

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	17 – 0290
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1 SUBJECT OFFICER 2
Allegation 1:	Harassment- Unlawful Entry
Allegation 2:	Harassment- Property Damage
Complaint Examiner:	Peter W. Tague
Merits Determination Date:	April 25, 2018

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

In two ways the Complainant alleges that the police, and in particular SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him, in violation of MPD General Order 120.25 (effective Feb. 19, 2009), Part III, Subsection 2. First, while arresting him for assault, SUBJECT OFFICER 2, on authority from SUBJECT OFFICER 1, breached the door of his apartment, without lawful authority, to apprehend him. Second, although the police completed the form required when they damage property, they did not leave that form with him as required, and his property was damaged.¹

¹ The complainant also alleged that WITNESS OFFICER harassed him when he unlawfully arrested him for domestic violence/simple assault. Pursuant to D.C. Code § 5-1108 (1) on February 5, 2018, a member of the Police Complaints Board dismissed this allegation, concurring with the determination made by OPC's executive director. *See Exhibit 2*

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted concerning this complaint because, based on a review of OPC's Report of Investigation [ROI] the objections filed by one of the Subject Officers (SUBJECT OFFICER 1) on March 9, 2018, and OPC's response to those objections, the Complaint Examiner concluded that no issues in dispute had to be resolved to judge the merits of the complaint.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation (hereafter ROI), the objections submitted by one of the Subject Officers (SUBJECT OFFICER 1), and OPC's response to those objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. The incident began around 11:00 p.m. on March 12, 2017 when the Complainant telephoned 911 to report that he himself had been assaulted by a man (WITNESS) whom he had ejected from his apartment. In this first of many fervid verbal exchanges with the police, the Complainant warned that WITNESS might be armed (with a gun), but insisted that he would not assist any officers who arrived to address his concerns about WITNESS. *See* ROI, Exhibit 26 (transcript of the Complainant's 911 call).
2. Eight officers eventually appeared at the Complainant's address, AN APARTMENT IN NW, WASHINGTON, DC. The first two found WITNESS, clothed, sitting on the floor near the Complainant's apartment (APARTMENT NUMBER). He said the Complainant had scratched him and sprayed him with the contents of a fire extinguisher.
3. The police viewed the altercation between the Complainant and WITNESS as a "domestic dispute." The third officer to arrive, WITNESS OFFICER 2, a Crisis Intervention Officer, had visited the apartment on "multiple" occasions, in efforts to settle unidentified matters between the two men. *See* ROI, Exhibit 29 (transcript of body-worn camera (BWC) footage of WITNESS OFFICER 2).
4. At the time of this incident the relationship between the Complainant and WITNESS is not altogether clear, but unnecessary to clarify in resolving the Complainant's allegations. In his verbal exchanges with the police, the Complainant never indicated his relationship with WITNESS. In the complaint filed with OPC on March 27, 2017, the Complainant said he "called the police over a domestic issue with my former friend," and in his statement to OPC, he said he "used to let WITNESS stay at [his] residence." *See* ROI, Exhibits 3 and 2, respectively. Confirming the Complainant's claim that WITNESS lived elsewhere, his address is listed as ANOTHER ADDRESS IN NQ, WASHINGTON, DC. *See* ROI, Exhibit 21 ("Offense Report Arrest Type").
5. On the other hand, SUBJECT OFFICER 2 thought the two men were involved in a "domestic relationship." ROI, Exhibit 6 (statement by SUBJECT OFFICER 2). Asked

whether he lived in the apartment, WITNESS told SUBJECT OFFICER 2 that he did, and added that his keys were inside the apartment. *See* ROI, Exhibit 29 (transcript of BWC footage of SUBJECT OFFICER 2). By telephone, SUBJECT OFFICER 2 told SUBJECT OFFICER 1 that the incident was a “domestic assault” and that the “person [WITNESS] ... assaulted is locked out of his apartment ...” *Id.* Based on that conversation, SUBJECT OFFICER 1 believed that WITNESS was the “domestic partner” of the Complainant’s. *See* ROI, Exhibit 8 (statement by SUBJECT OFFICER 1).

6. Viewed as a domestic dispute, the police believed they were required to arrest one or the other party.
7. With probable cause to arrest either, the police chose to arrest the Complainant.
8. The Complainant was not interested in cooperating. Profanely and truculently, he rebuffed repeated exhortations by WITNESS OFFICER 2 to open the door and warnings from SUBJECT OFFICER 2 that the door would be breached if he refused to open it.
9. SUBJECT OFFICER 2 decided to breach the door. He did not believe a warrant was needed to do so. (At the scene, the officers who mentioned “warrant” did not indicate whether the warrant was to arrest or to search. WITNESS OFFICER 3 would later say he thought an arrest warrant was needed. *See* ROI, Exhibit 18 (statement by SUBJECT OFFICER 3).)
10. Prompted by WITNESS OFFICER 2’s misgivings over breaching the door without a “warrant,” SUBJECT OFFICER 2 telephoned SUBJECT OFFICER 1, that night’s watch commander for the DISTRICT IN WASHINGTON, DC, to confirm that a warrant was not required. He thought not, but told SUBJECT OFFICER 2 to continue the effort to persuade the Complainant to eliminate the need for force. When the Complainant refused yet again, SUBJECT OFFICER 2 breached the door. The police entered, and, without further turmoil, arrested the Complainant. From start to finish, the incident consumed about two hours. *See* ROI, Exhibit 12 (statement by WITNESS OFFICER 2).
11. Based on his conversation with SUBJECT OFFICER 2, SUBJECT OFFICER 1 believed WITNESS had given consent to enter the apartment. *See* Obj. to ROI of SUBJECT OFFICER 1 at 2-3 [hereinafter SUBJECT OFFICER 1 Objections]). But footage from the BWCs does not indicate that WITNESS was asked to give consent, let alone to consent to a forcible entry of the apartment.
12. No emergency existed to justify entering the apartment without a search warrant.²

² SUBJECT OFFICER 1 thought otherwise. He said that “[i]f we had left the scene without making an arrest, it was very likely that further violence could have occurred.” *See* SUBJECT OFFICER 1 Objections at 3.

13. Footage of the BWCs of the various officers does not support SUBJECT OFFICER 1's belief about an emergency. Nothing warrants a conclusion that the altercation between the Complainant and WITNESS would resume. The Complainant had emphatically and continuously indicated he was remaining inside his apartment. In urging the Complainant to open the door, WITNESS OFFICER 2 indicated she was on duty throughout the night, until 6:00 a.m., and would remain at the door until the Complainant would comply. A neighbor had offered to let WITNESS stay in her apartment for the night. *See* ROI, Exhibit 29 (transcript of BWC footage of WITNESS OFFICER 1). Before that offer, WITNESS OFFICER 1 proposed trying to find a place for him to stay in a domestic shelter. *Id.*
14. Officers conducting a forcible entry must provide a copy of PD form 240-A (Notice of Forcible Entry) to the owner or occupant of the property, or leave a copy in a conspicuous place. After the arrest, WITNESS OFFICER 3 completed the PD Form 240-A (Notice of Forcible Entry), and gave it to WITNESS OFFICER 1, with instructions to photograph and download it to the incident file. What happened to the original form is unclear, but a copy exists. *See* ROI, Exhibit 27. The Complainant was not given a copy, nor did he find one upon returning to his apartment.

IV. DISCUSSION

A. The Allegations

The Complainant alleges that the subject officers harassed him in breaching his apartment's door without a warrant, and caused property damage in doing so.

Harassment is defined in MPC General Order 120.25 (effective Feb. 19, 2009), Part III, Section B, Subsection 2, as “[w]ords,

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.

B. Breaching the door without a warrant to arrest or to search

WITNESS was injured in what the police understandably believed was an intrafamily dispute. With probable cause to arrest the Complainant, they were required to do so. *See* D.C. Official Code § 16-1031.

They had no warrant to arrest, and correctly believed one was not needed. *See* D.C. Official Code § 23-581(a) (authorizing an arrest “without an arrest warrant” if there is probable cause to believe a person has committed an offense per § 16-1031).

They also had probable cause to obtain a search warrant, to breach the door. Neither subject officer discussed whether such a warrant was necessary. It was. In its absence, breaching the door constituted harassment.

The Fourth Amendment to the United States Constitution provides that “people [shall] be secure in their ... houses ... against unreasonable searches and seizures, ... and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons ... to be seized.”

While over the years the relationship of those two parts of the amendment has been debated, the United States Supreme Court has recently settled the issue. While the first part—whether the intrusion was reasonable—is the overarching test, the police nonetheless presumptively act unreasonably by entering a home without a search warrant. *See* *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

As a *prima facie* matter, then, SUBJECT OFFICER 2 needed a search warrant to breach the door of the Complainant’s apartment.

In this setting, requiring a search warrant seems to elevate form over purpose. The purpose of requiring a search warrant is to interject a neutral person—a judge or magistrate—between the police and a person they intend to arrest inside his home. Judicial oversight is valued to ensure the police have not exaggerated their authority under the Fourth Amendment. Here, however, there is no doubt but that a judge would have issued a search warrant. Obtaining a judge’s authorization to enter, then, seems superfluous. Nonetheless, the warrant requirement in the Fourth Amendment looks at the long run, and must be satisfied even if its satisfaction in the particular case, like this one, is *pro forma*.

Given the length of the stalemate between the Complaint and the officers, the police had time to obtain a search warrant. To expedite the process, they are authorized to “request[] a warrant by telephone or other reliable electronic means.” *See* D.C. Superior Code Rules of Criminal Procedure, rule 41(d)(2)(D). With the setting explained, a judge would almost surely have issued a search warrant. That authorization would include breaching the door. If the judge refused, then breaching the door without that authorization would have violated the Fourth Amendment.

In this setting, per the first part of the Fourth Amendment, entry without a search warrant might have been reasonable—and thus a warrantless entry would have been forgiven—if either of two conditions applied: an emergency existed or proper consent to enter existed. Neither did.

C. Exceptions to the need for a search warrant

1. Emergency

SUBJECT OFFICER 1 believed an emergency existed justifying entry without a warrant (of any sort). *See* SUBJECT OFFICER 1 objections at 3. Even were his assessment accepted, his belief is insufficient. Whether an emergency existed is judged objectively. *See* *Corrigan v. District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016).

Police may enter a home without a search warrant “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Brigham City, Utah v. Stuart*, 547 U.S. at 403.

Assuming for the moment that WITNESS was “an occupant” of the apartment, he was not at risk of “imminent injury.” The Complainant had in effect barricaded himself inside the apartment. He posed no threat of resuming the altercation.

Moreover, ensconced in his apartment, the Complainant revealed no interest in fleeing. Had he opened the door, the officers would have arrested him.

As the police milled around him, WITNESS sat on the floor or on a landing. He was quiet, saying or doing nothing to indicate, let alone imply, he wished to retaliate. An occupant of

another apartment had offered him a place to stay for the night. One officer had also proposed finding him a place in a domestic shelter.

No emergency existed to justify not obtaining a search warrant.

2. *Consent*

SUBJECT OFFICER 1 contends that WITNESS consented to entry of the apartment. *See* SUBJECT OFFICER 1 objections at 2-3.

Consent to enter by a third party does eliminate the need to obtain a search warrant. That third party must have “[c]ommon authority ..., rest[ing] on mutual use of the property” *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974). Although the Complainant thought otherwise, from WITNESS’s answer that he lived in the apartment, the police (and in particular SUBJECT OFFICER 2) had reason to believe WITNESS had “mutual use of the property.”

For two reasons, however, this exception does not forgive failing to obtain a search warrant. First, the footage of the BWCs does not indicate WITNESS ever gave consent, let alone consent to breach the door.

Second, even if WITNESS had “common authority” and had consented, his consent would not override the Complainant’s refusal to open the door. As the leaseholder, the Complainant surely did not consent. *See Georgia v. Randolph*, 547 U.S. 103, 120 (2006) (“a warrantless search of a shared dwelling ... over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident”).

Though understandably frustrated by the Complainant’s obdurate refusal to cooperate, the officers were required to obtain a search warrant to enter his apartment, in the absence of an exception to that requirement. The facts do not warrant concluding that an exception applied.

D. Property Damage

If justified in entering a residence, police may use force to achieve that result.

Both Subject Officers believed force was justified.

SUBJECT OFFICER 2 used a breach kit to pry open the door to the Complainant’s apartment.

From BWC footage, the door was damaged and hard to open or close.

Officers executing a forcible entry must complete a form (PD Form 240-A) documenting their actions and must leave a copy of that form with the owner (or occupant) or in a conspicuous space inside the area. The form furnishes information for that person to file a claim against the District of Columbia for property loss or damage. *See* ROI, Exhibit 32.

After the Complainant was arrested, WITNESS OFFICER 3 completed the form, gave it to WITNESS OFFICER 1, and instructed him to photocopy and download it to the incident file. WITNESS OFFICER 1 had the form when he returned to his vehicle, to leave the scene. What happened to the original of the form is unclear. No BWC footage indicates that a copy was left in the Complainant's apartment. He did not find one upon his return the next day.

The door was damaged because the subject officers erred in assessing the authority to enter without a search warrant.

"Harassment" involves "actions" by the police that are purposefully, knowingly, or recklessly in violation of the law"

Both subject officers believed they had authority to arrest the complainant and to breach the door to do so. They did not "purposefully or knowingly" violate the law (the Fourth Amendment). But in discussing whether a "warrant" was required to breach the door, both must have recognized that their assessment could be wrong. They proceeded "recklessly."

Because SUBJECT OFFICER 1 was the arbiter, one could find that he alone "harassed" the Complainant. But because SUBJECT OFFICER 2 was himself certain that no warrant was needed, he too is responsible. Unless subordinate officers had questioned whether a "warrant" was necessary, SUBJECT OFFICER 2 would have breached the door without seeking confirmation from SUBJECT OFFICER 1.

V. CONCLUSION

In the absence of a search warrant, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 violated D.C. Code § 5-1107 and MPD General Order 120.25 (harassment) when the former authorized and the latter to carry out the forced entry of the complainant's apartment, and caused damage to the Complainant's property.

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VI. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER 1

Allegation 1: (Harassment-Unlawful Entry)	Sustained
Allegation 2: (Harassment-Property Damage)	Sustained

SUBJECT OFFICER 2

Allegation 1: (Harassment)	Sustained
Allegation 2: (Harassment-Property Damage)	Sustained

Submitted on April 25, 2018.

Peter W. Tague
Complaint Examiner