back. The civilian stepped back but maintained that he had a First Amendment right to photograph the arrest. The officer then shone a flashlight at the iPad. The CCRB substantiated an interference allegation against the officer based on photographic evidence and the consistent testimony of the civilian witnesses.

In a similar 2015 case, an officer stopped a group of individuals suspected of fighting and gun possession. When a third party civilian began to record the stop, an officer turned and pointed a flashlight towards the civilian's camera for nearly three and a half minutes. In that case, the interfering officer never issued any commands toward the recording civilian and the Board substantiated the interference allegation.

Another 2015 case involved a civilian who filmed officers as they arrested someone on an open container charge. When the arrest was completed and an officer observed the civilian recording, the officer told the civilian to move back. The civilian, who responded that he was standing at a reasonable distance, did not move back. The officer then pointed the spotlight of the police van at the recording civilian for over three minutes and rotated the light to follow civilian when he attempted to change positions. Again, the civilian's statements were corroborated by video evidence and the CCRB substantiated the interference allegation.

***Intimidation.*** In addition to physical and verbal interference, several civilians reported actions by police officers that seemed intended to intimidate civilians. Such acts of intimidation included reciprocal recording of civilians by officers using their own cell phones. In one such complaint, a civilian began recording an officer as the officer frisked and searched another person. A second police officer then

approached the civilian, stood between the civilian and the police activity she was recording, and began filming the civilian with his mobile phone. The CCRB substantiated the interference allegation based on the clear video evidence in that case.

Other forms of intimidation were more severe. In a 2015 case, a civilian called 911 after he was assaulted at a bar. Officers responded and the civilian became angry when officers could not find the assailant. After a heated verbal exchange, the responding officers told the civilian that he would be arrested if he did not leave the location. The officers then went back to their marked police vehicle to prepare their complaint paperwork, at which time the civilian stood in front of the vehicle and attempted to take a photograph of the officers' license plate. At that point, the officer in the driver's seat drove the vehicle toward the civilian and stopped within inches of his body before driving away. Finding that the video evidence proved that the officer intentionally drove the police vehicle towards the civilian in a threatening manner and with the intention of preventing him from taking a photo of the license plate, the CCRB substantiated allegations against the officer for interfering with the civilian's recording, and for threatening him with the use of physical force.

### ***B. Searches, Damage, and Deletion***

Substantiation rates were drastically lower among complaints alleging that officers had searched civilians' phones, deleted recordings, or physically damaged recording devices. In most of these instances, the definitiveness of the complainants' own video recordings was no longer present and could not provide independent corroboration as to the merits of the allegations. Yet certain facts, such as contemporaneous recordings from surveillance cameras or other civilians, sometimes led to a conclusion that an improper search or deletion of footage occurred.

***Searches of Recording Device Contents.*** As stated above, in many cases, allegations that police officers have searched a civilian's recording device are unable to be substantiated by the CCRB due to a lack of supporting evidence. There are, however, instances when the Board is able to substantiate these allegations. In a 2012 incident, a man began recording on his cell phone as officers stopped his neighbor for riding his bicycle on the sidewalk. A patrol car pulled up to the recording civilian and the officer who exited the vehicle and immediately took the cell phone from the civilian's hand. All data on the civilian's cell phone, including the video recording, was deleted. However, the entire incident was captured by a surveillance camera. The surveillance footage depicted the officer looking at the cell phone and pressing various buttons. The CCRB substantiated the officer's interference and improper search of the phone.

One substantiated 2016 complaint involved a civilian who used his cell phone to make an audio recording of his interaction with a police officer. The officer handcuffed and frisked the civilian, at which time the officer discovered the phone. The officer asked the civilian if he had recorded the conversation and the civilian said yes. The officer then searched the civilian's phone and deleted the recording. The civilian was later able to recover the deleted audio file, which provided evidence that the officer had searched the phone. However, because the civilian was still in possession of the recording and there was no additional evidence confirming that the video had ever been deleted, the Board found the deletion allegation to be unsubstantiated.

In another complaint, two brothers were involved in a car stop that led to a search. When one brother began recording the officer, the officer took that brother's mobile phone and brought it back to the police vehicle for several minutes. The CCRB substantiated the search allegation, finding that there was no other legitimate explanation for the officer to sit with the civilian's phone for so long.

***Deletion of Recordings.*** Allegations of deleted recordings are inherently difficult to prove because by their very nature, these cases necessarily involve missing evidence. For example, in a 2014 case, a civilian

recorded an officer issuing a summons to an individual on a subway platform. When the officer observed the civilian recording, the officer taunted the civilian, filmed the civilian with the officer's own cell phone, and eventually arrested the civilian. When the civilian was later released from the precinct, he got his camera back and found that the footage he had recorded had been deleted. The Board substantiated allegations against the officer for discourtesy and improper arrest. However, the allegations that the phone had been searched and records deleted<sup>43</sup> were not substantiated because no one had observed the officer searching the phone or deleting footage.

In 2016, an allegation of deletion was able to be substantiated based on surveillance footage and an admission by the officer involved. In that case, a minor was arrested for stealing from a café and a patron of the café photographed the incident with his mobile phone. Approximately 10 minutes later, the arresting officer asked the civilian to delete any photos of the officer's interaction with the arrestee. When the civilian refused to delete them, the officer told the civilian that the individual arrested was a minor and that the civilian could be arrested for unlawful surveillance if he did not delete the photographs. When the civilian again refused to delete the photos, the officer took the civilian's phone, searched it and deleted the photos. The search and deletion allegations were substantiated.

***Damaging and Destroying Recording Devices.*** Apart from improper search and deletion, civilians have alleged that officers physically destroyed or damaged the recording device itself. These allegations include both incidents where the interference and physical damage or destruction occur almost simultaneously (e.g., the officer knocks the phone out of a civilian's hand, it falls to the ground and breaks) as well as situations where destruction or damage occurs separately from the interference. As is the case with allegations of device searches and record deletion, the CCRB is often unable to substantiate or exonerate allegations that a recording device was damaged. In 2014, the CCRB found a damage allegation to be unsubstantiated in a case where a civilian claimed officers had grabbed her phone and thrown it to the ground, causing the screen to crack. All of the officers involved denied throwing the phone or seeing another officer do so and the Board was unable to reconcile the conflicting testimony of the civilian and the officers.

Substantiated instances of damage or destruction of recording devices can be proven by video evidence from sources other than the recording civilian. In one incident, surveillance cameras captured officers physically grabbing a civilian's body as he began recording their stop and questioning of a woman on a sidewalk. After officers arrested the civilian, placed him in their patrol car, and began driving away, surveillance video captured one officer throwing his cell phone out of the car window. The phone landed on the sidewalk. The civilian was charged with Obstructing Governmental Administration, Disorderly Conduct and Resisting Arrest, but these charges were all eventually dismissed.

In a 2014 incident, the officer's interference and destruction of a cell phone occurred simultaneously. The complainant sat in his car with two friends when officers approached him, told him the car smelled like marijuana, and asked him if he had been smoking it. When the complainant said no, officers removed the occupants from the car, frisked and searched them all, and then allowed them to return to the car. When an officer walked to the vehicle to return the complainant's identification, the complainant alleged that the officer saw his phone resting on his arm, assumed he was recording, grabbed his phone from his hand, and threw the phone to the ground, stomping on it. The officer then forcefully arrested the complainant. The CCRB found that the officer lacked credibility given three prior complaints of the same officer destroying civilian cell phones, and substantiated misconduct. The CCRB found in a subsequent 2015 incident that this officer again interfered with a civilian's attempt to record an incident by grabbing his

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<sup>43</sup> The allegation of record deletion in this case was pled as property damage. The CCRB only began using a deletion allegation in 2016.

hand and pulling him to the ground. Though the officer claimed that he used force only in response to the civilian pushing him, he did not arrest or issue a summons to the civilian.

### ***C. Summonses, Detentions, and Arrests***

Various sources of evidence support an inference that, in certain cases, police officers effected arrests and issued summonses for the purpose of retaliation. For example, in a 2015 case, a sergeant is captured on video pointing to the recording civilian and telling another officer, “Grab this guy too. This guy too. Grab him.” The video ends after that officer grabs the civilian’s arm and places the civilian under arrest. When interviewed by the CCRB, the sergeant claimed that he had observed the civilian push a nightclub bouncer and had decided to arrest the civilian for that crime before the civilian began recording. However, surveillance video from the nightclub showed no physical contact between any civilians and the bouncer and the complaint was substantiated.

In a 2015 case, a civilian recorded police officers as they searched a car across the street. The civilian told the CCRB that an officer walked over to him, knocked the civilian’s phone out of his hand, and began placing him under arrest. This account was corroborated by both civilian and police witnesses. The civilian was charged with Obstructing Governmental Administration, a misdemeanor. The corresponding arrest report stated that the civilian stood in the middle of the intersection and prevented officers from safeguarding the car being searched. However, the civilian’s cell phone video of the incident showed that he had been standing a full traffic lane away from the car search and was interfering. As a result, the complaint was substantiated by the CCRB

Even without video, an arrest or summons may appear retaliatory on its face given the facts of the case. In a 2014 incident, for example, a civilian began audio-recording an officer’s stop of the civilian’s friends. The officer grabbed the audio-recorder from the civilian’s shirt pocket, then issued him a summons for possession of a box cutter under a section of the New York City Administrative Code that prohibits minors from possessing box cutters. The complainant was over 50 years old and clearly could not be mistaken for a minor and the CCRB substantiated the improper issuance of a summons.

### ***D. Complaints in Which Interference Was Not Pled***

While conducting a comprehensive review of CCRB interference complaints for this study, the use of targeted keyword queries led the CCRB to identify 38 relevant complaints closed between 2014 and 2016 in which civilians claimed police interference with their recording activities but CCRB investigators did not plead any interference-related allegations.

A number of these complaints were closed prior to March of 2015, which is when the CCRB added a new interference allegation. In one such 2013 case, which was closed in 2014, a civilian recorded a police officer who was arresting the civilian’s friend. Based on the recording activity, the officer arrested the civilian for Disorderly Conduct. A third individual then took over the filming and he was also arrested for Disorderly Conduct by the same officer. The entire incident was captured on video and the CCRB substantiated allegations against the officer for improper issuance of both summonses and for improper threats of arrest. However, there was no allegation addressing the officer’s interference with the civilians’ ability to record.

In complaints closed since the CCRB’s addition of interference allegations in 2015, some investigators’ failure to allege interference shows the need for additional training. For example, it is well-settled CCRB policy that a police officer commits misconduct when he or she improperly attempts to interfere with a civilian’s recording activity, regardless of whether the officer’s actions actually result in interference. However, in a case that was closed in 2016, the investigator did not understand this policy. The officer in



that case struck a civilian with a baton while the civilian was recording a cell phone video and then grabbed for the civilian's phone. The Board substantiated a misconduct allegation against the officer for his use of force but no interference allegation was pled. In the closing report, the investigator incorrectly explained that no interference-related allegation was included because the subject officer never actually gained control of the civilian's phone and was unsuccessful at hindering the recording.

In another complaint closed in 2016, the Board substantiated a discourtesy allegation against an officer who knocked the cell phone out of a civilian's hand as the civilian attempted to record a video of the officer. The investigator incorrectly failed to plead an interference charge in that case, reasoning that the officer's actions did not constitute interference with a recording because the civilian had not yet begun to record when the phone was knocked out of the civilian's hand.

As discussed in the following section, these cases and others like them indicate that the CCRB must improve its training of investigators so they are better equipped to handle allegations of interference.

### ***E. Types of Civilian Recorders***

***Civilians Recording Their Own Police Interactions.*** In cases where civilians are recording their own interactions with police officers, the right to record tends to be more limited. In 2015, one civilian attempted to use his cell phone to record officers as they placed him under arrest. One of the arresting officers knocked the phone out of the civilian's hand and the CCRB exonerated that conduct. The civilian was not an observer but the target of the arrest. Under the circumstances, the officers' interference with the civilian's recording activity was proper.

There are, however, situations in which a civilian has the right to record his or her encounter with police officers. In a 2016 case, a civilian on the street was carrying a small box when he was stopped by officers. The officers questioned the civilian about the box and eventually searched it. When the civilian attempted to record the officers using his cell phone, one of the officers grabbed the cell phone and held it until the end of the encounter. The Board substantiated the interference allegation.

***Civilians Recording as Third Party Bystanders.*** Many of the interference complaints received by the CCRB are from bystanders who were not initially involved in the police encounter being recorded. In a 2015 incident, a civilian saw police officers stopping and frisking an individual in a park at around 9:45 p.m. The civilian began filming the incident on his cell phone from several feet away, which prompted an officer to walk over to the civilian, stand close to the phone to block its view, and then grab the phone from the civilian. The officer then issued two summonses to the recording civilian, one for being in the park after dusk and another for not complying with park rules, both of which contradicted park signs and were dismissed in court. The CCRB substantiated the allegation of recording interference and advised the New York City Police Department's Internal Affairs Bureau (IAB) of the officer's potentially false official statements denying the seizure of the civilian's phone.

In another case, a husband and wife alleged that an undercover police officer accosted them as they walked down the street, pointed his gun at them, and threatened to shoot them. After the couple walked away, other officers followed and arrested them for obstructing governmental administration. When interviewed, the subject officers told the CCRB that the couple had noticed the undercover officer, shouted "snitch" to alert bystanders to the undercover officer's identity, and proceeded to follow the undercover officer on foot as the husband took out his phone to film the undercover officer. The complaint was ultimately deemed unsubstantiated because the CCRB could not resolve the conflicting factual accounts made by the civilians and the officers involved.

## ***F. Reasons for Police Interference with Civilian Recording***

As stated above, officers with substantiated allegations of interference denied engaging in such conduct, claimed no memory of such conduct, or justified their actions with explanations that narrowly aligned with the three justifications provided in Patrol Guide § 208-03. These justifications include: (1) the safety of the officers or other persons was endangered; (2) the recording civilian was engaged in conduct that violated the law (unrelated to the recording activity); and/or (3) the recording civilian was obstructing the officers' duties.

In some complaints, police officers were accused of interfering with civilian recording activity but said they did not recall doing so or denied the allegations. Of these complaints, the CCRB found several to be unsubstantiated because conflicting accounts given by the civilian and officer could not be resolved. For instance, in a 2014 case, an officer approached a food cart vendor and told him to move his cart. When the vendor's manager arrived, he began recording the incident on his phone. While the manager alleged that the officer told him to put his f—ing phone down and then grabbed the phone, the officer denied both allegations. The CCRB found the complaint "unsubstantiated." Yet, in other complaints, the CCRB could substantiate the interference despite officers' denials or lack of memory. In a 2015 incident, for example, a sergeant told the CCRB that he did not recall whether a civilian was trying to take photographs of his patrol car with his phone, and denied telling the civilian that he would go to jail if he took a photograph. The CCRB substantiated the interference allegation, however, because an audio recording captures the sergeant making exactly this threat.<sup>44</sup>

In a 2013 incident, an officer justified taking a cell phone from the hand of a recording civilian in order to confirm that it was not a cell phone capable of firing bullets. No allegation of interference was pled, but the CCRB did substantiate the allegation that the officer improperly searched the phone and deleted footage. The CCRB found that, even if the officer was justified in confirming that the phone was not a weapon, the fact that he took the phone to his car and remained with it for several minutes supported a finding that he searched the phone rather than simply viewing the exterior for holes indicating it could be used as a weapon.

Finally, in three complaints, officers admitted to actions tantamount to interference with civilian recording, but did not provide a justification for their actions. In another incident, an officer was captured on a civilian's cell phone video telling him to go away and pushing him down the street. The officer confirmed that the civilian was not interfering with other officers engaged in a stop and frisk of the civilian's friends.

## ***G. Permissible Restrictions on Civilian Recording***

Although the right of civilians to record police activity is broad, it is not absolute. As stated above, the Patrol Guide outlines three justifications for interference with recording civilians and, accordingly, the CCRB has exonerated the interfering conduct of officers in numerous cases. One such exoneration arose from a 2015 complaint. In that case, an officer stood at the side of a car during a nighttime traffic stop and looked inside the car window. A passenger inside began recording, and used the flashlight on his phone. Video taken by the passenger demonstrated that the light emanating from the phone prevented the officer from seeing, and that the civilian did not turn off the light despite the officer's request that he do so. The

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<sup>44</sup> The CCRB also referred the sergeant to IAB for further investigation of a false official statement. Even though the CCRB interviewed the sergeant within three months of the incident, the sergeant stated he could not recall many details of the incident. When the CCRB played an audio recording of the incident for the sergeant, not only did this not refresh his recollection of making several discourteous and offensive statements to the civilian, he claimed that he did not recognize the voice speaking clearly and loudly on the recording as his own.

CCRB exonerated the allegation of interference with the person's right to record due to the officer's legitimate safety concerns.

In a 2016 case, a civilian began recording an officer during a car stop. The officer repeatedly asked the civilian to put the phone down and exit the vehicle but the civilian refused, stating that he would exit the car but had the right to keep recording. The officer told the civilian that he needed to conduct a frisk and that the civilian could keep recording but had to place the phone down. The civilian again refused to comply, at which point the officer took the phone from the civilian's hand and placed it on the seat of the vehicle with the camera facing upwards. The Board exonerated the interference allegation against the officer, finding that the interference was reasonable because the civilian was obstructing the officer's ability to perform a lawful frisk.

## Section Seven: Recommendations

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As indicated throughout this report, civilian recordings of police activity are on the rise. Whether this trend is simply a byproduct of ubiquitous mobile recording devices or evidence of a widespread social response to current events, the right of civilians to record the public actions of police officers is rooted in the First Amendment of the Constitution and must be protected.

The data presented in this report shows a decline in Civilian Complaint Review Board (CCRB) complaints of police interference with civilian recording. In 2016, the CCRB closed 63 complaints in which civilians alleged police interference with their recording activities. This number represents a 33 percent drop from the 94 interference-related complaints closed in 2015. However, more can be done to eliminate improper police interference with civilian recordings.

### *A. Improvements to CCRB Data Collection and Investigator Training*

As discussed above, the CCRB identified 38 relevant complaints closed between 2014 and 2016 in which police interference with recording activity was alleged by the complaining civilian but was not pled by CCRB investigators. Although the majority of these complaints were closed prior to the CCRB's addition of a new interference-related allegation in March of 2015, these numbers suggest a need for additional training of CCRB investigators. For that reason, it is recommended that the CCRB take steps to ensure that the following is reinforced to all investigators during training:

- Members of the public are permitted to record police officers engaged in their duties, unless such recording actions interfere with an officer's ability to perform his or her official duties.
- Members of the public can record officers in public spaces and on private property, provided the person recording has a legal right to be present.
- An officer has committed misconduct when his or her actions indicate a clear attempt to improperly interfere with a civilian's recording of police activity; this is true regardless of whether such interference was successful.

### *B. Supplemental Patrol Guide Section and Training Addressing the Right to Record*

The New York City Police Department (NYPD) Patrol Guide, which contains the rules that police officers must follow in carrying out their official duties, includes only a limited discussion of a civilian's right to record police activity. While the NYPD has issued internal guidance<sup>45</sup> informing officers of a civilian's right to record, this guidance must be enhanced and codified. It is, therefore, essential that the Patrol Guide be updated to include a section with comprehensive guidelines for officers to follow when they encounter a civilian who wants to record police conduct.

Currently, the Patrol Guide refers to a civilian's right to record only indirectly – and very briefly – in the middle of an unrelated section entitled, “Arrests - General Processing.”<sup>46</sup> That section instructs officers that “onlookers” have the right to be present during police encounters and mentions that the acts of “[t]aking photographs, videotapes, or tape recordings” do not, alone, provide probable cause to arrest a civilian.

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<sup>45</sup> See Appendices B and C.

<sup>46</sup> NYPD Patrol Guide §208-03.

The right of a civilian to record was made more explicit by the NYPD in the FINEST Message issued in 2014<sup>47</sup> and was further explained by the Department in an internally circulated Legal Bulletin in 2016.<sup>48</sup> The content of the FINEST Message is an improvement upon what is currently in the Patrol Guide but is extremely limited in terms of the practical guidance it offers. For example, the message says that civilian recordings “may not interfere with police operations” without defining what actions would constitute interference. The Legal Bulletin, on the other hand, is clear, detailed, and uses specific examples and hypotheticals to illustrate appropriate officer behavior. However, circulating a legal bulletin internally does not have the same impact as codifying these important principles in the Patrol Guide.

One problem is that the Legal Bulletin was distributed to NYPD commands for training purposes but was not made available to the public or to the CCRB. Policy transparency on the part of the NYPD is crucial to maintaining public trust in the Department. It is not enough for the NYPD to explain the rights of recording civilians to police officers. Members of the public and the CCRB should also have access to Department-generated explanations of civilians’ rights, as well as any instructions to officers defining appropriate conduct.

Moreover, this sort of guidance should be included in the Patrol Guide for police officers’ ease of reference. Although the Legal Bulletin is available to officers through the NYPD’s intranet, officers who want to refresh their knowledge of its policies must affirmatively seek it out. Instead, the Legal Bulletin’s important guidance for dealing with recording civilians should be located in the same place as all other rules governing proper police conduct—the NYPD Patrol Guide.

If the NYPD does add a Patrol Guide section dealing with a civilian’s right to record the police, the comprehensive and detailed policy that was issued in 2012 by the District of Columbia’s Metropolitan Police Department should serve as a model.<sup>49</sup> According to this policy, an effective Patrol Guide section that addresses civilians’ recording rights should do the following:

- Clearly state that members of the public are permitted to record police officers engaged in the exercise of their duties, subject to a few, specific limitations.
- Clarify that members of the public, including members of organizations whose mission is to record police activities, can record officers while in public places and settings, as well as on private property, provided the recording party has a legal right to be present.
- Define what police actions constitute “interference” with a civilian’s right to record and expressly identify that the following conduct is prohibited when intended to impede a civilian’s ability to record:
  - Verbal commands to cease recording;
  - Threats to arrest, seize or damage property, or use force against the individual;
  - Use of physical force against the recording civilian or the recording device itself;
  - Physical obstruction of the view of the recording device;

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<sup>47</sup> See Appendix C.

<sup>48</sup> See Appendix D.

<sup>49</sup> Metropolitan Police Department, GO-OPS-304.19 (Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public), July 19, 2012, *available at* [https://go.mpdconline.com/GO/GO\\_304\\_19.pdf](https://go.mpdconline.com/GO/GO_304_19.pdf) (last visited June 23, 2017) (attached hereto as Appendix E).

- Arrests or detention of recording civilians, including the issuance of a summons or a desk appearance ticket; and/or
  - Other physical or verbal intimidation of the recording civilian intended to prevent the civilian from recording or to make recording more difficult to accomplish.
- Point out that civilians are not permitted to interfere with police activity or jeopardize the safety of police officers or other members of the public, giving examples of actions that would constitute actual interference and those that would not.
  - Direct officers that if a recording civilian interferes with police activity, officers should not tell such civilians to stop recording, but instead should ask such civilians to move to a position that will not interfere with the police.
  - Remind officers that searches and seizures of cell phones and other recording devices require a search warrant, and may only be permitted without a warrant in certain delineated circumstances.
  - Emphasize that under no circumstances should officers delete recordings from cell phones or other recording devices, or destroy or damage the recording devices themselves.

In addition to creating a new section in the Patrol Guide to address civilian recording of police activity, the CCRB further recommends that the NYPD implements training to ensure that officers comply with the updated Patrol Guide parameters. The analysis of three years of interference-related CCRB complaints shows that officers who interfere with civilian recordings often do so out of frustration because they do not want to be filmed. Implementing training that teaches officers about the legal rights of recording civilians, including members of organizations whose mission is to record police activities, and incorporates principles of de-escalation might help mitigate the number of interference-related CCRB complaints made against officers.

### ***C. NYPD Engagement With Community Organizations Committed to Recording Police***

The CCRB received a number of interference-related complaints from individuals affiliated with organizations whose mission is to record police activities. The CCRB substantiated more than half of those complaints. Therefore, the CCRB recommends that the NYPD create opportunities for open dialogue between police officers and community members who organize to record police activity.

### ***D. Conclusion***

The data analyzed for this report only reflects the experiences of civilians whose interactions with police are the subject of complaints investigated by the CCRB and, therefore, does not represent the incidents of interference that may go unreported. However, even with its limitations, the data supports the conclusion that officer interference with civilian recordings of police conduct is an issue in New York City. Implementing the recommendations proposed herein should reduce the incidence of police interference. Doing so will protect the rights of New Yorkers while helping to prevent tense confrontations between officers and members of the public.

# Appendix A

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## ***Background of the CCRB and Glossary***

The Charter of the City of New York empowers the Civilian Complaint Review Board (CCRB) to receive and investigate complaints from members of the public concerning misconduct by officers of the New York City Police Department (NYPD).<sup>50</sup> The CCRB is required to conduct its investigations “fairly and independently, and in a manner in which the public and the police department have confidence.”<sup>51</sup> Under the City Charter, the CCRB has jurisdiction to investigate the following categories of police misconduct: Force, Abuse of Authority, Discourtesy, and Offensive Language, collectively known as “**FADO**.”<sup>52</sup> The CCRB will also note “**other misconduct**” when, during the course of its investigation, it uncovers certain conduct by NYPD officers that falls outside the CCRB’s jurisdiction but that the Department has requested be noted and brought to its attention. Examples of “other misconduct” include failure by officers to enter necessary information into their activity logs (also known as “memo books”), failure to fill out appropriate NYPD forms or to otherwise document an incident as required, and evidence suggesting that officers have made false official statements to CCRB investigators.

The “**Board**” consists of 13 individuals. Of the 13 members, the Mayor designates five, the City Council designates five, and the Police Commissioner designates three members who are required to have experience in law enforcement. Apart from the members selected by the Police Commissioner, none of the Board members may have experience as law enforcement professionals or be former employees of the NYPD. The Mayor selects one of the 13 members to serve as Board Chair.

The Agency consists of a 110-member Investigations Division responsible for investigating allegations of police misconduct within the Agency’s jurisdiction (“FADO”), and for making investigative findings. The most serious police misconduct cases are referred to attorneys in the Agency’s Administrative Prosecution Unit, who are responsible for administratively prosecuting these cases at One Police Plaza. The Agency also includes a Mediation Unit which resolves complaints by facilitating mediations between police officers and civilians. The Outreach Unit, which acts as a liaison between the Agency and the community, engages with the public and various officials about issues relating to police accountability and educates New Yorkers about the work of the CCRB. The Outreach staff makes presentations at schools and other community organizations throughout the five boroughs of New York City. Finally, data from the police misconduct complaints that the CCRB receives is collected and analyzed by the Agency’s Policy Unit. The Policy Unit releases this data online as part of the CCRB’s Data Transparency Initiative and also publishes the data in monthly, semi-annual, and annual reports. Additionally, the Policy Unit releases issue-based reports exploring subjects that impact police accountability and recommends data-based solutions to the NYPD.

The CCRB uses the term “**complainants**” to refer to members of the public who file CCRB complaints alleging misconduct by NYPD officers. The CCRB categorizes other civilians involved in these alleged incidents as “**victims**” or “**witnesses**.” The Agency classifies officers who are alleged to have committed misconduct as “**subject officers**,” while those officers who merely witnessed or were present for the alleged misconduct are referred to as “**witness officers**.” The CCRB’s Intake team accepts complaints filed by members of the public by telephone, voice message, online complaint form submission, and referrals from the NYPD’s Internal Affairs Bureau.

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<sup>50</sup> See NYC Charter § 440(a).

<sup>51</sup> *Id.*

<sup>52</sup> See NYC Charter § 440(c)(1).

When a complaint is filed with the CCRB, the CCRB assigns it a unique complaint identification number. The CCRB also refers to “**complaints**” as “**cases**.” A single complaint or case may contain multiple “**allegations**” relating to force, abuse of authority, discourtesy, and/or offensive language. Allegations regarding improper entries, searches, failures to show warrants, and officer interference with civilian recordings of police activity fall within the CCRB’s Abuse of Authority jurisdiction.

During an “**investigation**,” the CCRB’s civilian investigators gather documentary and video evidence and conduct interviews with complainants, victims, civilian witnesses, subject officers and witness officers in order to determine whether the allegations occurred, and whether those actions constitute misconduct. At the conclusion of the investigation, the assigned investigator prepares a closing report that summarizes the relevant evidence and provides a factual and legal analysis of the allegations. After a full investigation is conducted, a panel of three Board members (a “**Board Panel**”) reviews the closing report and case file, makes findings for each allegation in the case and, if allegations are substantiated, provides recommendations as to the discipline that should be imposed on the subject officers.

The “**Disposition**” is the Board’s finding of the outcome of a case (i.e. if misconduct occurred). The Board is required by its rules to use a “preponderance of the evidence” standard of proof in evaluating cases. Findings on the merits result when the CCRB conducts a full investigation and obtains sufficient credible evidence for the Board to reach a factual and legal determination regarding the officer’s conduct. In these cases, the Board may make one of the following findings on the merits for each allegation in the case: “**substantiated**,” “**exonerated**,” or “**unfounded**.” When the Board determines that the act alleged occurred and constituted misconduct, it substantiates the allegation. A case with at least one substantiated allegation is deemed substantiated. When the Board determines that the alleged act did not occur the allegation is unfounded. When none of the allegations in a case are substantiated or exonerated and at least one is unfounded, the case is deemed to be unfounded. When the Board determines that the alleged act occurred but did not constitute misconduct, it exonerates the allegation. When none of the allegations in a case are substantiated or unfounded and at least one is exonerated, the case is considered to be exonerated. “**Unsubstantiated**” cases are those where the CCRB was able to conduct a full investigation, but there was insufficient evidence to establish whether or not there was an act of misconduct. In many cases, the CCRB is unable to conduct a full investigation or mediation and must “**truncate**” the case.<sup>53</sup>

A complainant may “**mediate**” his or her case with the subject officer, in lieu of an investigation, with the CCRB providing a neutral, third-party mediator. The goal of mediation is mutual understanding. A mediation is successful when the complainant and the officer agree that the issues raised by the incident and the complaint have been effectively resolved. When a case is mediated, the officer will not face discipline.

The CCRB’s **Administrative Prosecution Unit (APU)** prosecutes cases in which the Board substantiated misconduct and recommended discipline in the form of Charges and Specifications. This disciplinary recommendation launches an administrative prosecution in the NYPD Trial Room. An officer may lose vacation days, be suspended, or terminated if he is found guilty. The APU began operating in April 2013, after the CCRB and the NYPD signed a Memorandum of Understanding establishing the unit.

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<sup>53</sup> Fully investigated cases comprise complaints disposed of as “substantiated,” “unsubstantiated,” “exonerated,” “unfounded,” “officers unidentified,” or “miscellaneous.” Miscellaneous cases are typically those where an officer retires or leaves the Department before the Board receives the case for decision. Truncated cases are disposed of in one of the following ways: “complaint withdrawn,” “complainant/victim uncooperative,” “complainant/victim unavailable,” and “victim unidentified.”



## Appendix B

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The CCRB used the terms below to search closing reports for complaints decided by the Board between January 1, 2014 and December 31, 2016 for relevant allegations. For phrases with more than one term, a full text search was used with a NEAR quantity of 100. The initial search returned 2,778 complaints of which 257 proved relevant.

"camera"  
"cell phone"  
"film"  
"iphone"  
"mobile phone"  
"record"  
"tape"  
"block\*" near() "camera\*"  
"block\*" near() "cell phone\*"  
"block\*" near() "cellphone\*"  
"block\*" near() "footage"  
"block\*" near() "iphone\*"  
"block\*" near() "mobile phone\*"  
"block\*" near() "phone\*"  
"block\*" near() "recording"  
"block\*" near() "video\*"  
"confiscat\*" near() "camera\*"  
"confiscat\*" near() "cell phone\*"  
"confiscat\*" near() "cellphone\*"  
"confiscat\*" near() "footage"  
"confiscat\*" near() "iphone\*"  
"confiscat\*" near() "mobile phone\*"  
"confiscat\*" near() "phone\*"  
"confiscat\*" near() "recording"  
"confiscat\*" near() "video\*"  
"damag\*" near() "camera\*"  
"damag\*" near() "cell phone\*"  
"damag\*" near() "cellphone\*"  
"damag\*" near() "footage"  
"damag\*" near() "iphone\*"  
"damag\*" near() "mobile phone\*"  
"damag\*" near() "phone\*"  
"damag\*" near() "recording"  
"damag\*" near() "video\*"  
"delet\*" near() "camera\*"  
"delet\*" near() "cell phone\*"  
"delet\*" near() "cellphone\*"  
"delet\*" near() "footage"  
"delet\*" near() "iphone\*"  
"delet\*" near() "mobile phone\*"  
"delet\*" near() "phone\*"  
"delet\*" near() "recording"  
"delet\*" near() "video\*"  
"destroy\*" near() "camera\*"  
"destroy\*" near() "cell phone\*"  
"destroy\*" near() "cellphone\*"  
"destroy\*" near() "footage"  
"destroy\*" near() "iphone\*"  
"destroy\*" near() "mobile phone\*"  
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"interfer\*" near() "video\*"  
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"prevent\*" near() "cell phone\*"  
"prevent\*" near() "cellphone\*"  
"prevent\*" near() "footage"  
"prevent\*" near() "iphone\*"  
"prevent\*" near() "mobile phone\*"  
"prevent\*" near() "phone\*"  
"prevent\*" near() "recording"  
"prevent\*" near() "video\*"  
"search\*" near() "camera\*"  
"search\*" near() "cell phone\*"  
"search\*" near() "cellphone\*"

"search\*" near() "footage"  
"search\*" near() "iphone\*"  
"search\*" near() "mobile phone\*"  
"search\*" near() "phone\*"  
"search\*" near() "recording"  
"search\*" near() "video\*"  
"seiz\*" near() "camera\*"  
"seiz\*" near() "cell phone\*"  
"seiz\*" near() "cellphone\*"  
"seiz\*" near() "footage"

"seiz\*" near() "iphone\*"  
"seiz\*" near() "mobile phone\*"  
"seiz\*" near() "phone\*"  
"seiz\*" near() "recording"  
"seiz\*" near() "video\*"  
"tak\*" near() "camera\*"  
"tak\*" near() "cell phone\*"  
"tak\*" near() "cellphone\*"  
"tak\*" near() "footage"

# Appendix C



DATE: 08/06/2014  
TIME: 15:08:40  
SER#: 9881632

## FINEST MESSAGE General Administrative Information

14

TO: ALL COMMANDS

RE: RECORDING OF POLICE ACTION BY THE PUBLIC

MEMBERS OF THE SERVICE ARE REMINDED THAT MEMBERS OF THE PUBLIC ARE LEGALLY ALLOWED TO RECORD (BY VIDEO, AUDIO, OR PHOTOGRAPHY) POLICE INTERACTIONS. THESE INTERACTIONS INCLUDE ARREST AND OTHER SITUATIONS. MEMBERS OF THE SERVICE WILL NOT INTERFERE WITH A PERSON'S USE OF RECORDING DEVICES TO RECORD POLICE INTERACTIONS. INTENTIONAL INTERFERENCE SUCH AS BLOCKING OR OBSTRUCTING CAMERAS OR ORDERING THE PERSON TO CEASE CONSTITUTES CENSORSHIP AND ALSO VIOLATES THE FIRST AMENDMENT.

IT SHOULD BE NOTED, HOWEVER, THAT PERSONS MAY NOT INTERFERE WITH POLICE OPERATIONS. MEMBERS, IF APPROPRIATE, SHOULD ADVISE THE PUBLIC NOT TO GET TOO CLOSE AND MAY TAKE ACTION ONLY IF THE PERSON INTERFERES WITH THE OPERATION OR THE SAFETY OF THE MEMBERS OF THE SERVICE OR THE PUBLIC. HOWEVER, MERE RECORDING OF AN INCIDENT DOES NOT CONSTITUTE INTERFERENCE.

COMMANDING OFFICERS WILL ENSURE THAT THE CONTENTS OF THIS MESSAGE ARE DISSEMINATED TO ALL MEMBERS OF THE SERVICE.

AUTHORITY: CHIEF OF DEPARTMENT  
OPER: LT CORBETT

ADMN - SER#: 9881632

# Appendix D



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

## LEGAL BUREAU BULLETIN

Vol. 46, No. 2

April 2016

- I. SUBJECT:** RIGHTS OF OBSERVERS TO RECORD POLICE OFFICERS
- II. QUESTION:** IS IT PERMISSIBLE FOR A CIVILIAN TO OBSERVE AND RECORD A POLICE OFFICER IN THE PERFORMANCE OF THE OFFICER'S DUTY?
- III. ANSWER:** YES. THE FIRST AMENDMENT PROVIDES CITIZENS THE RIGHT TO OBSERVE AND RECORD POLICE OFFICERS CARRYING OUT THEIR DUTIES. CITIZENS ALSO HAVE THE RIGHT TO MONITOR AND CRITICIZE THE POLICE. CITIZENS DO NOT HAVE THE RIGHT TO INTERFERE WITH OR PREVENT A POLICE OFFICER FROM PERFORMING AN OFFICIAL FUNCTION.

#### **IV. DISCUSSION**

##### **A. Introduction**

Both federal and New York State courts have consistently held that individuals have a fundamental First Amendment right to record police officers carrying out their duties and to criticize police activity, even if that criticism includes profane, insulting, or demeaning language. However, this right is not absolute, and there are restrictions that prohibit an individual from engaging in actual interference with police activity.

The purpose of this Bulletin is to provide guidance to police officers on:

- The First Amendment rights of individuals to record and/or criticize police action;
- How to respond when confronted with permissible First Amendment activities;
- How to determine when the activity amounts to interference with police duties and the recommended proportional response to such interference; and
- Under what circumstances it is permissible to seize recordings or recording devices, as well as guidance on supervisory review.

## **B. First Amendment Right to Record Police Activity**

Individuals have a First Amendment right to lawfully record police activity including, but not limited to, detentions, searches, arrests, or uses of force. This right extends to those individuals in both public places, such as streets, sidewalks, and parks, *and* private property such as a building, lobby, workplace, or an individual's own property, providing the individual has a legal right to be present at that location. An individual's recording of police activity from a safe distance without any additional action intended to obstruct the officer or threaten public safety does not amount to interference. Further, an individual's conduct does not amount to interference if he or she expresses criticism of the police or the police activity being observed.<sup>1</sup>

## **C. Prohibited Responses to Individuals Observing or Recording Police Activity**

Police officers may **NOT** order an observer to stop recording or disperse, arrest an observer for Obstructing Governmental Administration ("OGA"), or seize a recording device in any of the following situations:

- Observer is taking photographs, videotaping, or making a digital recording;
- Observer is requesting or making note of shield numbers or names of members of the service;
- Observer is criticizing the police or objecting to police activity; or
- Observer is using crude or vulgar speech.

Recognizing the affirmative right to record police action, **UNDER NO CIRCUMSTANCES** should a Member of the Service:

- Threaten, intimidate, or otherwise discourage an observer from recording the police officer's activities, assuming the observer is at a safe distance;
- Intentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so; or
- Delete any pictures or videos from the observer's camera, or order observer to delete such pictures or recordings.

## **D. Interference with Police Activity and How to Respond Appropriately**

A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity; violate the law; or incite others to violate the law.<sup>2</sup> However, an individual's right to record police action is not protected by the First Amendment if it amounts to actual obstruction of a police officer's investigation. Examples of this might be tampering with a witness or persistently engaging an officer who is in the midst of performing his or her duties.<sup>3</sup> Therefore, in order for such conduct to reach the requisite level of interference, there must be some additional activity (other than video recording or criticism) that leads to an *actual* interference with the performance of an official police function.

Interference involves using actual physical force or intruding into the "zone of safety" established by the officer in the performance of his or her duties. This zone of safety should be established on a case-by-case basis by the police officer taking police action after taking into account all

<sup>1</sup> *Houston v. Hill*, 482 U.S. 451, 461 (1987).

<sup>2</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

<sup>3</sup> *Colten v. Kentucky*, 407 U.S. 104 (1972).

relevant factors, i.e., the matter being investigated, the location, size and actions of the crowd, the time of day, and the lighting. This zone of safety should only encompass the physical space necessary to safely perform police operations. As a practical matter, a reasonable zone of safety would be at a minimum, the span of an officer's arms when he or she is engaged in enforcement activities (i.e. arrest, summons, etc.).<sup>4</sup>

When an individual is **NOT** at a safe distance and is endangering the Member of the Service or others, or is actually interfering with the police action, the officer should immediately issue a warning. Acceptable warnings include:

- Please step back!
- Please get on the sidewalk!
- Please step away from the arrest van!

According to the New York State Penal Law, "a person is guilty of obstructing governmental administration when he . . . prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act . . ." <sup>5</sup> If the individual does not obey the warning **AND** one of the following situations is present, an arrest for OGA may be appropriate:

- The individual is touching or physically interfering with the officers or suspect (i.e. using a camera so close to the officer's face that it intentionally obstructs his or her view and prevents the officer from performing his or her duty);
- The individual is unreasonably encroaching in the immediate area in which the enforcement action is occurring **AND** refuses to obey an order to move back; or
- The individual is engaging in passive, non-violent behavior but is still purposefully blocking or preventing the officer from taking enforcement action (i.e. blocking a prisoner van).

#### **E. Permissible Seizure of Recordings and/or Recording Devices**

A police officer's response to an observer's recording can implicate First Amendment rights as discussed above *and* Fourth Amendment rights related to search and seizure. When a police officer has probable cause to believe that a recording contains evidence of a crime, he or she should:

- Inform the observer that the recording is believed to contain evidence of a crime, and ask for consent to examine the recording. It should be noted that this consent to view must be freely and voluntarily given. Officers should be prepared for a subsequent court assessment to ensure that this consent was not coerced, either implicitly or explicitly.<sup>6</sup>
  - Note: It may be possible for the observer to email the recording directly to the officer's Department-issued smartphone.

<sup>4</sup> Examples of "zone of safety" intrusions:

- An individual enters an "obvious, defined area of police activity" and tips off others that the police are approaching. *See, People v. Covington*, 18 A.D.3d 65, 71 (1st Dep't. 2005).
- A group of onlookers encircle an officer attempting to make an arrest thereby allowing the person to escape. *See, People v. Shea*, 68 Misc. 2d 271 (N.Y. Spec Sess. 1971).
- Approaching an officer from behind in a threatening manner while the officer was attempting to make an arrest. *See, People v. Tarver*, 188 A.D.2d 938 (3rd Dep't. 1992).
- An observer physically placing him/herself between an officer and other individuals and ignoring repeated requests to move. *See, People v. Jimenez*, 138 Misc. 2d 867 (N.Y. Crim. Ct. 1988); *People v. Yarborough*, 19 Misc. 3d 520 (N.Y. Sup. Ct. 2008).

<sup>5</sup> N.Y. PENAL LAW § 195.05.

<sup>6</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

- If the observer refuses, the officer should inform the observer that he or she will seek a search warrant for the device, and if the observer deletes the content the observer may be charged with tampering with physical evidence in violation of N.Y. Penal Law § 215.40.
- If the officer has reason to believe that the observer will delete the recording, he or she may seize the device, *without* looking into the device, and only for the time necessary to secure a warrant. In these types of seizures, the officer **MAY NOT** view the recording before obtaining the search warrant.

Under no circumstances should a Member of the Service seize a recording device merely because it has captured a law enforcement encounter. The seizure of the device would only be appropriate in circumstances where the officer has probable cause to believe that the recording captures evidence of an actual crime (i.e. assault on a police officer, an assault on a third party, possession of a weapon, etc.). Seizure of any recording device **MUST** be approved by a supervisor. In addition, it is a violation of N.Y. Penal Law § 215.40 for an officer to delete any video from a seized recording device.

#### **F. Duties of Supervisors**

In situations where an observer is arrested for interference with police action or where the contents of a recording device are believed to contain evidence of a crime, Members of the Service **MUST** request a supervisor to respond to the scene. This is in addition to officers' responsibilities to have the validity of an arrest verified prior to removal to the stationhouse, as explained in Patrol Guide Procedure No. 208-02.

Front line supervision is a critical component in protecting the First and Fourth Amendment rights of observers. Supervisors **MUST** be familiar with this Bulletin and be prepared to take immediate remedial action in the field to ensure the constitutional rights of individuals are protected. This should be balanced with the priority to ensure the safety of the police officers and the public involved in police action.

#### **V. CONCLUSION**

As a general matter, the recording of officers during the performance of their duties is not a violation of the law, so long as this recording does not amount to an *actual* interference with the police activity. Members of the Service are reminded that the courts have consistently held that police officers, as agents of the state, must tolerate a higher level of verbal criticism and potentially offensive language than an ordinary citizen.<sup>7</sup> Nevertheless, this does not mean that Members of the Service must wait until they are placed in serious jeopardy or imminent danger before taking affirmative action to protect themselves and safely complete the enforcement action that they are undertaking. However, in cases that implicate the First or Fourth Amendment rights of observers, officers must be able to clearly articulate the manner in which the observer engaged in *actual* interference of the police activity that lead to action being taken against the observer, and/or why it was necessary to seize any recording or recording device.

Members of the Service are encouraged to contact the Legal Bureau at (646) 610-5400 with any questions about the content of this Bulletin.

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<sup>7</sup> See, e.g., *Duran v. Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (An individual who was making obscene gestures and yelled profanities at an officer engaged in conduct that "fell squarely within the protective umbrella of the First Amendment, and any action to punish or deter such speech – such as stopping or hassling the speaker – is categorically prohibited by the Constitution.").

# Appendix E

## GENERAL ORDER



**DISTRICT OF COLUMBIA**

<b>Title</b>		
Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public		
<b>Topic</b>	<b>Series</b>	<b>Number</b>
OPS	304	19
<b>Effective Date</b>		
July 19, 2012		
<b>Related to:</b>		
GO-PER-201.26 (Duties, Responsibilities and Conduct of Members of the Department)		
GO-SPT-204.01 (Media)		
GO-OPS-304.10 (Police-Citizen Contacts, Stops and Frisks)		

I.	Policy	Page	1
II.	Regulations	Page	1
III.	Cross References	Page	6

### I. POLICY

The Metropolitan Police Department (MPD) recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.

### II. REGULATIONS

- A. Members are reminded that photography, including videotaping, of places, buildings, structures and events are common and lawful activities in Washington, D.C.
  - 1. If a person is taking photographs or recording from a place where he or she has a right to be, members are reminded that this activity by itself does not constitute suspicious conduct.
  - 2. Members shall refer to GO-HRC-802.06 (Suspicious Activity Reporting Program) for guidance concerning identification and reporting of suspicious activities.
- B. In areas open to the public, members shall allow bystanders the same access for photography as is given to members of the news media [See GO-SPT-204.01 (Media)]. Members shall be aware that:
  - 1. A bystander has the same right to take photographs or make recordings as a member of the media, as long as the bystander has a legal right to be present where he or she is located.



2. A bystander has the right under the First Amendment to observe and record members in the public discharge of their duties.
  3. Public settings include, e.g., parks, sidewalks, streets, and locations of public protests; but that protection extends also to an individual's home or business, common areas of public and private facilities and buildings, and any other public or private facility at which the individual has a legal right to be present.
  4. The fact that a bystander has a camera or other recording device does not, however, entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any area designated as a crime scene.
- C. As long as the photographing or recording takes place in a setting at which the individual has a legal right to be present and does not interfere with a member's safety, members **shall not** inform or instruct people that photographing or recording of police officers, police activity or individuals who are the subject of police action (such as a *Terry* stop or an arrest) is not allowed; requires a permit; or requires the member's consent. Additionally, members **shall not**:
1. Order that person to cease such activity;
  2. Demand that person's identification;
  3. Demand that the person state a reason why he or she is taking photographs or recording;
  4. Detain that person;
  5. Intentionally block or obstruct cameras or recording devices; or
  6. In any way threaten, intimidate or otherwise discourage an individual from recording members' enforcement activities.

NOTE: Members may ask questions during the course of a contact, but members are reminded that there is no justification for ordering a person to stop or requiring that they answer unless the member reasonably suspects that a person has committed, is committing, or is about to commit any crime. [See GO-OPS-304.10 (Police-Citizen Contacts, Stops, and Frisks)].

- D. Members are reminded that the public does not have a right to interfere with police activity. Interference consists of conduct, threats, actions or activities that prevent or hinder, or purport to prevent or hinder, members from doing their job.

1. If a person is photographing or recording police activity from a position that impedes or interferes with the safety of members or their ability to perform their duties, a member may direct the person to move to a position that will not interfere. However, a member shall not order the person to stop photographing or recording.
2. If a person is photographing or recording police activity from a position that impedes or threatens the safety of members of the public, a member shall direct the person to move to a position that will not interfere. However, members shall not order the person to stop photographing or recording.
3. A person's recording of members' activity from a safe distance, and absent any attendant action that obstructs the activity or threatens the safety of the member(s), does not constitute interference.
4. A person has the right to express criticism of the police activity being observed. So long as that expression does not jeopardize the safety of any member, suspect or bystander; and so long as that expression does not violate the law or incite others to violate the law, the expression does not constitute interference.

**E. Evidence on a Camera or Recording Device; Probable Cause**

1. Probable cause exists where the known facts and circumstances are such that a reasonable member in the same situation would believe that evidence of a crime will be found.  
See, e.g., *United States v. Scott*, 987 A.2d 1180, 1191 (D.C. 2010).
2. If a member has probable cause to believe that a camera or other recording device contains images or sounds that are evidence of criminal acts, the member shall request that the person either:
  - a. Voluntarily provide the device or recording medium (e.g., the memory chip) to the member; or
  - b. Where possible and practicable, and in the presence of the member, voluntarily transmit the images or sound via text message or electronic mail to the member's official government electronic mail account.
  - c. Consent to take possession of a recording device or medium must be given voluntarily. A member shall not, implicitly or explicitly, coerce consent to take possession of any recording device or any information thereon.

3. If the person provides the device or recording medium to the member, the member shall:
  - a. Exercise due care and caution with any of the individual's property or electronic device(s);
  - b. Obtain CCN numbers for the evidence obtained, and provide the CCN numbers to the individual;
  - c. In the "Property listing/Evidence Recovered" section of any applicable field report(s), Document the item(s) surrendered by the individual in the PD-81 in accordance with MPD procedures;
  - d. Document the member's request and the individual's response in the narrative of applicable field reports and other documents; and
  - e. Submit the device(s) to the Electronic Surveillance Unit to access any relevant material as quickly as practicable. Members shall not attempt to view, download, or otherwise access any material contained on the device.
  
4. If the individual declines to voluntarily provide the device or recording medium, or to electronically transmit the sound and/or images where possible and practicable, and the member believes that exigent circumstances exist insofar as the evidence of criminal activity will be lost absent a seizure of the device, the member shall contact the Watch Commander, Criminal Investigations Division (CID).
  - a. The Watch Commander, CID, or other official with supervisory authority over the member, must be present at the scene before a member takes any significant action involving a person's use of a recording device. This includes warrantless search or seizure of a camera or recording device, or an arrest.
  - b. The member shall inform the Watch Commander of the nature of the evidence of criminal acts believed to be contained on the device.
  - c. The Watch Commander, CID, shall, in consultation with the Commander, CID, determine whether exigent circumstances, including the seriousness of the possible crime at issue, permit the seizure of the device without a warrant. Warrantless seizure is permissible only when:

- (1) There is probable cause to believe that the property holds contraband or evidence of a crime; and
  - (2) The exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.
- d. If the Watch Commander, CID, finds that exigent circumstances permit the seizure of the device without a warrant, approval shall be given to the member for the seizure.
  - e. The member shall obtain and provide CCN numbers to the individual possessing the device.
  - f. Any such seizure must be a temporary restraint intended only to preserve evidence until a warrant can be obtained. *Illinois v. McArthur*, 531 U.S. 326, 334 (2001).
- F. Viewing/Listening to Evidence on a Camera or Recording Device
1. Absent exigent circumstances, members shall obtain a search warrant before viewing photographs or listening to recordings on a camera or memory chip that has been seized as evidence.
  2. In exigent circumstances, where there is reason to believe that an immediate search of the seized material is necessary to prevent death or serious injury, members shall contact the Watch Commander, CID, for authorization to review photographs or recordings without a warrant.
  3. The Watch Commander, CID, in consultation with the Commander, CID, may authorize such review without a warrant.
  4. Photographs or recordings that have been seized as evidence and are not directly related to the exigent purpose shall not be reviewed.
- G. Members shall not, under any circumstances, erase or delete, or instruct or require any other person to erase or delete, any recorded images or sounds from any camera or other recording device that is in the possession of a non-member, or that has been voluntarily turned over or seized under the terms of this order.
- H. Members shall maintain cameras and other recording devices that are in Department custody so that they can be returned to the owner intact with all images or recordings undisturbed.

**III. CROSS REFERENCE**

- A. GO-SPT-204.01 (Media)
- B. GO-OPS-304.10 (Police-Citizen Contacts, Stops, and Frisks)
- C. GO-HRC-802.06 (Suspicious Activity Reporting Program)

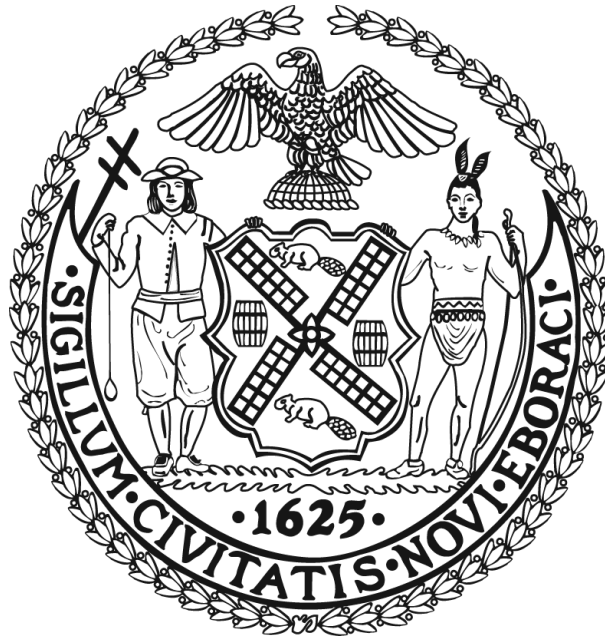


Cathy L. Lanier  
Chief of Police

CLL:PAB:MOC:JC

*“It is in the interest of the people of the City of New York and the New York City Police Department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough and impartial. These inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence. An independent civilian complaint review board is hereby established...”*

*(NYC Charter, Chapter 18-A, effective July 4, 1993)*



**CIVILIAN COMPLAINT REVIEW BOARD**

100 Church St., 10th Floor, New York, NY 10007

Complaints: 1-800-341-2272 or 311 | Outside NYC: 212-New-York

General Information: 212-912-7235

[www.nyc.gov/ccrb](http://www.nyc.gov/ccrb)

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