



NYPD
New York City Police Department

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**Process of Developing the NYPD
Response to First Amendment Activities
Procedure and Response to Public
Comments**

Introduction

Subsequent to the mass demonstrations which took place in Summer 2020, the New York City Department of Investigation (DOI) conducted an investigation of the NYPD's response to these demonstrations. DOI published a report detailing various deficiencies in the NYPD response and suggesting several recommendations to improve Department policies and practices relating to policing protests. One of these recommendations was to draft a Patrol Guide policy specific to policing protests and protected First Amendment activities. The Department took numerous steps to develop the attached Response to First Amendment Activities Procedure (Procedure) including consultation with various stakeholders and a public comment period to solicit input. This process is described in more detail below. Subsequent modifications to the Procedure will be made available at the NYPD's online Patrol Guide website.

Review of the Process to Develop the Procedure

The NYPD has long supported all people's rights to lawfully engage in First Amendment activities. However, prior to creating the Procedure, the Department did not have a formal policy to address police response to lawful, peaceful, First Amendment activities. DOI conducted an in depth investigation of the NYPD's response to the mass demonstrations of Summer 2020 and determined that such a procedure should be implemented. As a result, the Procedure was developed over the course of several months.

The process to develop the Procedure has been comprehensive. Subject matter experts within the Department formed a working group, evaluated similar procedures from other municipalities, reviewed federal guidelines and recommendations, and reviewed existing formal and informal Department policy. Prior to creation of this Procedure, response to lawful, peaceful, First Amendment activities was largely guided by Patrol Guide procedure 213-05, "Duties at an Unusual Disorder." Incidents covered by that procedure could run the gamut of lawfulness and violence. As such, the DOI recommendation is logical as the new Procedure creates separation between lawful, peaceful First Amendment activities and other incidents which may require different police tactics.

The NYPD posted a draft of the Procedure on the Department's website on May 28, 2021, which was available for review and public comment until June 30, 2021. The draft Procedure provided the initial vision for the Department's response to First Amendment activities, as developed by subject matter experts and in accordance with DOI's recommendations. The Department then solicited public feedback which it received from various outlets including politicians, social justice organizations, and general members of the public.

Overview of the Feedback

Between May 28, 2021 and June 30, 2021, the NYPD received a total of 32 relevant comments through the Department's website and three letters from various organizations, such as the NYCLU, the Office of New York Assemblyman Dan Quart, and the Patrolman's Benevolent Association. Many of the recommendations from these comments have been incorporated.

The comments ranged from concerns regarding certain parts of the proposed Procedure to broad impressions of the proposed Procedure as a whole. Some comments were not relevant to the Procedure's First Amendment focus and others went well beyond the scope of the Procedure's intent. The aspect of the proposed Procedure which received the most attention was its definition of "Violent Behavior." Other common themes from these comments were that

feasibility should be included with respect to de-escalation and compliance with laws, including prevention of violence and destruction of property, should be maintained at First Amendment activities. Other comments of note included revising the definition of “Nonviolent Participant” to include a requirement of compliance with all laws, modifying the procedure to provide non-participants will not be inconvenienced, providing that “Protest Liaisons” should not wear civilian clothes, the National Lawyers Guild should not be afforded special privileges at demonstrations, violent behavior should be expertly defined so that the public knows exactly what cannot be done at demonstrations, permit requirements for demonstrations should be enforced, police should not have any presence whatsoever at demonstrations, police presence should not be assumed but instead justified, and that rights of peaceful protestors are more important than traffic and should be protected. The most common comments the NYPD received are listed below and were considered in making the changes to the final version:

1. The definition of “Violent Behavior” is vague with respect to portions “include, but is not limited to”, “cause public unrest”, and “prevent law enforcement from maintaining the peace”
2. Step 22 and step 41 should be revised to state “if feasible”, “attempt” to use de-escalation techniques when encountering violent subjects
3. Demonstrations must remain non-violent with respect to person and property and cannot be permitted to get out of hand
4. Protest liaisons should not be permitted to wear civilian attire
5. The Handschu Guidelines should be referenced and any required “Digital Activity Log” or “First Amendment Activity/Citywide Event Report” entry must be in compliance with the Guidelines
6. Certain steps which are assumingly assigned to police officers would be more appropriate if assigned to the incident commander
7. The discretion to wear protective helmets, if the situation warrants, should be mentioned

Revisions to the Procedure

Upon receipt of all of the comments, the NYPD made revisions to the draft Procedure. The Procedure was then shared with the working group of Department subject matter experts, including representatives from the Police Commissioner’s office, Chief of Department’s office, Deputy Commissioner Strategic Initiatives, and the Chief of Operation’s office to identify and mitigate potential conflicts, concerns, and other issues.

The Department reviewed and considered every recommendation and point of view, despite the conflicts between many of the comments received from the public. In some cases, the recommendations were outside the scope of the Procedure (e.g., permits, ban SRG from demonstrations, geofense warrants, etc.) or were covered by other Department procedure’s (e.g., excessive force, use of pepper spray, providing name and shield number, etc.). In others, the Department disagreed with the recommendation (e.g., “[i]ncludes, but is not limited to” language in “Violent Behavior” definition, do not solicit public input, permit only one path into and out of demonstration, etc.). One comment in particular suggested that New York Penal Law § 70.02 contained every offense which could be considered violent. Adopting such an interpretation would discriminate against victims of misdemeanor violent acts such as assault. Another comment suggested that violent behavior should be expertly defined as to inform the public regarding behavior they should not engage in at a demonstration, however, the New York State Penal Code, New York City Administrative Code, and several other codified bodies of law instruct the public regarding action which they should not take during demonstrations. Overall, several important changes were made between the draft released for public comment and the version of the Procedure effective August 31, 2021.

Some of the revisions to highlight include:

- The definition of “Violent Behavior” was revised to remove “cause public unrest” and “prevent law enforcement from maintaining the peace”
- New note which provides that protest liaisons may not wear civilian attire
- Revision of de-escalation steps to provide de-escalation will be attempted, if feasible, when encountering violent subjects
- New step providing dual purpose disorder control/scooter helmet may be worn at discretion if it is reasonable to believe that conditions warrant
- New additional data statement which provides that the Procedure does not limit the authority of Department personnel to effect arrests or take other enforcement action for unlawful acts, in light of the frequent exercise of discretion at demonstrations
- Removal of the requirement of protest liaisons to document attempted contacts with First Amendment activity leaders and a new additional data statement reminding Department personnel that the Handschu guidelines must be complied with
- Some duties were reorganized to fall under the incident commander

Certain comments are difficult to implement because they are challenging to quantify or would be otherwise difficult to implement. For instance, the Procedure instructs Department personnel to balance the right of free expression against the need for public safety and some comments inquired as to how this balance would be achieved. Since First Amendment activities can vary greatly in circumstances, such an inquiry can likely only be answered during each First Amendment activity on a case by case basis. Another comment suggested the Procedure should address a manner to keep agitators out of First Amendment activities. Implementing such a step is difficult since, most often, there is no concrete way to know who is or is not an agitator before they join the activity and the Department would potentially be infringing on the alleged agitators First Amendment rights.

Conclusion

The comments received from all participants in this process were valuable in reaching the final version of the Procedure. The Department believes that the Procedure represents a fair and reasonable process for responding to First Amendment activities. The Procedure reflects the Department’s commitment to support the right of people to engage in First Amendment activities, in furtherance of its mission to serve the community and provide public safety.