GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	22-0329
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment – Mishandling Property
Complaint Examiner:	Peter Tague
Merits Determination Date:	January 9, 2023

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by § 5-1107(a). This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

The complainant, COMPLAINANT, filed a complaint with the Office of Police Complaints (OPC) on March 23, 2022 [all events occurred in 2022]. COMPLAINANT alleged that on March 4, Metropolitan Police Department (MPD) SUBJECT OFFICER, harassed him by taking his property (a cellphone) over his objection.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint. The Complaint Examiner reviewed OPC's Report of Investigation (ROI), the objections submitted by SUBJECT OFFICER on October 20, 2022, and OPC's response to SUBJECT OFFICER's objections. The Complaint Examiner also reviewed three documents not available to OPC when it completed the ROI: a "timeline" of events relevant to this complaint prepared by UNITED STATES ATTORNEY OFFICE CHIEF in the United States Attorney's Office for the District of Columbia on November 28, 2022; SUBJECT OFFICER's affidavit accompanying the request for a search warrant to search the cellphone of SUSPECT #2; and WITNESS OFFICER's responses to questions asked by OPC, received on December 28, 2022. Based on the review of those documents, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on October 20, 2022, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. The complainant, COMPLAINANT, accused SUBJECT OFFICER, of harassing him when SUBJECT OFFICER seized COMPLAINANT's cellphone, over COMPLAINANT's objection, at the end of their interview at the AN MPD DISTRICT STATION on March 4, 2022. Asked to consent to have his cellphone searched, the complainant refused. Together with other officers, SUBJECT OFFICER then took the cellphone from the complainant. When the complainant insisted that a warrant was needed, SUBJECT OFFICER said that while a warrant was needed to search the cellphone one was not needed to take it. He added (to paraphrase), "if a person … has evidence, it is common practice [for the police] to collect the evidence." ROI at 5.

2. When interviewed by OPC, SUBJECT OFFICER said he took the cellphone because he believed that "COMPLAINANT helped the suspect" in a murder. ROI Exhibit 6 at 2 (SUBJECT OFFICER Interview). He did not elaborate.

3. SUBJECT OFFICER was investigating a murder that occurred on February 9, 2022. The suspect, SUSPECT #1, was arrested on April 1, 2022. *See* ROI Exhibit 7.

4. As part of the investigation, SUBJECT OFFICER sought to learn whether the complainant and another man, SUSPECT #2, had helped SUSPECT #1.

5. SUBJECT OFFICER prepared an affidavit to support an application for a search warrant to open the complainant's cellphone and examine its contents. The date he completed that affidavit—probably quite long, as discussed below—is not known. On April 15, 2022, MPD asked the United States Attorneys' Office (USAO) to authorize a request for a search warrant to search the complainant's cellphone. Five days later, with the USAO's approval, MPD submitted the request for judicial approval. On that same day, April 20, 2022, a judge authorized the search.

6. It took over six weeks to obtain the search warrant. SUBJECT OFFICER says the delay was caused in part by the USAO. Aware that SUBJECT OFFICER had the complainant's cellphone, the USAO "wanted to figure out what type of verbiage to use for the search warrant." ROI Exhibit 6 at 2 (SUBJECT OFFICER Interview). Describing the process, SUBJECT OFFICER added that after sending the affidavit to the USAO (also after it was reviewed by his supervisor) "they would review it, make certain edits, and send it back to him." *Id*.

7. OPC asked for a copy of the affidavit. The USAO refused to share it. The USAO did, however, provide a list of certain legal events (a "timeline") connected to the

investigation of the murder. See Memorandum from UNITED STATES ATTORNEY OFFICE CHIEF of the US Attorneys' Office for the District of Columbia (November 28, 2022).

8. Of relevance are these events. On April 14, 2022, MPD asked the USAO to approve its desire for warrants to arrest SUSPECT #2 and the complainant as accessories after the fact. The USAO apparently did not honor those requests. On November 1, 2022, MPD resubmitted that request for SUSPECT #2 but not for the complainant. The USAO signed that request, and two days later a judge issued the warrant to arrest SUSPECT #2. No arrest warrant has (apparently) been issued for the complainant.

9. SUBJECT OFFICER also wrote an affidavit to accompany a request to search SUSPECT #2's cellphone. OPC received a copy of that affidavit, dated December 2, 2022 (SUSPECT #2 Affidavit). That lengthy affidavit contains 145 paragraphs spread over 53 pages. It includes screenshots of the accused murderer (SUSPECT #1), of SUSPECT #2, and of the complainant from footage taken from cameras in and around the location of the murder.

10. Referring to SUSPECT #2 as POI-1 (Person of Interest), and to the complainant as POI-3 (and as Subject-1), the SUSPECT #2 Affidavit describes the complainant's possible connection to SUSPECT #1. The complainant may have helped SUSPECT #2 to change clothes after SUSPECT #1 allegedly committed the murder.

11. To assess whether SUBJECT OFFICER had probable cause to seize the complainant's cellphone, it is useful to summarize the affidavit's description of the conduct of SUSPECT #1, SUSPECT #2, and the complainant.

12. Shortly before the murder occurred, SUSPECT #1 left an apartment at LOCATION #1 IN NE, WASHINGTON, DC, wearing different clothes than he wore as he entered that apartment. SUSPECT #2 Affidavit, paras. 101 at 29 and 104 at 30.

13. At the time he allegedly fired the shots, SUSPECT #1 was dressed in the clothes he wore as he left the apartment.

14. After the murder occurred, SUSPECT #1 and the complainant encountered each other near an apartment building located at LOCATION #2, IN NE, WASHINGTON, DC. They acted as if they knew each other. SUSPECT #2 Affidavit, para. 60 at 18. They then entered that apartment building, followed by SUSPECT #2. *Id*. para. 62, at 19.

15. Shortly thereafter, SUSPECT #2 left that apartment complex and drove away. He was next seen entering the apartment building at LOCATION #1, IN NE, WASHINGTON, DC. SUSPECT #2 Affidavit, para. 15, at 3. He was invited into an apartment allegedly occupied by SUSPECT #1. (SUSPECT #1's connection to the apartment appears disputed. Compare SUSPECT #2 Affidavit, para. 74, at 22 with para. 92, at 26.

Resolving this dispute is not relevant to COMPLAINANT's complaint.) SUSPECT #2 left that apartment carrying clothes. *Id*. para. 16, at 3. Those clothes appeared to be the ones worn by SUSPECT #1 as he entered that same apartment earlier. SUSPECT #2 Affidavit, paras. 101 at 29 and 104 at 30.

16. SUSPECT #2 returned by car to the apartment building at LOCATION #2, IN NE, WASHINGTON, DC. SUSPECT #2 Affidavit, para. 25 at 5. The complainant was outside when SUSPECT #2 arrived. *Id*. and para. 64 at 20. (The complainant is there identified as "Subject-1," considered by SUBJECT OFFICER #1 to be the same person. *Id*. para. 82 at 24.) The complainant reentered the building. *Id*. para. 25 at 5 and para. 66 at 20. He emerged carrying a bag that is thought to be empty ("the bag blows with the wind as if empty," *id*. para. 66 at 20). After placing that bag in SUSPECT #2's vehicle, the complainant retrieved it, now zipped and seemingly containing something, and returned to the building. *Id*. paras. 25 and 28 at 5 and 6, and para. 69 at 20.

17. A few minutes later the complainant and SUSPECT #1 left the building, climbed into a truck, that was driven away. SUSPECT #1 wore clothes resembling those he wore when entering the apartment at LOCATION #1, IN NE, WASHINGTON, DC, and that in turn were taken by SUSPECT #2. SUSPECT #2 Affidavit, para. 29 at 6 and para. 72, at 21.

18. In the SUSPECT #2 Affidavit, SUBJECT OFFICER described at length what he has learned from various surveillance cameras. SUSPECT #2 Affidavit, para. 45 at 11. The footage supports the points made above. There was, however, no footage from inside the apartment complex at LOCATION #2, IN NE, WASHINGTON, DC.

19. SUBJECT OFFICER identified several instances when SUSPECT #2 used his cellphone. He did not say that the complainant was seen using his.

20. On March 4 the complainant spoke with SUBJECT OFFICER at the AN MPD DISTRICT STATION. Not in custody, the complainant came to the station voluntarily. During that interview SUBJECT OFFICER told the complainant that "the shooter ran right past the complainant, and it looked like they were together." ROI Exhibit 12 at 2 (paraphrasing what SUBJECT OFFICER said). See also SUSPECT #2 Affidavit, para. 113 at 36. As paraphrased by SUBJECT OFFICER, the complainant answered, "that he did shoot nothing and that he does not know anyone that shot nothing." *Id*.

21. In that interview, SUBJECT OFFICER did not ask the complainant about various matters he described in his SUSPECT #2 Affidavit. He did not ask the complainant whether he knew SUSPECT #1 or had entered the building at LOCATION #2, IN NE, WASHINGTON, DC, with SUSPECT #1. Nor did he ask about the bag the complainant allegedly carried from that address to SUSPECT #2's vehicle and then back into the building. More generally, SUBJECT OFFICER did not ask whether the complainant helped SUSPECT #1 in any way before or after the murder. Nor did he ask the

complainant whether he had used his cellphone around the time the murder was committed.

22. After seizing the complainant's cellphone, SUBJECT OFFICER did not turn it over to MPD's evidence department. He made a note in his case file of its possession. He did not complete form PD-81. Had he completed that form, he said he would have had to deliver the cellphone to MPD's evidence department. He deviated from normal procedure from concern that the evidence department would not have kept the cellphone charged. If the "phone [is] powered off …," he explained, "it will become encrypted, and they will be unable to get into it." ROI Exhibit 6 (SUBJECT OFFICER Interview). Whether his concerns are justified is not known.

23. After the warrant to search the complainant's cellphone was issued on April 20, SUBJECT OFFICER did not give the warrant and the cellphone to the MPD's Department of Forensic Science (DFS) to open. Instead, he sent both to a federal agency, the Department of Alcohol, Tobacco, Firearms and Explosives (ATFE). He bypassed the DFS because in his view there was an issue with its "credibility." ROI Exhibit 6 at 2 (SUBJECT OFFICER Interview).

24. Responding to a request by OPC, the MPD offered an extensive explanation why the cellphone was submitted to ATFE rather than to DFS. See Letter from WITNESS OFFICER to OPC CHIEF INVESTIGATER (December 12, 2022). WITNESS OFFICER said that "[d]uring homicide investigations, we routinely use our federal partners to assist with forensic capabilities." To avoid "accreditation issues" at trial, the USAO also prefers that "the evidence be processed by our federal partners rather than … [by the] DFS …." Together with another MPD officer who "works with the ATF daily," SUBJECT OFFICER asked ATFE to unlock the complainant's cellphone in the belief it "would be the most expedient route to take."

25. What ATFE has done with the cellphone is unknown. Also unknown is whether SUBJECT OFFICER or anyone else in the MPD knows why the ATFE has apparently not acted on his request or whether SUBJECT OFFICER has tried to spur ATFE to complete its work.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority to adjudicate "a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police powers by such member or members, including "(1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; (5)

retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public."

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 as "words, conduct, gestures, or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD, so as to: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity."

The regulations governing OPC define harassment as "[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD … so as to (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD … the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating." D.C. Mun. Regs. tit. 6A, § 2199.1.

The Fourth Amendment imposes two requirements. First, any search and seizure must be reasonable. Second, a warrant must not be issued in the absence of probable cause.

A warrant to search the complainant's cellphone was issued. The complainant has nothing to complain about here.

But two issues arise over the first requirement, that of reasonableness.

SUBJECT OFFICER had no warrant when he seized the complainant's cellphone. Did he need one? If so, did there exist an exception to the requirement to obtain a warrant?

Second, assuming the warrantless seizure was constitutional, was the time taken to obtain the warrant unreasonable? Has the time to execute the warrant become unreasonable?

Seizing the cellphone.

SUBJECT OFFICER had no warrant to seize the complainant's cellphone. The complainant opposed the seizure vigorously.

The Fourth Amendment protects against "unreasonable searches and seizures" of "effects." "Effects" involve personal property (like a cellphone). *See* Oliver v. United States, 464 U.S. 170 (1984).

Was a warrant needed? If so, did an exception apply that forgave the lack of a warrant?

SUBJECT OFFICER did not believe he needed a warrant to seize the cellphone. In their interview, SUBJECT OFFICER told the complainant a warrant was needed to search the cellphone but not to seize it. It was "common practice," he added, to "collect … evidence."

SUBJECT OFFICER is wrong. He needed a warrant or some other justification. He "seized" the cellphone. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (seizure defined as a "meaningful interference with an individual's possessory interest in that property").

Seizures are subject to the same scrutiny as searches. *See* Arizona v. Hicks, 480 U.S. 321, 328 (1987) (no "categorical distinction between the two [searches and seizures] insofar as concerns the degree of justification needed to establish the reasonableness of police action").

Warrantless seizures are *per se* unreasonable. *See* United States v. Place, 462 U.S. 696, 701 (1983) ("In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the fourth amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.")

Was the seizure nonetheless reasonable?

In its Report of Investigation, OPC conceded that SUBJECT OFFICER had probable cause to seize the cellphone. ROI at 7. Given that a warrant to search the complainant's cellphone was issued, probable cause to search it obviously existed. The SUSPECT #2 Affidavit provides the reasons why the warrant was issued for the complainant's cellphone.

But the warrant's issuance does not answer the seminal question. Did SUBJECT OFFICER have the information he included in the affidavit at the time he seized the cellphone? Around six weeks elapsed between the seizure and the issuance of the search warrant. Did SUBJECT OFFICER acquire the information linking the complainant to SUSPECT #1 after he seized the cellphone? He was not asked that question by OPC, but it is safe to assume that he had the information providing probable cause when he seized the cellphone. That assumption stems from his conversation with the complainant at the police station. SUBJECT OFFICER told the complainant that camera footage showed that the complainant encountered SUSPECT #1, and that together they entered an apartment building.

That finding establishes the government's interest in learning whether the information on the cellphone would advance the investigation of the murder, and of the complainant's and SUSPECT #2's involvement with SUSPECT #1. It would also justify issuance of a warrant to seize the cellphone. But it is insufficient.

More is needed. Because a warrant was not obtained, does an exception excuse its lack? The only exception that might apply is that for so-called "exigent circumstances."

Seizures without a warrant are justified if the ability of the police to learn whether the object is connected to a crime would be defeated were they denied possession of the object. *See* United States v. Place, 462 U.S. at 701 ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.").

On balance, this exception justified the seizure. On the one hand, during his interview with OPC SUBJECT OFFICER did not say (but was not asked) why he thought he had to take the cellphone. He had not arrested the complainant as an accessory after the fact. He had not instituted the interview with the complainant. Instead, the complainant sought to speak with SUBJECT OFFICER at the police. On the other hand, once SUBJECT OFFICER told the complainant that evidence connected the complainant to the alleged murderer, the complainant would have realized that the cellphone might contain incriminating information. So alerted, the complainant had reason to dispose of the cellphone or try to delete the information from the cellphone.

The conclusion, then, is that the seizure of the cellphone was constitutional. Its seizure does not constitute harassment of the complainant.

Executing the search warrant.

Concluding that the cellphone's seizure was constitutional does not end the inquiry.

Constitutional seizures become unreasonable if the government takes too long to satisfy its interest. With that assessment, several factors are germane. They include the extent of the interference with the complainant's possessory interest in the cellphone. The length of time taken to obtain the warrant. The government's interest in holding the property as evidence. And the government's diligence in pursuing the investigation. *See* United States v. Wilkins, 538 F.Supp. 3d 39, 90 (DDC 2021) (drawing from United States v. Laist, 702 F.3d 608, 613-614 (11th Cir. 2012)).

In this case, two periods of time are relevant in comparing the interference with the complainant's possessory interest in the cellphone with the government's interest in learning whether the cellphone contained useful information. The first is the time between the seizure and the issuance of the warrant to search the cellphone. The second is the time after the cellphone was delivered to ATFE for it to open the cellphone.

Take *Wilkins'* four factors in order. The first is the complainant's possessory interest. In *Wilkins* the police had that defendant's cellphone for over 15 months before applying for a warrant to open it. The defendant never sought its return. But *Wilkins* dismissed this failure as important. So, too, with this complaint. Like the defendant in *Wilkins*, the complainant has not attempted to recover the cellphone. Shortly after the interview he telephoned SUBJECT

OFFICER to say he would return to the station to give consent to search the cellphone because he needed it for work. He did not return. The complainant's failure to try to recover the cellphone slightly reduces his possessory interest in its recovery. As *Wilkins* held, it is not very important when compared with the other factors.

The time taken to obtain the warrant, the next factor, is initially troubling. It took over six weeks to obtain the warrant.

In *Wilkins* for 15 months the police forgot they had taken the defendant's cellphone. Once awoken to its possession, they obtained a warrant almost immediately. Based on *Wilkins*, the ROI found the time taken to obtain the warrant to search the complainant's cellphone was unreasonable. Further investigation has complicated that finding. Not known is when SUBJECT OFFICER began to write the affidavit, nor the time he took in drafting it. Not known is the time taken by a supervisor to review his draft. Not known are the number of exchanges between the USAO and the police over the affidavit's contents.

Even without that information, however, the time taken does not seem unreasonable. To prepare the SUSPECT #2 Affidavit SUBJECT OFFICER had to review extensive footage from cameras. In that affidavit he included screen shots from that footage. That affidavit is very long. It would have taken considerable time to prepare. So too with the affidavit to search the complainant's cellphone. To be true, the two affidavits probably include much of the same information. While without more information about the process, SUBJECT OFFICER could be faulted, on balance the time taken to obtain the search warrant for the complainant's cellphone does not seem unreasonable.

Wilkins' third factor is satisfied. The government's interest in learning whether the complainant was involved with SUSPECT #1 was significant.

Wilkins' fourth factor takes us back to the second. SUBJECT OFFICER seems to have been diligent in fulfilling his responsibility in applying for a warrant.

The second period—that involving the warrant's execution—is far more troubling. Over eight months have elapsed since the warrant was issued. From what is known, the warrant has not been executed. That is, the ATFE has not opened the cellphone or informed SUBJECT OFFICER that it has failed to do so. *See* WITNESS OFFICER's email of December 12 to OPC CHIEF INVESTIGATER ("The complainant's phone was sent to ATF and, to the best of my knowledge, is still there attempting to be unlocked").

Ostensibly, the MPD has not been diligent, *Wilkins'* fourth factor. Yet, that conclusion is problematic. After the sentence quoted above, WITNESS OFFICER added that "[t]his process, unfortunately, can take anywhere from days to over a year."

If it could take ATFE "over a year" to complete its work, there is also another issue. Is SUBJECT OFFICER responsible for this delay? He has no control over the ATFE's efforts. Unknown is whether he has asked ATFE to explain its (in)action.

Having taken the complainant's cellphone, SUBJECT OFFICER is responsible for its use or return. Whatever might be found on the cellphone may be less important than envisioned. On April 14, the police asked the USAO to approve arrest warrants for the complainant and for SUSPECT #2 as accessories after the fact. *See* UNITED STATES ATTORNEY OFFICE CHIEF Letter (providing a "timeline"). (Recall that UNITES STATES ATTORNEY OFFICE CHIEF is the Chief of the REDACTED of the USAO for the District of Columbia.) The police—SUBJECT OFFICER—thus must have thought probable cause existed to arrest the complainant and SUSPECT #2. That request was made before the USAO had approved of submitting the request for a warrant to search the complainant's cellphone.

In his timeline UNITED STATES ATTORNEY OFFICE CHIEF indicates that on November 1 the MPD again sought permission from the USAO to seek an arrest warrant for SUSPECT #2. On the next day the USAO approved that request, and on the day after a judge issued that warrant.

From UNITED STATES ATTORNEY OFFICE CHIEF's timeline, it appears that the USAO did not sanction the MPD's request (on April 14) for permission to apply for an arrest warrant for the complainant. And the MPD did not renew that request, as it did for SUSPECT #2 (on November 1).

What to make of all this is unclear. Does it follow from the USAO's apparent refusal to approve of arresting the complainant as an accessary after the fact that the cellphone's contents have lost importance? Or, has it become more imperative to open the cellphone to determine whether information could be found to incriminate the complainant or to absolve him of complicity? And, again, what is SUBJECT OFFICER's responsibility?

If the delay in executing the warrant is unreasonable, on balance SUBJECT OFFICER cannot be held responsible.

SUBJECT OFFICER's Failure to Comply with the MPD's Order.

One issue remains. MPD has a procedure for recording property taken as evidence. See MPD General Order 601.01 (ROI Exhibit 17). That order directs officers who take property "where no arrest is made" to complete certain forms to record its possession and disposition. SUBJECT OFFICER did not comply with these requirements. His explanation for this failure and for retaining the cellphone until it was delivered to the ATFE are indicated in the discussion of facts.

SUBJECT OFFICER's failure here could be important with different facts (if, for example, he had lost the cellphone). Whether his reasons for violating the General Order are

well-founded or specious, his violation does not affect the complainant's interest in recovering his cellphone. By itself, this failure does not support the complaint.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment – Mishandling Property	Exonerated

Submitted on January 9, 2023.

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Peter Tague
Complaint Examiner