



Citizen's Guide to Reporting on Occupy Protests

by Citizen Media Law Project Staff

We at the Citizen Media Law Project have taken great interest in the ongoing "Occupy" protests. Much of what we know about the protest has come from independent reporters and citizen journalists covering the story from the ground. Knowing this, we are alarmed to hear reports of police arresting reporters during the protest. This, of course, could greatly discourage press coverage of this story.

In order to encourage citizen reporting from the ground at these protests, and to dispel the uncertainties as to the rights of those covering the protest, we have created this special question-and-answer guide regarding covering the protests as a special addendum to our CMLP Legal Guide.

Note: *This guide addresses general principles of law as they apply to #occupy protests throughout the United States. While we tried our best to present the law as it generally applies, specific facts and circumstances often alter outcomes in specific cases, and laws vary from state to state. Also, this post provides the law as it exists in October of 2011. We do not intend to update this guide as the law changes, so if you find yourself returning to this at a later time please note that the law may have changed.*

Think of this as a starting point for further research. This is not a substitute for legal advice.

Questions

Q1: Do I have a right to record police action at the protest? Do I have a right to record the protesters?

Q2: May the police record me?

Q3: May the police seize my camera and view its contents?

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Q5: If the police ask for my identity, do I have to provide it?

Q6: Does reporting on the Occupy protests give me the right to enter into private property without permission? To obstruct police activity? To block the sidewalk? To shove a cop?

Q7: Who should I call if I am arrested?

Q. 1: Do I have the right to record police action at the protest? Do I have a right to record the protesters? [Back to top]

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

Some states' wiretapping laws (most notably Illinois) criminalize the electronic recording of oral statements or communications without the permission of all parties to the communication. Other states allow recording of oral communications so long as the recording is not done secretly or if one party to the communication consents to recording. Resources to help you determine the requirements of your state's law are available at <http://www.citmedialaw.org/legal-guide/state-law-recording> and at <http://www.rcfp.org/taping/states.html>.

Even if your state has a wiretapping law that would apply to your conduct, you might nevertheless have a qualified First Amendment right to record public activities of the police, which would trump the state law. This right has been recognized by several federal courts of appeal, including the First Circuit (the decisions of which are controlling in MA, ME, NH, PR and RI), the Ninth Circuit (controlling in AK, AZ, CA, HI, ID, MT, NV, OR, WA, and Guam and the Northern Mariana Islands) and the Eleventh Circuit (controlling in AL, FL and GA). The right does not, however, allow you to interfere in police activity or break other generally applicable laws. It is not clear whether courts in states not listed above will recognize this right.

Most states also prohibit the publication of non-newsworthy private facts about individuals without their consent; see <http://www.citmedialaw.org/legal-guide/publication-private-facts>. Generally, if you are recording in public, the people you are recording will have no legitimate expectation of privacy, and this will not be an issue. However, you should be careful if you record in privately owned or enclosed spaces (such as inside a tent) where someone might reasonably expect their activities to be private.

You can be sued or arrested for trespassing, assault, or other torts or crimes committed in the course of gathering information; see Q.6.

Q. 2: May the police record me? [Back to top]

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

Although the police are entitled to record activity in public, they are not entitled to intimidate you from the exercise of your rights in the guise of recording you or conducting other law enforcement activity. You should seek legal assistance if you believe that the police are using cameras as a tool for harassment or intimidation (for

example, if an officer follows you closely with a camera without any reason to believe you are engaged in unlawful activity).

Q. 3: May the police search me? May the police seize my camera and view its contents? [Back to top]

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

Absent your consent, the Fourth Amendment generally prohibits the police from stopping and frisking you at random unless the police have reason to believe that you may be carrying a weapon. If they do have reason to suspect that you are armed, they may pat you down to determine the presence of a weapon. If the police detect any unusual items in the course of their pat-down, the Fourth Amendment allows the police to search your pockets even if the pat-down reveals no weapon. You might have additional rights against such searches under your state's constitution.

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

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

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

If the police lawfully seize your camera or recordings without a warrant to preserve evidence, the police are nevertheless generally required by the Fourth Amendment to obtain a warrant if they want to review the content of your recordings. While you might lack an expectation of privacy in a recording made in a public place with the police present, it is likely that a court would find that the police need a warrant to search your device for that recording and do not have a right to access other files (such as e-mail or call records on a smartphone, or unrelated photos and other recordings).

If the police seize your recording device or smartphone after arresting you, courts are divided on whether police may review the contents of your device without a warrant.

Currently, California permits warrantless searches of devices incident to an arrest, while Ohio does not. The U.S. Court of Appeals for the Fifth Circuit, in a decision binding on state police in AL, FL, GA, LA, MI and TX, has held that it is illegal for police to play a tape recording seized without a warrant during an arrest, without obtaining a separate warrant authorizing them to play the tape. Other states lack clear authority on this issue.

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

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

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

Most states have laws permitting the police to disperse crowds that are disturbing the peace. If the police order you and all of the people around you to move from a location, it is generally advisable to follow police instruction. If you are merely present at a gathering as a journalist and not as a participant, the police might allow you to remain if you explain the situation and show press credentials (if you have them). However, if you are in the middle of a group that is ignoring police orders to disperse, the police are not required to take steps to verify your independence from the group before engaging in crowd control measures. Therefore, it is advisable to get clear of such a crowd and identify yourself to the police as press as soon as possible when a situation looks like it might get out of hand.

While one cannot be lawfully punished for disobeying an order that is itself a violation of the constitution, the exact constitutionality of a particular order to disperse is often a close call and unlikely to be resolved in the field. If you think a particular police order is unlawful, it is wise to comply with the order while simultaneously documenting the order and your response. You may then consider seeking legal assistance.

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

The following states have adopted “stop and identify” laws: AL, AR, AZ, CO, DE, FL, GA, IL, IN, KS, LA, MO, MT, NE, NV, NH, NM, NY, ND, OH, RI, UT, VT, WI

Although the specific parameters of these laws vary, in general these laws allow an officer who has reasonable suspicion that a particular person has committed or is committing a crime to stop the person and demand the person provide his or her name, address, and explanation of their conduct. These laws have been upheld by the

Supreme Court as far as requests for a person's name; the Court has not addressed the constitutionality of requesting additional information.

The police do not need to give you *Miranda* warnings (i.e., "You have the right to remain silent," etc.) before asking for this information. It is an unsettled question whether police in states without a "stop and identify" law may demand a person's identity if they have a reasonable suspicion that the person has committed or is committing a crime.

Q. 6: Does reporting on the Occupy protests give me the right to enter into private property without permission? To obstruct police activity? To block the sidewalk? To shove a cop? [Back to top]

Generally, no. Reporting on an event does not give you the right to violate generally applicable laws, including laws prohibiting trespassing, violence to others, obstruction of justice, or disturbing the peace.

Q. 7: Who should I call if I am arrested? [Back to top]

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

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

For legal issues other than arrests, you may consider contacting the Online Media Legal Network at legalhelp <at> omIn.org. Our network is not designed to handle arrests directly, but may be able to assist with other issues you are facing while covering the protests.