



## **COVID-19 FOR COPS *At-a-glance!***

Issued March 20, 2020 – May be copied and circulated without limitation

**Issue 1: Preventing spread of COVID-19.** Police have four options from least to most intrusive.

1. **Voluntary compliance.** Encourage voluntary compliance (isolation and self-quarantine), document incident, send report to local health authority, and consider whether a stronger intervention is necessary.
2. **Community caretaker detention.** In the case of COVID-19, police may, depending on the circumstances, remove an individual from a public setting, detain him or her pending the arrival of public health officials, transport the person to a medical facility for evaluation, and/or transport the person home to initiate self-quarantine. Officers should only take the action necessary to deal with the emergency and, whenever possible, be guided by medical and/or public health professionals. *Comm. v. Knowles*, 451 Mass. 91, 95 (2008).
3. **State of emergency arrest or complaint.** Governor Baker issued a written declaration of a “state of emergency” (SOE) concerning COVID-19 on March 10<sup>th</sup>. See Executive Order 591; Chapter 639 of the Acts of 1950 (Civil Defense Act); and 17, § 2A.
  - a. **The SOE and Department of Public Health (DPH) regulations authorize local Board of Health (BOH) officials to issue verbal “quarantine orders.”** Chapter 639, § 16 (state and local agencies empowered by Governor to act during SOE).<sup>1</sup>
  - b. **Oral “isolation and quarantine” orders authorized by DPH regulations 105 CMR 300.210.** Local BOH officials shall attempt to secure voluntary compliance before issuing an “oral order [if] delay in imposing the isolation or quarantine [will] pose a serious, imminent danger to the public health.” 105 CMR 300.210(D)(1).
  - c. **Police are authorized to assist DPH or local BOHs in enforcing oral “isolation and quarantine” orders.** 105 CMR 300.210(G).
  - d. **Refusing to obey or violating an order issued by a BOH during this SOE is a crime.** Chapter 639, § 8.
  - e. **Any crime in violation of an SOE in the presence of officers is a clear “breach of peace.” Police may arrest any violator or anticipated violator** (e.g., an infected person insists they are going to enter areas with other people and police need to stop them). *Comm. v. Gorman*, 288 Mass. 294, 298 (1934) (arrest need not be delayed if potential harm).

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<sup>1</sup> For anyone who claims that more cumbersome legal procedures must be utilized, refer them to Chapter 639, § 8A (any current law or regulation *inconsistent* with the SOE shall be *inoperative* during the emergency).

- f. **In conclusion, BOH officials may verbally order isolation and quarantine. If the citizen refuses to comply, officers have probable cause to arrest for a criminal SOE violation.** Of course, the presence of officers may persuade the person to self-quarantine. At that point, police may end their intervention and allow health officials to carry on. Police may still apply for a criminal complaint depending on the citizen's initial behavior.

**4. Infectious disease warrant.** Under 111, § 96, a magistrate may issue a warrant authorizing any police officer, under the direction of a BOH, to remove any person infected with COVID-19 or a "carrier of [COVID-19]." The subject(s) of the warrant may be brought to a hospital or other proper location. 111, § 101 (if necessary, officers may force entry). Under 111, 96, officers would certainly be justified in detaining an individual pending the issuance of this type of warrant.

**Issue 2: Communicating openly to deal with this crisis.**<sup>2</sup>

**State law authorizes local BOH and other health officials to tell police and other first responders about the identity and physical location of quarantined individuals.** See 105 CMR 300.120(A) ("confidential personally identifying information [may be disclosed] . . . when necessary for . . . control, treatment and prevention purposes." [emphasis added] Clearly first responders need to know when, where, and with whom they may encounter COVID-19.

**Federal law — i.e., HIPAA — does not prevent the communication of personal health information to first responders if necessary to deal with the threat of COVID-19.** See 45 CFR 164.512(j) and U.S. Dept. of HHS, Civil Rights Office, bulletin "HIPAA and Coronavirus" (Feb. 2020).

**Issue 3: No public gatherings or food/drink service.** Governor on March 15, 2020:

**Prohibited gatherings in excess of 25 people.** Virtually every social or business gathering covered, except work by state and local government. It covers activities in a single room or "other confined indoor or outdoor space."

**Closed restaurants & bars.** No "restaurant, bar, or establishment that offers food or drink" may allow customers to eat or drink on the premises. Restaurants may provide take-out or food delivery.

**Enforcement strategy.** Governor's declaration names local BOH and agents as primary enforcers, who "if necessary . . . [may employ] the assistance of State or municipal police." Upon seeing or learning about prohibited activity, police should report it to their local BOH or agent. The health authority may deal with the issue alone or request police assistance.

**Arrest authority.** Under an SOE, any unlawful gathering or on-premises eating or drinking is a crime. Chapter 639, § 8. Violators are subject to arrest for this breach of peace. *Gorman*, 288 Mass. at 298. Of course, lesser sanctions may be used — e.g., warning, dispersal order, public health citation with fine, and/or criminal complaint.

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<sup>2</sup> This information is based on memos from DPH Commissioner Monica Bharel (March 18, 2020) and the Massachusetts Assoc. of Health Boards (undated). My thanks to Officer William Trelegan, Burlington Police, for his help in obtaining critical information.



# **COVID-19 FOR COPS: Dealing with False Reports**

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## **What if a person deliberately spreads false information about COVID-19 to cause some panic?<sup>1</sup>**

**Spreading false information about COVID-19 may constitute a felony under 269, § 14.** At the end of this bulletin, I quote the actual statute with relevant elements highlighted in red and punishment in purple.

- **In short, 269, § 14 punishes any offender who:** (1) communicates, directly or indirectly, by any means (verbally or in writing on the internet, by post-it note, etc.); (2) a threat; (3) about a biological agent or *any* substance capable of causing death or serious injury; (4) which is present or will be present at a location; (5) whether the claim is true or false; and (6) causes anxiety or personal discomfort to any person or group. Upon probable cause, officers may arrest for this felony. Note: An attorney may argue that COVID-19 is not a biological agent (fair point), but it certainly qualifies as "any substance" capable of causing death or injury.
- **May I also suggest, if arrest is warranted, that police alert the media** to publicize law enforcement's ZERO TOLERANCE for spreading false information about this disease.
- **Be careful not to use 269, § 14 against misguided opinion, which is largely protected by the First Amendment** — e.g., a post reads: "As far as I'm concerned, the government wants people to be infected so they can take away our guns, and only rich people are getting treatment." (clear opinion) *versus* "There are 700 confirmed cases of COVID-19 in Anytown. Town officials say you should evacuate now!" (If false, clearly illegal).
- **As a lesser or initial intervention, police may want to send a message to people who have put out the information:** "This information is a possible violation of General Laws Chapter 269, Section 14, which is a felony for publishing false information about a dangerous disease being present at a location that causes anxiety to other persons. We recommend that you call Lt. \_\_\_\_\_ immediately at \_\_\_\_\_ and explain your communication and its source, or that you remove it immediately. You are subject to arrest for a violation of 269, § 14 and to the imposition of up to 20 years in state prison upon conviction."

**DISORDERLY CONDUCT. Under 272, § 53, disorderly applies to the creation of a hazardous condition with no legitimate purpose.** Putting out false information about a national and state health emergency is clearly hazardous and has no legitimate purpose. However, officers would not have a

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<sup>1</sup> This question was emailed to Attorney Scheft by a sergeant in Massachusetts.

right of arrest, since the communication would not occur in your presence at the time you located the source.<sup>2</sup> Bear in mind, first offense disorderly only draws a \$150 criminal fine.

**LARCENY BY FALSE PRETENSE. Under 266, § 30, this crime applies when a person lies about a fact related to COVID-19 in order to obtain money or property.** If the money or property obtained has a value over \$250, then police may arrest on probable cause. If \$250 or less, apply for a complaint. See generally *Comm. v. Khan*, 92 Mass. App. Ct. 487 (2017).

**CONSPIRACY. As a final point, consult your DA and consider conspiracy.** There is some legal precedent that criminal conspiracy may apply to illegal behavior that is clearly wrong, even though it is not defined by a criminal statute. *Comm. v. Kelley*, 359 Mass. 77 (1971) (conspiracy to violate non-criminal public bidding law). *Comm. v. Benesch*, 290 Mass. 125 (1935) (conspiracy to violate a non-criminal securities arrangement). So, if at least two people have put together the communication, then a conspiracy charge may work based on common law. Get approval from the DA first!

**Actual language of 269, 14**

Section 14. (a) [provides definitions not relevant to this discussion] . . .

(b) **Whoever willfully communicates or causes to be communicated, either directly or indirectly, orally, in writing**, by mail, by use of a telephone or telecommunication device including, but not limited to, electronic mail, Internet communications and facsimile communications, through an electronic communication device or by any other means, **a threat**:—

(1) that a firearm, rifle, shotgun, machine gun or assault weapon, as defined in section 121 of chapter 140, an explosive or incendiary device, a dangerous chemical or **biological agent**, a poison, a harmful radioactive substance **or any other device, substance or item capable of causing death, serious bodily injury** or substantial property damage, will be used at a place or location, **or is present or will be present at a place or location, whether or not the same is in fact used or present**; or

(2) to hijack an aircraft, ship, or common carrier thereby **causing anxiety**, unrest, fear, **or personal**

**discomfort to any person or group** of persons **shall be punished by** imprisonment in the **state prison** for not more than **20 years or** imprisonment in the **house of correction** for not more than **21/2 years**, or by fine of not more than \$10,000, or by both such fine and imprisonment.

(c) [enhanced penalty if building evacuation] . . .

(d) . . . A **person found guilty** of violating this section shall, **in all cases**, in addition to any other punishment, be **ordered to make restitution to the individual, public or private entity for any costs incurred**, damages and financial loss sustained as a result of the commission of the crime. Restitution shall be imposed in addition to incarceration or fine, and not in lieu thereof, however, the court shall consider the defendant's present and future ability to pay in its determinations . . .

(e) Nothing in this section shall authorize the criminal prosecution of picketing, public demonstrations or other similar forms of expressing views.

<sup>2</sup> 272, § 54 (arrest for disorderly in presence in public only).