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LAW ENFORCEMENT DIRECTIVE 2022-01

TO: ALL CHIEFS OF POLICE/POLICE DIRECTORS/SHERIFF JACK KEMLER

**FROM: ANGELO J. ONOFRI
MERCER COUNTY PROSECUTOR**

RE: ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVES

DATE: JANUARY 3, 2022

Attorney General Andrew Bruck recently issued Attorney General Law Enforcement Directives 2021-11 (First Amendment Right to Observe, Object to, and Record Police Activity); 2021-13 (Directive Respecting Confidentiality of Internal Affairs Investigations); and 2021-14 (Directive Updating Statewide Use of Force Policy). Each Directive will be discussed below. A copy of each Directive is also attached for your review.

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2021-11

This Directive affirms that the press and general public have the First Amendment right to observe, object to and record police conduct. Further, the Directive was deemed necessary ensure that the First Amendment's bounds are as clear as possible to the press, civilians, and law enforcement officers. It is well established that the First Amendment protects an individual's right to "record police officers conducting their official duties." *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (Third Circuit 2017).

Section I(A) of the Directive clarifies the right to observe, video/audio record, photograph, witness, comment on, or complain about police conduct when an officer is conducting their official duties in public or private places *where the person/bystander has a right to be present*. The bystander/person has the same right to make recordings as does a member of the press. Section I(A)(2) sets forth the actions that the officer may not take

so long as the bystander/person's recording takes place *in a setting in which they have a legal right to be present and does not interfere with an officer's safety or lawful duties*. The prohibitions are self-explanatory.

Section I(B) sets forth the limitations on the right to record:

- Nothing prohibits the officer from questioning or detaining the individual for a reasonable period of time if they reasonable suspect the individual committed, is committing or is about to commit or incite others to violate the law. *Section I(B)(1)*.
- Bystanders/persons with a recording device may not cross a police line, enter an area closed to the public, or enter any area designated as a crime scene. *Section I(B)(2)*.
- Credentialed media may be granted closer access to incident scenes with law enforcement approval.
- If the bystander is recording police activity from a position that "materially impedes or interferes with officer safety, their ability to perform their duties, or threatens the safety of members of the public," officers may direct the bystander to move to a position that will not interfere with the above. Officers may not order the bystander to stop recording. If the bystander fails to comply with the order to relocate, *N.J.S.A. 2C: 29-1* would be a viable charge. *Section I(B)(3)*.

Section I(C) reminds officers that they may not use or threaten to use force, their arrest authority or any of the other prohibited detailed in Section 1(A)(2), in response to mere criticism or gestures so long as the expressions do not give rise to an objectively reasonable fear of harm to the officers or others, violates the law or incites the others to violate the law.

Section II reminds officers that generally, a warrant is required to seize and search a recording device except in very narrow and limited circumstances:

- Seizure of the device incident to arrest.
- Officer may request the recording device from the bystander where the officer has probable cause to believe the device contains a recording that is evidence of the crime. The officer may request that the bystander transmit the recording to the officer. If electronic transmission is not possible, the officer may request that the bystander consent to providing the device.
- If the bystander refuses, the officer may seize the device under exigent circumstances- 1) there is probable to believe that a violent crime resulting in serious bodily injury or death has been committed; 2) there is a good-faith belief

there is evidence of that crime on the device; and, 3) a good-faith belief that the evidence will be lost or destroyed.

- The seizure of the device under exigent circumstances does not permit for a search without a warrant unless necessary to prevent imminent death or serious bodily injury.

Any seized devices should be returned as soon as possible. Law enforcement should not seize a press member's recording device except in the extremely rare circumstance of where it is necessary for public safety or the result of a search incident to arrest.

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2021-13

Attorney General Law Enforcement Directive 2021-13 revises the Internal Affairs Policy and Procedures to further ensure confidentiality by requiring that any representative present for/accompanying a witness to any interview must now sign a non-disclosure agreement. The representative non-disclosure agreement is attached.

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2021-14

Attorney General Bruck issued Law Enforcement Directive 2021-14 on December 28, 2021, updating certain provisions of the Law Enforcement Directive 2020-13 issued by then-Attorney General Gurbir Grewal. The new Law Enforcement Directive identified several provisions of the Use of Force policy that required correction.

Initially, Law Enforcement Directive 2021-14 revises the definitions of the following:

- **Active Resistor.** This term was revised to include situations in correctional facilities. This revision does not impact municipal police departments or the Sheriff.
- **Law Enforcement Officer.** This term now includes college and university police officers as well as state parole officers.
- **Peaceful demonstrator.** The revision clarifies that the term does not apply to situations in correctional facilities where an inmate/detainee fails to comply with an order from a correctional police officer.
- **Tactical team.** This term inserts the term tactical team and incorporates the definition used in the Attorney General's Body Worn Camera directive (Law Enforcement Directive 2021-05). As used in the BWC Policy, tactical team is defined as "a group of officers who are specially selected, trained, and equipped to handle high-risk incidents, including, but not limited to, those involving snipers,

barricaded persons, warrant services, apprehensions, acts of terrorism, and other situations or activities as deemed necessary by command leadership.”

Law Enforcement Directive 2021-14 adds a new Section 1.4 to clarify that the Use of Force Policy applies to correctional police officers.

A new subsection 3.4(c) has been added to revise the reporting requirements for the pointing of a firearm by tactical teams. It is now clear that an officer engaged in a tactical team operation is required to report the pointing **only** when the pointing “**involves a sustained active engagement with a person in order to gain that person’s compliance.**” The new subsection also clarifies that a tactical team member who quickly “sweeps” a room during an operation does not need to report the momentary pointing of the firearm at a person.

When a chief of police utilizes force, Subsection 7.5(a) now clarifies that the command-level review is to be conducted by the County Prosecutor’s Office and that the County Prosecutor must be advised of such use of force.

The only other substantive change concerns the Vehicular Pursuit Policy contained in Addendum B. Two new subsections (12.1(e) and 12.2(e)) have been added. Subsection 12.1(e) requires prosecutorial review of non-compliant vehicular pursuits while Subsection 12.2(e) requires that the law enforcement executive’s review of non-compliant pursuits include an analysis of the non-compliant incident and the steps taken to address the non-compliance.

Law Enforcement Directive 2021-14 also makes non-substantive changes which correct typos and make minor edits. These changes are set forth in the policy.

Should you have any questions, please feel free to contact me.

AJO/

cc: All Assistant Prosecutors
Investigative Staff
Warden Charles Ellis