

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	09-0003
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Narcotics and Special Investigations Division – Gun Recovery Unit SUBJECT OFFICER #2, Narcotics and Special Investigations Division – Gun Recovery Unit
Allegation 1:	Harassment
Complaint Examiner:	Linda Reese Davidson
Merits Determination Date:	April 19, 2012

Pursuant to D.C. Official Code § 5-1107(a), the office of Police Complaints (OPC), formerly known as the Office of Citizen Complaint Review (OCCR), has the 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 that section. 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 alleges that on September 11, 2008, two subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #1, Narcotics and Special Investigations Division-Gun Recovery Unit (NSID-GRU), and SUBJECT OFFICER #2, NSID-GRU, harassed her by entering her home without her or her son's consent.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation and the attached exhibits, the Complaint Examiner determined that the Report of Investigation presented no issues of a material fact in dispute that required a hearing. See D.C. Mun. Regs., title 6A, §2116.3.¹

III. FINDINGS OF FACT

¹ On February 29, 2012, SUBJECT OFFICER #1's attorney requested a dismissal based on D.C. Code §5-103.1 or in the alternative [s] a request for remand for further investigation or a full evidentiary hearing.

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER #1, and SUBJECT OFFICER #2 on September 2, 2011, and OPC's response to objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT filed a complaint with OPC on October 1, 2008.
2. On September 11, 2008, COMPLAINANT learned that her 17 year old son, WITNESS, had been arrested for Possession With the Intent to Distribute PCP (a recreational drug with hallucinogenic effects) and Urinating In Public.
3. At the scene of the arrest, WITNESS told SUBJECT OFFICERS he was 18 years old.
4. After it was discovered that WITNESS was a 17-year-old minor, he was driven from the Sixth District Police Station to the Juvenile Processing Center.
5. In addition to having a vial of PCP on his person, WITNESS had \$49.00 in cash, a set of shoe laces and keys.
6. The PCP was to be turned in as evidence and the \$49.00 was taken pursuant to the Law Enforcement's Civil Forfeiture Authority.
7. WITNESS' property was placed in a small plastic bag.
8. WITNESS was handcuffed and seated in the back of the car.
9. The complainant left her home in an effort to pick up WITNESS from the Sixth District Police Station; however, when she arrived, she was informed that WITNESS was not in the system and therefore had not been processed.
10. SUBJECT OFFICERS asked WITNESS where he lived and asked if he wanted to have his property dropped off at his apartment. SUBJECT OFFICERS drove WITNESS to the apartment to drop off his personal property.
11. SUBJECT OFFICER #2 attempted to drop off the property but was unable to get inside of the building. He returned to the car, and informed WITNESS and SUBJECT OFFICER #1 that there was no answer at the door. WITNESS told SUBJECT OFFICERS that if they used his key, it would open the door and they would see that he lived there.
12. SUBJECT OFFICER #1 used WITNESS' key to enter the apartment and dropped off the property bag.

13. COMPLAINANT was not at home at the time SUBJECT OFFICER #1 entered the apartment.
14. SUBJECT OFFICER #2 acknowledges that, although it is not common practice, as a courtesy, he has dropped off an inmate's property at the arrested person's home before being taken to the police station for processing.
15. SUBJECT OFFICER #1 admits to driving arrestees to their homes to drop off personal property before taking them to the police station for processing.
16. SUBJECT OFFICER #1 admits that one of the reasons he went to the apartment with WITNESS' property was to get a description of the building door for the search warrant application.
17. SUBJECT OFFICER #2 admits that WITNESS' property could have been entered as prisoner property, but it was easier to drop it off at WITNESS' apartment.
18. SUBJECT OFFICER #1 did not document the property he dropped off at WITNESS' apartment.
19. Driving an arrestee to his/her home in an effort to drop off personal property, before being taken to the police station for processing, is in violation of General Order 601.1, Part I (A) (2).
20. When COMPLAINANT returned from the Sixth District Police Station, she noticed the top lock of her apartment unit was unlocked.
21. COMPLAINANT opened the door and saw a plastic bag lying on the floor. The bag consisted of WITNESS' apartment keys and shoe laces.
22. SUBJECT OFFICER #1 called COMPLAINANT'S home; he left a message informing her of WITNESS' arrest and requested that she return his call.
23. COMPLAINANT called SUBJECT OFFICER #1. He asked if he could come over to give her WITNESS' property. COMPLAINANT agreed to the visit.
24. SUBJECT OFFICER #1 arrived, removed two dimes from his pocket and handed the coins to COMPLAINANT. He did not give COMPLAINANT any other items.
25. During the visit, COMPLAINANT did not question SUBJECT OFFICER #1 as to how WITNESS' property appeared inside her locked apartment.

26. COMPLAINANT received a call from the Juvenile Processing Center notifying her that WITNESS was ready to be released.
27. When WITNESS was released from the Juvenile Processing Center, he was not issued a receipt for his property.
28. Approximately one week after her son's arrest, COMPLAINANT arrived home and discovered the police had searched the apartment.
29. SUBJECT OFFICER was on the premises and handed COMPLAINANT the search warrant.
30. The search recovered nothing of an illegal nature.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), "The Office [of Police Complaints] shall have the authority to receive and 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; [or] (2) use of language or conduct that is insulting, demeaning, or humiliating..."

Harassment

Harassment, as defined by MPD Special Order 01-01, Part III, Section G, includes "acts that are intended to bother, annoy, or otherwise interfere with a citizen's ability to go about lawful business normally, in the absence of a specific law enforcement purpose."

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., title 6A, §2199.1.

COMPLAINANT alleged that on September 11, 2008, two subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #1, Narcotics and Special Investigations

Division-Gun Recovery Unit (NSID-GRU), and SUBJECT OFFICER #2, NSID-GRU, harassed her by entering her home without her or her son's consent.

The primary question for consideration is whether SUBJECT OFFICERS harassed COMPLAINANT when SUBJECT OFFICER #1 entered her apartment without her or her son's consent.

It is the Complaint Examiner's finding that WITNESS gave SUBJECT OFFICER #1 consent to use his key to enter the apartment and drop off WITNESS' property. On September 11, 2008, COMPLAINANT was informed that her 17-year-old son, WITNESS, had been arrested for Possession With the Intent to Distribute PCP and Urinating in Public. At the time of his arrest, WITNESS had on his person, PCP with an estimated street value of \$1000.00, \$49.00 in cash, a set of keys, a set of shoelaces and a condom. The PCP was taken to be entered as evidence and the \$49.00 was confiscated pursuant to Law Enforcement's Civil Forfeiture Authority.

COMPLAINANT left her home in route to the Sixth District Police Station to pick up her son. When COMPLAINANT arrived at the police station, she was informed that WITNESS was a juvenile and would not be processed at the Sixth District Police Station. COMPLAINANT was told that minors are processed at the Juvenile Processing Center. COMPLAINANT drove to the Juvenile Processing Center. When she arrived, she was informed that WITNESS was not in the system and there was no record of his arrest. COMPLAINANT left the Juvenile Processing Center and returned home. COMPLAINANT was unaware that WITNESS had lied about his age. When SUBJECT OFFICERS finally transported WITNESS to the Sixth District Police Station, only then, was it discovered that WITNESS was a 17-year-old minor. WITNESS was transported from the Sixth District Police Station to the Juvenile Processing Center.

When COMPLAINANT arrived at her apartment, she noticed the top lock to her unit door was unlocked. COMPLAINANT asserts she locked the top lock before leaving. COMPLAINANT asserts that there are two locks on her apartment door. The bottom lock locks automatically when the door shuts. The top lock has to be manually locked (inserting the key into the lock and turning it). COMPLAINANT asserts that when she opened the apartment door, she saw a zip lock bag on the floor. The bag contained WITNESS' apartment keys, a set of shoelaces and a condom. SUBJECT OFFICER #1 left a phone message informing her of WITNESS' arrest and requested that she return his call. COMPLAINANT returned SUBJECT OFFICER #1's phone call. SUBJECT OFFICER #1 asked if he could stop by to give her WITNESS' property. COMPLAINANT agreed. COMPLAINANT asserts that when SUBJECT OFFICER #1 arrived, he introduced himself, removed twenty cents from his pocket and handed it to her. He informed her that the 0.20 cents was recovered from WITNESS at the time of his arrest. SUBJECT OFFICER #1 did not give COMPLAINANT any other property. SUBJECT OFFICER #1 did not provide COMPLAINANT a receipt for any of WITNESS' property. SUBJECT OFFICER #1 made no mention of his previous visit to her apartment (when he used

WITNESS' key to enter the apartment and dropped off the property bag). The complainant did not inquire as to how WITNESS' personal property ended up inside her locked apartment. According to COMPLAINANT, SUBJECT OFFICER #1 stood in the doorway of the apartment and the visit lasted approximately two minutes.

COMPLAINANT received a call from the Juvenile Processing Center informing her that WITNESS was ready to be released. Upon leaving the Juvenile Processing Center, neither she nor her son was issued a property receipt. COMPLAINANT informed WITNESS that the property bag was in the apartment and inquired as to how it appeared. WITNESS told her he did not know how his property ended up inside the apartment. WITNESS asserts that he did not give the subject officers permission to enter the unit or drop off the property. However, WITNESS' assertion is not completely accurate. According to WITNESS' signed statement, he knew that the subject officers drove from the location of the arrest to his apartment in an effort to drop off the property bag. SUBJECT OFFICER #2 never gained access inside the building. However, SUBJECT OFFICER #1 gained entry to the apartment by using WITNESS' key. After reviewing the statements from SUBJECT OFFICERS and the statements made by WITNESS, it was clear that the officers wanted to gain access inside of the apartment. It is doubtful that SUBJECT OFFICERS' only reason for driving to the apartment was to drop off WITNESS' property and inform the complainant of WITNESS' arrest. Nevertheless, once inside, SUBJECT OFFICER #1 did leave the property bag in the apartment.

WITNESS states that when he and his mother returned home, his mother was upset and that he did not understand why she was perturbed. However, viewed from a mature perspective, it is both reasonable and understandable for a parent to be upset if their offspring had just been arrested for drug possession and urinating in public. Additionally, COMPLAINANT was certain that before leaving to pick up WITNESS, she locked both unit locks. However, when she returned, the top lock was unlocked and WITNESS' property was inside the apartment. This was the opportune time for WITNESS to disclose to the complainant, how the property came to be inside the apartment. Instead, according to his own statement, WITNESS told COMPLAINANT that he did not know how the property bag appeared inside the apartment. WITNESS may not have been able to appreciate the consequences of offering the officers the use of his key. It is doubtful that WITNESS envisioned that SUBJECT OFFICER #1's courteous efforts of dropping off WITNESS' property would result in the search of his apartment. It was only after the apartment was searched that WITNESS understood that offering the use of his key was tantamount to giving consent for SUBJECT OFFICER to enter the apartment. COMPLAINANT'S anger regarding WITNESS' arrest, the fact that someone entered her apartment when she was not home and the subsequent search of the premises, may have been the reason WITNESS qualified his earlier statement to "if you use my key, you will see that I live here... "[b]ut if my [WITNESS] mother was not home, they probably should not enter the apartment." WITNESS was 17 years old; he has no mental handicap; he engaged in a normal conversation with the officers; there is no information in the record that indicates that WITNESS was under the influence of drugs or alcohol. There is no evidence in the record that consent was

coerced or forced. It is the Complaint Examiner's finding that while WITNESS gave his initial consent for SUBJECT OFFICER #1 to enter the premises and drop off the property bag, he did not foresee that SUBJECT OFFICER #1 would apply for an application for a search warrant, and conduct a subsequent search.

Did SUBJECT OFFICER #1 intend to bother, annoy, or otherwise interfere with COMPLAINANT'S ability to go about lawful business normally, in the absence of a specific law enforcement purpose? Did SUBJECT OFFICER #1 purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD, subject the complainant to search or seizure or deny or impede the complainant in the exercise or enjoyment of any right, privilege, power or immunity? 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."

At the time of WITNESS' arrest, he was in possession of PCP with an estimated street value of \$1000.00. SUBJECT OFFICER #1 is assigned to the Narcotics and Special Investigations Division-Gun Recovery Unit (NSID-GRU). According to SUBJECT OFFICERS, they were extending a courtesy by transporting WITNESS to his apartment to drop off his personal property. However, in his OPC statement, SUBJECT OFFICER #1 asserts "one of the reasons he brought WITNESS' property to WITNESS' residence on the date of the arrest was because he wanted to get a description of the building and the apartment door for the search warrant application." SUBJECT OFFICER #1 may have intended to enter the apartment for purposes other than to drop off WITNESS' property. But there is nothing in the record that indicates that once inside, SUBJECT OFFICER #1 exceeded the scope of consent. If there was evidence in the record to support such a theory, such conduct would violate both COMPLAINANT'S and WITNESS' Fourth Amendment Rights. If SUBJECT OFFICER #1 believed he had WITNESS' consent to enter the apartment, that would have given him a specific law enforcement purpose for entering. COMPLAINANT believes that when SUBJECT OFFICER #1 entered her apartment to drop off WITNESS' property, he looked around for information to substantiate the search warrant application. However, when reviewing the search warrant application, SUBJECT OFFICER #1 cited his years of experience in investigating drug cases as a basis for the request. He cites the usual behavior of those suspected in selling drugs. He cites the usual places where contraband is stashed. In this case, he cited WITNESS' address, and apartment number. This is information that could have been obtained without entering the interior of COMPLAINANT'S apartment.

When reviewing the totality of the circumstances, there are three questions that are intrinsically connected to the inquiry of whether SUBJECT OFFICER #1 harassed COMPLAINANT when he used her son's key to enter the apartment:

(1) Was WITNESS' consent to allow SUBJECT OFFICER #1 to enter the apartment and drop off his property valid?

(2) Did SUBJECT OFFICER #1 exceed the scope of consent?

(3) Did SUBJECT OFFICERS violate Metropolitan Police Department (MPD) policies and regulations by driving WITNESS to his apartment to drop off his property?

(1) Was WITNESS' consent to allow SUBJECT OFFICER #1 to enter the apartment and drop off his property valid?

When WITNESS told the officers that he was 18 years old, he was already in custody. WITNESS was handcuffed, seated in the rear of the car then driven to his apartment. Allegedly, SUBJECT OFFICERS were going to inform COMPLAINANT of WITNESS' arrest and drop off WITNESS' personal property. When SUBJECT OFFICER #2 rang the outside intercom and received no answer, WITNESS told SUBJECT OFFICERS that if they used his key, they would see that he lived there. WITNESS admitted to providing SUBJECT OFFICERS with an incorrect date of birth and later in the evening, the subject officers discovered that WITNESS was 17 years old. Is consent valid if at the time given, SUBJECT OFFICERS believed WITNESS was an adult? Or, is WITNESS' consent invalidated because as a minor, he was unable to consent?

Whether consent is voluntary is determined from the totality of the circumstances. The courts consider the age, intelligence, education and physical condition of the person giving consent and whether he was informed of his right to withhold consent. Generally, if law enforcement officers reasonably believe that a suspect consented voluntarily, the search is lawful under the Fourth Amendment. The reasonableness of an officer's conduct in searching, based on alleged consent, is assessed on the basis of what the officer perceived as of the time he searched, even if it later appears that valid consent was not given. WITNESS was in custody but there is nothing in the record that indicates that WITNESS offered the use of his keys to SUBJECT OFFICERS as a result of coercion, duress or force. WITNESS told the officers "if you use my key, you will see that I live there." Generally, a person placed in custody is not rendered incapable of giving his free consent to a warrantless search. In this case, there is no evidence that SUBJECT OFFICER #1 conducted a search when he entered the premises and dropped off WITNESS' property. It is the Complaint Examiner's determination that WITNESS gave consent for the officers to use his key to enter the apartment and drop off his property. Under the principles of third party consent, WITNESS had common authority. Had COMPLAINANT been home and objected to SUBJECT OFFICER #1 entering the premises, WITNESS' consent would not have been valid. However, COMPLAINANT was not home at the time SUBJECT OFFICER #1 entered the apartment. A majority of jurisdictions conclude that a minor (usually 13 and over) has sufficient joint control in a parent's house for consent to search. The following factors are considered:

(1) Did the minor live in the home? Yes.

(2) Did the minor have the right of access to the premises? Yes.

(3) In the totality of the circumstances, did the minor's age and intelligence communicate that consent was freely given? Yes.

(2) Did SUBJECT OFFICER #1 exceed the scope of consent?

The complainant alleges that SUBJECT OFFICER #1 searched her apartment when he dropped off WITNESS' property. There is no evidence found in the record to support the allegation. The Complaint Examiner reviewed the application for the search warrant. As discussed earlier, the subject officer cites his years of experience in drug cases as a basis for applying for the search warrant. It is likely that SUBJECT OFFICER #1 believed that drugs would be found in WITNESS' apartment. The information cited on the application for the search warrant include pictures of the apartment building and the front door of the apartment. Had SUBJECT OFFICER #1 conducted a search when he dropped off the property bag and uncovered something of an illegal nature, SUBJECT OFFICER #1 would have exceeded the scope of consent. Consent was limited to his dropping off WITNESS' property. There is sufficient evidence that SUBJECT OFFICER #1 may have used the excuse to drop off WITNESS' property as a guise to enter and search the apartment. However, the property bag was left at the premises. And, there is no specific item cited on the search warrant application that is connected to any item in the interior of the apartment. SUBJECT OFFICER #1 made an administrative error on the search warrant application. He entered the date of WITNESS' arrest as September 9, 2008 when in fact the correct date of WITNESS' arrest was September 11, 2008. There is no evidence in the record to support that SUBJECT OFFICER #1 exceeded the scope of consent when he dropped off WITNESS' property bag. There is no information in the record that indicates SUBJECT OFFICER #1 looked around the apartment or that he found any evidence that was used as a basis for the application for the search warrant.

(3) Did SUBJECT OFFICERS violate Metropolitan Police Department (MPD) policies and regulations by driving WITNESS to his apartment to drop off his property?

This question alone is not within the jurisdiction of an OPC inquiry; however, when reviewing the totality of the circumstances and analyzing the laws of consent and search, it must be considered and discussed. SUBJECT OFFICERS delayed taking WITNESS to the Sixth District Police Station for processing. SUBJECT OFFICER #1 was unable to recall if WITNESS asked SUBJECT OFFICERS to drop off his property at the apartment or if the officers suggested that they would and WITNESS agreed. When the subject officers arrived at WITNESS' apartment, SUBJECT OFFICER #2 attempted to drop off the property. However, no one answered the door. SUBJECT OFFICER #2 returned to the vehicle to inform WITNESS and SUBJECT OFFICER #1 that no one answered. Still, SUBJECT OFFICERS did not drive WITNESS to the police station to be processed. SUBJECT OFFICERS admit that as a courtesy, they routinely, upon request, drive arrestees to their homes to drop off personal property found on them at the time of the arrest. SUBJECT OFFICER #1 said "he was willing to drop off WITNESS' property because it was in his [SUBJECT OFFICER #1's] best interest to work with people [he] arrests because he might encounter the arrestee again...WITNESS' residence was on the way to the Sixth District Police Station."

According to General Order 601.1 Part I (A) Prisoner's Property: (1) Station clerks shall review each entry made in the property book during their tour of duty to ensure that entries have been properly recorded... (2) The recovering member shall turn all personal property (e.g. wallets, coins, combs, etc.) and currency in the amount of \$100.00 or less. (2) (a) Inspect the prisoner's property to ensure that all items that could affect an escape or inflict harm (2) (b) Review, in the presence of the recovering members each item of personal property that has been listed on the property book. (2) (c) If the entries are accurate and coincide with the property received, sign the entry as accepting station clerk and have the recovering member sign the entry as "Searching Officer." (2) (d) Place items into a PD 14, listing on the envelope all property placed inside... (2) (f) As a safeguard against another person, other than the owner, gaining possession of a receipt and presenting him/her self as the owner..." There are no provisions that govern officers to drive arrestees home to drop off property. Such conduct is in violation of MPD rules.

SUBJECT OFFICER #2 attempted to drop off WITNESS' property at his apartment. However, there was no response. SUBJECT OFFICER #2 violated General Order 601.1 Part II A (1) (2) (2a) (2b) (2c) (2d) (2f) (2g) and (A4), when he attempted to enter COMPLAINANT'S apartment and drop off WITNESS' property. Also, SUBJECT OFFICER #2 admitted that he routinely permits arrestees to drop off their property at home before going to the police station to be processed. This is a clear violation of MPD rules. On the night of the incident, SUBJECT OFFICER #2 was the supervising officer that partnered with SUBJECT OFFICER #1. But, because it was SUBJECT OFFICER #1 and not SUBJECT OFFICER #2 who actually entered COMPLAINANT'S apartment and dropped off the property, no OPC violation can be sustained. The allegation of harassment against SUBJECT OFFICER #2 is Unfounded.

SUBJECT OFFICER #1 violated General Order 601.1 Part II A(1) ((2) 2A) (2b) (2c) (2d) (2f) (2g) and (A4). SUBJECT OFFICER #1 entered into COMPLAINANT'S apartment but reasonably believed he had consent from COMPLAINANT's son. SUBJECT OFFICER #1 did violate MPD rules when dropped off WITNESS' property in COMPLAINANT's apartment.

SUBJECT OFFICER #1 did not harass COMPLAINANT when he used WITNESS' key to enter the apartment and dropped off WITNESS' property bag. It is the Complaint Examiner's finding that WITNESS consented to SUBJECT OFFICER #1's using his key. The allegation for harassment against SUBJECT OFFICER #1 is entered as Exonerated.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1:	Exonerated
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SUBJECT OFFICER #2

Allegation 1:	Unfounded
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Submitted on April 19, 2012.

Linda Reese Davidson
Complaint Examiner