

Value. Police departments benefit by installing and maintaining closed circuit television (CCTV). CCTV often exposes false claims of officer misconduct and may verify legitimate ones, especially in relation to the care and custody of pre-trial detainees.

CCTV is an important component of stationhouse security, and it is essential for documenting the interrogation process.

These guidelines do not apply to the use of video cameras, overtly or covertly, for law enforcement purposes beyond the station or its surrounding property.

Applications.

➤ **General station security.** CCTV exterior and interior monitoring is permitted for stationhouse security. For this purpose, it is recommended that CCTV only record:

- Video images, not audio sounds;
- In locations approved in writing by the Chief or designee;
- Where individuals do not have an expectation of privacy.¹

➤ **Station booking and lockup areas.** CCTV monitoring should be employed in any area where individuals will be booked², processed³ or held in police custody.

This includes individuals of both genders and all ages who have been:

- Arrested for a crime;
- Placed in “protective custody” under G.L. Chapter 111B;
- Held as a “status offender” under G.L. Chapter 119;
- Held as an emotionally disturbed person (EDP) under G.L. Chapter 123;
- Held on the basis of any other civil or criminal process; or
- Held on the basis of any other legal, good faith justification.

For this purpose, it is recommended that CCTV record:

- Video images *and* audio sounds;
- In all locations where individuals in custody will be booked, processed or held.⁴

- **Notification.** A conspicuous sign should notify individuals that they are being audio and video recorded. However, no verbal notification should take place.⁵

Recorded admissions or confessions are admissible in court because individuals in high security areas have no expectation of privacy.⁶

- **Suicide prevention.** Audio monitoring of lockup areas is required for suicide prevention. Moreover, prisoners must be physically observed at reasonable intervals, which should not exceed 30 minutes apart without written justification in a report submitted to the Officer in Charge (OIC).⁷
- **Strip searches.** Massachusetts law has not specifically authorized videotaping strip searches of pre-trial detainees. Consequently, when a strip search or visual body cavity search becomes necessary,⁸ officers should:
 - Inform the detainee on videotape that he will be strip searched;
 - Ask the detainee whether he has any contraband that he would like to surrender prior to the process;
 - Ask the detainee whether he would like the search videotaped in the private location where it will be conducted;⁹
 - Perform the procedure:
 - On or off videotape in accordance with the detainee's request;
 - In a professional and non-humiliating manner;
 - With one witness present in addition to the officer performing the search.
 - Document the procedure on the booking form or in a supplemental report.
- **Attorney contact.** Police should *not* listen to attorney/client communication in the station. Any contact must occur in an area where there is *no* audio monitoring.¹⁰ Video monitoring is recommended to protect the attorney and to ensure that no contraband is passed to or received from the prisoner.

➤ **Interviews and interrogations.**

- **Interview:** Any conversation with a member of the public in which information is exchanged.
 - Interviews do not have to be audio or video recorded.
 - Officers may, on a case-by-case basis, decide whether to record an interview, provided they notify the people present before the interview.
- **Interrogation:** Any verbal or nonverbal communication by a police officer which is designed to incriminate a suspect.¹¹
 - Any interrogation at the station, whether or not the suspect is in custody, must be audio recorded.¹²
 - Ideally, an audiovisual recording should be made in which the suspect and lead interrogator are visible throughout the process.¹³

- **Notification, not permission.** Officers must verbally inform a suspect that he will be recorded, but they do *not* need his permission.¹⁴ A simple statement at the beginning of the recorded interview will suffice. For example:

“Detective Jones and Officer Smith are present with John Doe in the interview room of the Anytown Police Department. It is 2:15 p.m. and, John, we want to let you know that we are recording our interview with you to be fair and accurate.”

The failure to inform suspects or anyone else that they are being recorded may result in the suppression of any audiovisual evidence and/or civil liability.¹⁵

- **Record entire interview.** The best practice is to leave the recorder on during the entire interview (including short breaks).¹⁶ For longer delays, the investigator should explain *any* time the recorder is shut off and re-started. For example:

“Ok, Detective Smith is going to shut off the recorder so that John Defendant may use the bathroom and eat lunch. It is 12:24 p.m. by my watch.”

“We are now resuming the interview with John Defendant, who had a drink and sandwich for lunch. It is 1:15 p.m. and we are still located in the first floor interview room of the Smalltown Police Department. So, John, we were talking about your visit to Andy Accomplice’s house on October 10th”

- **Discontinuing the recording.** All interview and interrogation rooms should have audiovisual recording capabilities that may be shut off when appropriate. The audio portion of the recording may be discontinued for the following reasons:
 - ***Suspect objection.*** In the event that a suspect objects to being recorded, officers should explain, with the CCTV still running, that recording ensures an accurate record for the suspect’s protection. At this point, the suspect will often agree to be recorded.

If he continues to refuse, investigators should ask him if he will speak with them in an unrecorded session. If he agrees, investigators should turn off the audio recording and continue the interview -- with officers taking notes and later documenting the suspect’s statement in their written report.¹⁷

Note: The entire interaction with the suspect should be recorded, since it will later prove that it was the suspect’s decision, not the police, to turn off the CCTV. Having a recorded refusal is much better than a written waiver. Moreover, if *Miranda* warnings are legally required, officers should always try to record the warnings and suspect’s waiver prior to discontinuing the audio recording.

- ***Juvenile Miranda consultation.*** Police should record when a juvenile is informed of his *Miranda* rights and consults with his parent or interested adult in order to decide whether to waive his rights and speak with investigators. However, if the juvenile or his parent/interested adult requests to confer in private, investigators should vacate the room and discontinue the recording.^{18,19} Investigators should not suggest private consultation, but must honor any request for it.²⁰

- **Investigative necessity.** Only statements that may be offered into evidence against a suspect must be recorded.²¹ There are times when officers seek information from criminals solely for investigative purposes. A common example is the arrested drug dealer who may implicate his supplier in the hope of receiving a more lenient sentence. In these situations, it is counterproductive and legally unnecessary to record. However, officers should fully document the content of these discussions in their investigative notes and, if appropriate, in a supplemental report.

Care, Custody & Retention of Recordings

- **Maintenance and malfunction.** CCTV equipment will be maintained in accordance with the standards promulgated by the installer and manufacturer of the system.

Any malfunction of CCTV equipment will be immediately reported at the time it is discovered to the OIC, who shall file a written report (email is sufficient) and contact the appropriate department official to arrange for repair. The OIC is responsible for expediting the repair process and ensuring its completion.

- **Release and review.** Recordings and/or video images will only be reviewed and observed for official purposes. They will not be released to any individual, agency or organization outside the police department unless authorized by:
 - Subpoena.
 - Court order.
 - Written directive from the chief or designee.

Unauthorized use, reconfiguration, or review of any recording or video images may result in discipline up to and including discharge. This internal process is separate and distinct from any criminal charges that might be brought.

- **Suspect interview.** Any audio or audiovisual recording of a suspect interview shall be stored and maintained in the evidence management system.

- **Retention.** Electronic and video records must be maintained, disseminated, and destroyed in compliance with the public records law.²² The following retention schedule shall be followed:²³
- Security and surveillance videotapes – retain 1 month.
 - Equipment maintenance and repair records – retain 1 year after disposal of equipment.
 - Booking and interrogation videotapes related to active investigations – retain until completion of prosecution and exhaustion of appeals.
 - Booking and interrogation videotapes unrelated to active investigations – retain for 3 years.

¹ For example, locker rooms where officers get changed should not be subject to video surveillance, nor should stationhouse bathrooms. Compare *Trujillo v. City of Ontario*, 428 F.Supp.2d 1094 (2006) (secret videotaping of police locker room violated Fourth Amendment) with *Sacramento County Deputy Sheriff's Association v. County of Sacramento*, 51 Cal.App.4th 1468 (1996) (deputies lacked objectively reasonable expectation of privacy against being videotaped in jail office and, therefore, warrantless video surveillance was not an unlawful search and seizure under the Fourth Amendment).

² “Booking” is a process where police officials record the reason for taking a citizen into custody and his biographical data, so he may be considered for bail or release, or transferred for appropriate services.

³ Processing includes any related activities, such as inspecting for medical injuries, administering a breathalyzer test, allowing a phone call, and engaging in a strip search.

⁴ Interestingly, many officers argue that videotaped booking of operating under the influence (OUI) arrestees is a disadvantage at trial, as juries often conclude that the defendant did not appear particularly inebriated on the video. That said, the value of videotaped booking in reducing police liability outweighs any diminished opportunity to convict for OUI. Finally, the impact of video may be enhanced when it depicts the entire body of the defendant during booking. By depicting the whole body, the video will often show how the defendant was swaying during the booking process.

⁵ In fact, police departments do not even have to display a sign or tell prisoners that they are being recorded. Since the booking process is an administrative procedure, it is not covered by the prohibition against secret recording that is found in the wiretap statute, G.L. c. 272, § 99. *Comm. v. Gordon*, 422 Mass. 816 (1996).

⁶ In *Comm. v. Pierce*, 66 Mass. App. Ct. 283 (2006), Joseph Pierce and two other men were held in separate cells because a firearm was found in their vehicle. Through an audio-visual intercom system that monitored the cells, Officer Fisher overheard Pierce admit that he owned the gun. The use of the intercom system was legal. The intercom is there so that officers may insure that prisoners do not harm themselves or plan to harm an officer. Maintaining safety is a legitimate business practice in a police station, so it is outside the coverage of the wiretap law. Also see *Comm. v. Dixon*, 79 Mass. App. Ct. 701 (2011) (no requirement that an arrestee be afforded a private setting in order to make his phone call under G.L. c. 276, § 33A; here, officers overheard this murder suspect say to his girlfriend, “I fucked up. I fucked up”).

⁷ Under G.L. c. 40, § 36B, at least one cell *must* have an electronic audio system “whereby a police officer at the duty desk is brought within the audible range of such cell.” No electronic audio system is required if at least one cell is within audible range of the duty desk without electronic assistance.

⁸ Although these searches are demeaning and invasive, they are necessary because “controlled substances [and weapons] may be packaged and concealed on the body so as to be virtually undetectable during the manual probing of the outerwear of a fully clothed person.” *United States v. Cofield*, 391 F. 3d 334 (1st Cir. 2004). Massachusetts requires probable cause to perform strip and visual body cavity searches. A manual body cavity search requires a warrant issued by a judge and executed by competent medical authorities. *Comm. v. Thomas*, 429 Mass. 403 (1999).

⁹ While no case law indicates that videotaping a strip search violates a suspect’s privacy rights, many court decisions recognize that strip searches are invasive and potentially demeaning. *Rodrigues v. Furtado*, 410 Mass. 878 (1991). By knowing that a video record of the procedure exists, the prisoner’s perceived humiliation may intensify. Equally important, the existence of a recording increases the possibility of officers exploiting the incident by showing the video to other officers and even other people unaffiliated with the department.

On the other hand, a video record may deter official abuses. *Barnes v. District of Columbia*, 793 F.Supp.2d 260 (2011) [inmates at the Department of Corrections (DOC) challenged the DOC’s policy of videotaping strip searches; the policy was reasonable because: (1) the videos were created for the legitimate purpose of monitoring the behavior of correctional officers and prisoners during the searches, and (2) only 72 hours of video was retained at any given time, limiting the availability of the videos for purposes other than investigating inmate or staff complaints within that time period].

¹⁰ *Comm. v. Fontaine*, 402 Mass. 491 (1988) (charges pending against the defendant were dismissed because the police electronically intercepted privileged communications between him and his lawyer).

¹¹ *Rhode Island v. Innis*, 446 U.S. 291 (1980).

¹² *Comm. v. DiGiambattista*, 442 Mass. 423 (2004) mandated the recording of stationhouse interrogations. According to the SJC, “Given the fine line between proper and improper interrogation techniques, the ability to reproduce the exact statements made during an interrogation is of the utmost benefit.” *DiGiambattista* also required that the police record *custodial* interrogations *anywhere*. This is the challenging aspect of this rule. Is it realistic to expect that officers will turn on their tape recorder when they ask questions of a suspect who is in handcuffs on the ground at 2:00 a.m.? Nevertheless, taping suspects and witnesses in the field may soon become standard operating procedure. In the meantime, officers should simply do the best they can to record interrogations.

¹³ “Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts,” Boston Bar Association (December 2009) at page 41. Go to www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Dec09.pdf.

¹⁴ *Comm. v. Morganti*, 455 Mass. 388 (2009) held that simply informing a defendant that you *intend* to record him is sufficient notice.

¹⁵ *State v. Howard*, 728 A.2d 1178 (1998) (a Delaware court found that a married couple had a reasonable expectation of privacy in their communications inside a police interview room after the police had left them alone. The couple was not aware they were being recorded).

¹⁶ *Comm. v. Fernette*, 398 Mass. 658 (1986) (“there is a potential for abuse if the tape recorder is started and stopped during an interview . . . The better practice is to record the entire interview, including the defendant’s silences and emotional outbursts”). The danger of selective recording was highlighted in the Central Park jogger case, where four defendants, after long hours of unrecorded interrogation, falsely confessed to the rape on videotape. Leo, R., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wisconsin L. Rev. 479, 535.

¹⁷ A defendant’s refusal to sign a *Miranda* form and to have an interview recorded does not prevent a finding that a valid oral waiver of *Miranda* rights occurred. *Comm. v. Williams*, 456 Mass. 857 (2010). *Comm. v. Raposa*, 440 Mass. 684 (2004).

¹⁸ Another option is to move the juvenile and adult to another area that is not being audio recorded.

¹⁹ Massachusetts would likely allow police to continue video monitoring (as they do when prisoners meet with lawyers), but would probably forbid continued audio recording. See generally *Comm. v. Fontaine*, 402 Mass. 491 (1988). More specifically, consider *S.D. v. State*, 937 N.E.2d 425 (2010) (in this Indiana case, the detective left the interview room to allow the juvenile and his guardian to discuss whether the juvenile would agree to talk and whether the guardian would stay in the room. The consultation between the two was videotaped. Although both the juvenile and the guardian were aware of the video cameras in the room, the video cameras constituted an improper police presence and infringed on the privacy necessary to any meaningful consultation).

²⁰ *Comm. v. Ward*, 412 Mass. 395 (1992).

²¹ *Comm. v. DiGiambattista*, 442 Mass. 423 (2004) only dealt with statements offered into evidence against the accused. That is why the remedy for a violation of this rule is a jury instruction, not suppression of the unrecorded statement.

²² See G.L. c. 66, § 1 and *Electronic Records Management Guidelines*, Secretary of the Commonwealth (www.sec.state.ma.us), at page 1.

²³ Public records retention schedules are found at www.sec.state.ma.us/arc/arcmu/murds/0707.doc.