



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
POLICE COMPLAINTS BOARD
OFFICE OF POLICE COMPLAINTS**

**Office of Police Complaints
Michael G. Tobin, Executive Director**

**POLICE COMPLAINTS BOARD
Paul Ashton, Chair
Commander Morgan Kane
Bobbi Strang
Kurt Vorndran**

**PCB POLICY REPORT #17-5:
CONSENT SEARCH PROCEDURES**

Summary of Issue:

Consent searches are a constitutionally valid way for law enforcement officers to conduct a search of a person or property. However, the consent for the search must be voluntary. The Office of Police Complaints (OPC) has received a number of complaints concerning searches of a person, vehicle, or home that were conducted without consent. In fact, in fiscal years 2015, 2016 and 2017 so far, OPC received 112 cumulative separate complaints for harassment related to searches.¹ Analysis of the complaints indicates that 76% of the complainants were African-American. Further, 44% of the complaints are related to incidents in the 6th or 7th Districts. This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations. This report examines issues related to consent searches and ways that the Metropolitan Police Department (MPD) and the District of Columbia Housing Authority Police Department (DCHAPD) can protect the validity of their searches, the constitutional rights of individuals, and trust in the police by updating and modifying consent search procedures.²

Applicable Directive or Law:

Under *Katz v. U.S.*, warrantless searches are presumed unreasonable.³ However, the Supreme Court has recognized exceptions to the warrant requirement including consent searches. In *Schneckloth v. Bustamonte*, consent searches were held to be constitutionally valid, assuming the consent is given voluntarily, the search is conducted within the scope of the consent, and the

¹ As of July 12, 2017. This is the number of complaints received, and may or may not indicate actual misconduct, but this number does indicate a pattern of police-community engagement that warrants further attention.

² The Police Complaints Board (PCB) is issuing this report pursuant to D.C. Code § 5-1104(d), which authorizes the Board to recommend to the District of Columbia Mayor, Council, MPD Police Chief, and the Director of District of Columbia Housing Authority reforms that have the potential to improve the complaint process or reduce the incidence of police misconduct.

³ *Katz v. United States*, 389 U.S. 347 (1967).

person giving the consent is authorized to do so.⁴ Voluntariness is determined by the totality of the circumstances, and there are both subjective and objective factors to analyze.⁵ Subjective factors include, but are not limited to, the suspect's age, education, intelligence, and experience.⁶ Objective factors include, but are not limited to, officers' tactics of questioning or physicality, length of detention, and any misrepresentations made by the officers.⁷

In addition to applicable law, currently MPD officers use of consent searches is governed by MPD directives. The General Order on search warrants states:

Members may search any object, place, or person if consent for that search is given by a person with legal authority to do so.

a. Consent searches:

- (1) Must be authorized by a person who has the legal authority to give the consent;
- (2) Must be limited to the exact words or meaning of the consent; and
- (3) May be withdrawn at any time.

b. Members shall:

- (1) Use the PD Form 781 (Consent to Search) to document consent searches of premises; **or**
- (2) Document (e.g., notebook, field report) who gave the consent to search the premises, the relationship of the person giving consent to the area searched, and the time the consent was given.⁸

MPD has provided some further guidance with the use of body-worn cameras. The Executive Order states:

When practicable, there shall be at least one BWC-equipped member present with his or her BWC activated prior to a consent search being conducted of a person, place, or object.

1. Both the consent and the search shall be documented by a BWC equipped member.
2. BWC documentation shall be in addition to the documentation requirements outlined in GO-PCA-702.03 (Search Warrants) [i.e., documentation of the consent search on the PD Form 781 (Consent to Search) **or** in the member's notebook].⁹

The current directives provide insufficient guidance to officers. First, the requirement that consent be voluntary is not even mentioned. Secondly, there is not a directive that specifically addresses the procedures for conducting consent searches. The limited guidance for

⁴ *Schnecko v. Bustamonte*, 412 U.S. 218 (1973).

⁵ Priscilla G. Adams, Senior Research Counsel, National Center for Justice and the Rule of Law, *Consent Searches*, <http://www.olemiss.edu/depts/ncjrl/pdf/Consent.pdf>.

⁶ Brian A. Sutherland, *Whether Consent to Search was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y. LAW REV. 2192, 2197 (2006).

⁷ *Id.* at 2198.

⁸ MPD General Order 702.03, December 23, 2013 (emphasis added).

⁹ MPD Executive Order 17-008, March 10, 2017 (emphasis added).

officers on consent searches is primarily found in General Order 702.03 governing search warrants, with very brief additional guidance in Executive Order 17-008. The brief guidance provided in the search warrant general order only refers to “consent searches of premises,” connoting a physical address, not a vehicle or person. Further, the guidance does not give officers any sort of framework for when a consent search is appropriate and should be conducted, it merely states the narrow directions provided above. Of particular concern is that this guidance does not include any requirement for the officer to inform a subject of their right to decline a consent search. In addition, the PD Form 781 appears to have been published in 1968, and it has not been updated since that time.¹⁰ The form also appears to only envision consent searches of residential property (i.e. “premises”); however officers often conduct consent searches of persons and vehicles. Further complicating this matter is the fact that the MPD directive for automobile searches contains no guidance on consent searches.¹¹

The PCB has previously addressed inadequate and outdated MPD policies and recommended that a full review be conducted.¹² On November 18, 2016 the PCB identified 118 General Orders that were more than 10 years old, with 34 of those being more than 30 years old. The volume of complaints pertaining to improper searches provides further evidence of the need to update procedures. This should be self-evident when the form used to document a search has not been revised in 49 years- since 1968.

Policy Concerns:

OPC continues to receive complaints regarding searches, even with full deployment of body-worn cameras for MPD, and since the issuance of the executive order on the use of Body-Worn Cameras with consent searches. So far, in fiscal year 2017 OPC has received 45 harassment complaints related to searches, which is more than in either fiscal year 2015 or 2016. This increase in volume of complaints indicates that a body-worn camera recording of an officer interacting with a complainant regarding a search does not ensure that officers act properly, nor that the complainant had a full understanding of the consent search, and BWC does not proactively protect the constitutional rights of the complainant to decline the search.

Causing further concern is the observed racial disparity, based on complaints received, in the use of consent searches within the African-American community. Of the 45 harassment complaints received by OPC related to searches in fiscal year 2017 as July 12, 2017¹³, 71% of the complaints have originated from African-Americans. Further, 72% of the 45 complaints have been for incidents in the 5th, 6th, or 7th Police Districts.¹⁴

When a community member encounters an officer in full uniform who requests to conduct a search of their person, belongings, vehicle, or home, a very thin line exists between

¹⁰ See Appendix A

¹¹ See MPD General Order 602.1, May 26, 1972.

¹² See PCB Policy Report #17-1: Ensuring MPD Policies and Procedures are Current, November 18, 2016.

¹³ As of September 22, 2017, 15 of these complaints are pending, 20 were dismissed, 7 were referred to MPD, 1 was withdrawn, 1 was mediated, and 1 was sustained.

¹⁴ This breaks down to 20% in 5D, 16% in 6D, and 36% in 7D.

voluntariness and coercion. There is often an implicit assumption that an individual should comply with any request made by a police officer during a stop. When officers routinely request consent searches it erodes individuals' belief that the police are the guardians of our neighborhoods and fosters ill-will in areas of the District of Columbia that have the most need for improving trust. Every step forward in community policing is offset by two steps backward whenever a law-abiding person is faced with a decision to comply with an officer's request to search their person, belongings, vehicle, or home.

In order to reduce the distrust generated by consent searches and remedy confusion regarding the voluntariness prong of consent, many jurisdictions have instituted the mandatory use of consent forms prior to conducting a consent search. Consent forms are completed by the officer, and reviewed and signed by the search subject to indicate the subject's consent to search.¹⁵ Consent forms are not required to prove voluntariness in court, but instead lend a strong argument during evidentiary suppression hearings.¹⁶ Consent forms essentially serve as legal protection for officers when the legality of their search is being questioned and when defendants propose that evidence should be suppressed.¹⁷ They can also prove useful in the investigation of police complaints, should a person make a complaint that a search was not consensual when the officer believes that it was. Consent forms differ from each jurisdiction, but generally, the forms identify a specific area that the officers are permitted to search, a location for the subject's signature, and describe the subject's rights to decline the search.¹⁸ When the form includes an explanation of a person's rights, which a person can read or have read to them, it can help alleviate the concern that an officer is misleading or coercing the person.

While MPD does have a consent search form, PD Form 781, based on the investigations of complaints filed with OPC, it is not often used.¹⁹ Further, the PD Form 781 is referred to in the General Order for search warrants, and is rarely, if ever, utilized for searches of vehicles or persons, as the form is designed for use with physical addresses. Use of the PD Form 781 is also discretionary based on the General Order,²⁰ so the lack of use is likely because it is easier for an officer to indicate in their notebook or field report²¹, as doing so does not require the participation of anyone else, as the consent form does. However, by only noting a search and not actually using the consent form, the officers are undermining the assertion that consent was

¹⁵ Sutherland at 2209.

¹⁶ See generally *id.*; see also Robert T. Thetford, *Should Officers Use Written Consent to Search Forms*, <http://www.icje.org/articles/WrittenConsentForms.pdf> (stating that consent forms are not legally required, but are used as a form of proof).

¹⁷ See generally Rocco Parascandola, *Consent to Search Forms, Now Available in Seven Languages, Allow Police to Bypass Warrant Process*, N.Y. DAILY NEWS, Oct. 1, 2011, <http://www.nydailynews.com/news/crime/consent-search-forms-languages-police-bypass-warrant-process-article-1.962160>.

¹⁸ Nancy Leong et al., *Consent Forms and Consent Formalism*, WIS. LAW REV. 751, 758 (2013). <http://wisconsinlawreview.org/wp-content/uploads/2013/06/9-Leong-Suyeishi.pdf>.

¹⁹ One investigator, who has been with OPC for 16 years and is now a supervisor, has never seen the PD Form 781 in an OPC investigation.

²⁰ MPD General Order 702.03

²¹ MPD General Order 702.03 refers to the officer's field report; however this could also include the PD 251 Incident Report, or PD 76 Stop or Contact Report.

given voluntarily, which in turn undermines the community's trust in the police. The consent form can only work if it is actually used.

In addition, when officers are only noting a consent search in their notebooks or field report and recording the incident on BWC, no one outside of the officers present will necessarily be aware of the search unless a complaint is made to OPC or the search turns up evidence. This creates a lack of oversight for the officers' actions, and makes it impossible for the department to meaningfully track the number of consent searches, who the subjects are, and which officers are conducting them. This information is important for determining if consent searches are being abused, and if so, if there are specific officers who are disproportionately responsible. Since the numbers based on OPC complaints indicate there is a reason for concern with the practice of consent searches, being able to track and analyze this information would enhance community trust, and protect the constitutional rights of all search subjects, not just those who make complaints to OPC.

Recommendations

To help improve and facilitate better relations and increase trust between MPD and DCHAPD officers and community members, the Police Complaints Board recommends that MPD and DCHAPD examine their procedures for consent searches. Specifically, the PCB recommends that:

1. MPD should create a separate General Order on consent searches and update the PD Form 781 (consent search form). In addition to recording the incident on body-worn camera, the General Order should include mandatory utilization of a consent form for all types of consent searches.²² The consent search form should include at a minimum:
 - a. A description of the subject's right to decline the search, which can be read by or to the subject, to ensure consistency and accuracy.
 - b. Signature of the individual consenting to the search.
 - c. A description of the specific place or area that the officers are permitted to search (i.e. address, vehicle, person).

²² See Appendices B and C for examples of comprehensive orders.

Appendix B is an excerpt from the Milwaukee Police Department's General Order 2014-94: Citizen Contacts, Field Interviews, Search and Seizure, issued August 1, 2014. The guidance provided to officers in this GO is broad, and specifically does include that consent needs to be voluntary, guidelines for obtaining consent, and use of a mandatory consent form. The PCB understands that this guidance was adopted as a result of the Milwaukee Police Department undergoing an accreditation process, similar to what the PCB recommended to MPD in Policy Report #17-1: Ensuring MPD Policies and Procedures are Current, issued on November 18, 2017.

Appendix C is an excerpt from the New Orleans Police Department Operations Manual, Chapter 1.2.4, Title: Search and Seizure, effective on July 10, 2016. The guidance provided to officers requires a supervisor to approve use of a consent search, a consent search form, and the officer must affirmatively inform the subject of the right to refuse and to revoke consent at any time. This guidance is in response to the U.S. Department of Justice's Consent Decree with the City of New Orleans, issued on July 24, 2012 (see paragraph 129, available at http://www.laed.uscourts.gov/sites/default/files/nopdconsent/12cv01924_Doc2-1.pdf).

DCHAPD²³ should create a similar mandatory form, or adopt usage of an updated PD Form 781.

2. With the mandatory use of a consent search form MPD and DCHAPD should track the following minimum data variables for all consent searches: location, time, circumstances, demographics of the subject and officers, and whether the search yielded contraband that resulted in an arrest. That data should be analyzed periodically to ensure that consent searches are conducted constitutionally and do not become the routine practice of officers, identify patterns and trends, and assist in training scenarios.
3. MPD and DCHAPD should review training on consent searches, and ensure that all training includes:
 - a. Discussion of voluntariness of consent in terms of subjective factors like age, education, intelligence, and experience.
 - b. Officer's conduct in obtaining consent to search, including what is and is not constitutionally permissible.
 - c. How to properly use the consent search form.
 - d. Discussion of how consent searches affect community trust in the police department.

Conclusion

Consent searches are an important and valuable tool in policing. The discretionary use of them must be carefully controlled to ensure the protection of constitutional rights, and the admissibility of any evidence discovered. Overuse and misuse of this law enforcement tool erodes community trust. By updating policies on consent searches, and implementing a mandatory consent to search form MPD and DCHAPD will be in the best position to properly use this tool while maintaining the trust of the community.

²³ There are no provisions of the DCHA standard lease that limit a tenant's right to privacy in their home. However, even if that were the case, DCHAPD would still need a standard for consent searches that officers may conduct as part of their duties for non-DCHA property.

Appendix

A

PD 781
9/68

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department

CONSENT TO SEARCH

DATE _____

LOCATION _____

I, _____, having been informed of my constitutional right NOT to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize

_____, and
Names of Officers or Agents

_____, _____
Titles of

Officers or Agents and Name of Agency

to conduct a complete search of my premises located at _____

_____ .

These officers or agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above named persons voluntarily and without threats or promises of any kind.

Signature of Consenter

WITNESSES:

Appendix

B

085.50 CRIME SCENE SEARCHES (WILEAG 1.7.3)

- A. Crime scene searches may fall into several areas of warrantless searches:
1. Consent (see 085.55)
 2. Plain View (see 085.35)
 3. Search incident to arrest (see 085.45)
 4. Exigent circumstances (see 085.60)
- B. According to the principles of the U.S. Supreme Court cases *Thompson v. Louisiana* and *Mincey v. Arizona*, there is no "crime scene exception" to the Fourth amendment mandates. Rather, police members must be able to articulate consent, plain view, search incident to arrest, or exigent circumstances. In most instances, it will be necessary to obtain a search warrant for a crime scene.
(WILEAG 1.7.3.4)
- C. When uncertainty arises regarding the legality of a crime scene search, the Milwaukee County District Attorney's office should be contacted for advice. After hours, police members may contact the on-call duty District Attorney by obtaining contact information through the Technical Communications Division at extension 7472.

085.55 SEARCH BY CONSENT (WILEAG 1.7.3, 10.1.1)

The purpose of our consent searches is to prevent violent crime by lawfully recovering contraband, weapons and evidence of crimes. The purpose is not to create random drug arrests. Consent searches are an important tool in policing, the discretionary use of which must be carefully controlled. The Chief of Police has restricted your ability to request consent for a search to those circumstances in which you have articulable suspicion that you will recover contraband, weapons and evidence of crimes. As with our traffic stop policy, it is important to maintain the community's support as we work with the community to reduce violent crime.

- A. Police members may conduct consensual searches of persons and/or property if:
1. The police member has articulable suspicion criminal activity has, is or will be occurring or when a police member has personal knowledge of either a person or certain location having a history of criminal activity, being a known offender or a police member has reasonable and articulable belief that a fugitive and/or a missing person may be within a particular location.
 2. The consent is voluntary and not given because of the threat of force.
 3. The person giving consent has apparent authority over and control of the premises or articles to be searched.

4. The person giving consent understands the consequences of consent and the right to refuse.
(WILEAG 1.7.3.1)

B. Scope of the Search

1. The person giving consent may limit the scope of the search.
2. The person giving consent may revoke the consent at any time. If consent is revoked after an item is found that is readily recognizable as evidence, the item may be seized and the scene secured until a search warrant is obtained. Otherwise, the search must end immediately.
3. Police members may search closed containers found during a consensual vehicle search as long as the officer reasonably believes the consent extended to closed containers in the vehicle.
4. An adult who has regular, unrestricted access to a place can grant consent for a search of that place, but not for the personal belongings or storage spaces of another.

C. Guidelines for Obtaining Consent

1. Police members shall ensure the person whose consent is sought has the authority to give consent.
2. Police members must obtain consent from a person, who has a "right to privacy" in the area to be searched, or against whom the incriminating search is directed, or from a person who has a valid and equal right to privacy in the area to be searched.
3. Police members shall not claim authority to conduct a search without consent or a search warrant unless otherwise permitted by law.
4. Police members shall advise the person, whose consent is sought, of the right to refuse a search.
5. Police members may advise the person, whose consent is sought, about the general nature of the investigation and the purpose of the search.

D. Reporting of Consent Searches

1. Prior to conducting a consent search, Form PF-3 "*Consent to Search Authorization*" must be completed and the pink copy of the form will be provided to the person who consented to the search.

2. When operationally feasible, an audible and visual record of consent utilizing the "in-car" video system should be made to assist in the mitigation of future claims that the search was coerced or non-consensual. This is especially true when the person does not wish to sign the consent form, but agrees to the search. The fact a recording is available shall be referenced in the incident report and on the consent form.
3. In the event contraband is located during a consensual search, the original completed Consent Form will become evidence and will be inventoried as such. Prior to inventorying the Consent Form, a copy of the completed form will be made and submitted to the police member's immediate supervisor for data entry into the search field of the Tiburon FI Module. Once entered, the copy will then be forwarded for imaging at Open Records.
4. If contraband is not located during a consensual search, the original Consent Form will be forwarded to the police member's immediate supervisor for data entry into the search field of the Tiburon FI Module. Once entered into Tiburon, all copies of the form will be retained by the work location for one year and then destroyed in accordance with SOP 680.10(E)(5), as it relates to data protection and security.
(WILEAG 10.1.1.3)
5. The yellow copy of the Consent Form will be submitted with the arrest / DA package (if any). If the yellow copy of the form is not required, it will be properly destroyed in accordance with SOP 680.10(E)(5), as it relates to data protection and security.
(WILEAG 10.1.1.3)

E. Third Party Consent Valid in Certain Circumstances

1. Consent is valid if the third person has equal authority over the business or residence and it can be concluded the absent person assumed the risk the cohabitant (roommate) might permit a search.
2. Consent to search is not allowed if one cohabitant (roommate) or business partner objects to the consent, even if the other person gives permission. Consent must be given by both people, if present.
3. Parents may consent to search a child's living area if the parents have routine access to the area (the child does not pay rent).
4. Landlords cannot give consent to search if a lease or rental agreement is still in effect.
(WILEAG 1.7.3.1)

Appendix C

15. Officers shall not frisk any person for the purpose of determining that person's gender or to view or touch the person's genitals. Where same-gender searches are required by law or NOPD policy, the officer shall respect the gender identification expressed by the individual. Where the individual does not self-identify and the gender identity is not clear to a reasonable person or the officer is uncertain, the officer will take reasonable, non-invasive steps to determine the gender identity, such as asking the individual how the individual would like to be addressed.
16. Officers shall use accurate and specific descriptive language and not rely solely on "boilerplate" or "pat" language in any reports documenting investigatory stops, detentions, or searches. Articulation of reasonable suspicion and probable cause shall be specific and clear.
17. Officers shall not use or rely on information known to be materially false or incorrect in effectuating an investigatory stop or detention, or in establishing reasonable suspicion for a search.
18. Officers shall not compromise their safety, or other officers' safety, in order to justify searches.
19. Officers shall not detain non-occupants present at the location where a search warrant is executed for longer than reasonably necessary to secure the area or determine whether they are occupants of the premises being searched, unless the officer has reasonable suspicion that the non-occupant is involved in criminal activity or poses a danger to officer safety;

CONSENT TO SEARCH

20. An officer shall immediately notify a supervisor when considering a search based on consent. Before an officer may conduct a consent search, the officer must have the express approval of his or her supervisor. The approving supervisor's name and approval shall be noted on the required Consent to Search Form.
21. When an officer seeks consent for a search, the officer shall affirmatively inform the subject of his or her right to refuse and to revoke consent at any time. The officer shall document and execute the subject's consent on the "Consent to Search Form" (Form #146), which clearly explains these rights. The following information shall be required on all Consent to Search Forms:
 - (a) The Date, Time, Location, and NOPD Item number that directly relates to the request or consent to search;
 - (b) The full name of the person who is granting the consent;
 - (c) The residential address of the person who is granting consent;
 - (d) The full name of the officer who is requesting consent to search;
 - (e) An indication if the consent relates to the search of the person, his/her vehicle or residence (it can be more than one);
 - (f) The initials of the person granting consent indicating the officer(s) did not threaten or coerce the person to obtain consent;
 - (g) The initials of the person granting consent indicating the officer(s) did not make any promises in return for cooperation to the person to obtain consent;
 - (h) An indication that the person granting consent had the right to refuse to consent to the search;
 - (i) An indication that the person granting consent had the right to revoke consent at any time;

- (j) An indication that all of the rights listed on the form were read and explained to the person granting consent by the officer(s) requesting consent prior to the person signing;
 - (k) The signature of the person granting consent to search;
 - (l) The signatures (and names printed) of two persons who are not members of the NOPD and preferably family or friends of the person granting consent;
 - (m) The signature of the officer requesting consent and a witness or assisting officer who was present for the entire recitation of rights to the person granting consent; and
 - (n) The signature of the supervisor who approved the consent to search BEFORE the search can be executed.
22. The original Consent to Search Form must accompany the related NOPD Incident Report or EPR along with a copy of the receipt for any items seized by the officer(s). The original receipt will be given to the consenting person.

CONSENSUAL CONTACTS

23. An officer may engage a person in consensual contact (see **Chapter 1.2.4.1 – Stops/Terry Stops**) during the course of his/her duties.

PERFORMING A STOP/DETENTION

24. When reasonable suspicion exists to perform a stop, it should be performed with due caution, restraint, and sensitivity. Officers are authorized to perform stops only in accordance with **Chapter 1.2.4.1 – Stops/Terry Stops**. All stops MUST be documented on the NOPD electronic Field Interview Card and any related incident reports (EPR).

JUSTIFICATION FOR CONDUCTING PAT-DOWN SEARCHES/FRISKS

25. During a stop, if the officer reasonably believes the suspect is in possession of a weapon that presents a danger to the officer or others, the officer may conduct a frisk (pat-down search) of the suspect's outer garments to search for weapons. The search must be limited to what is necessary to discover weapons; however, pursuant to the "plain-feel doctrine," police may seize contraband discovered in the course of a frisk, but only if the contraband's identity is immediately apparent.
26. Not every stop or detention justifies conducting a pat-down search. These searches are justifiable and may be performed only to protect the safety of officers and others and may never be used as a pretext for obtaining evidence.
27. In **addition** to the basis for the stop itself, the officer must have reasonable suspicion that the subject may possess a weapon and pose a threat to the officer and/or others. (See **Chapter 1.2.4.1 – Stops/Terry Stops**.) This may include, but is not limited to:
- (a) Prior knowledge that the subject carries a weapon;
 - (b) Suspicious behavior, such as failure to comply with instructions to keep hands in sight; and
 - (c) Observations, such as suspicious bulges, consistent with carrying a concealed weapon.