

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	08-0061
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, YID
Allegation 1:	Harassment
Complaint Examiner:	Laurie S. Kohn
Merits Determination Date:	April 29, 2011

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly 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

COMPLAINANT, filed a complaint with the Office of Police Complaints (OPC) on November 19, 2007. COMPLAINANT alleged that on October 21, 2007, the subject officer, Metropolitan Police Department (MPD), SUBJECT OFFICER, harassed him by entering his home without permission or a warrant.

Specifically, COMPLAINANT stated that on October 21, 2007, he and his wife, WITNESS #1, were in Baltimore when his wife received a phone call from her brother, WITNESS #2. WITNESS #1 ignored the phone call because she believed WITNESS #2 was calling about an incident the day before, in which Complainant's 15-year-old stepson, WITNESS #3, was removed from the FAMILY home by MPD officers. WITNESS #1 later checked her voicemail and discovered that WITNESS #2 left a message asking WITNESS #1 to come home immediately. COMPLAINANT and WITNESS #1 did not call WITNESS #2 back, and WITNESS #2 later left a second message on WITNESS #1's voicemail stating that he was inside the FAMILY home.

When COMPLAINANT and his wife returned home from Baltimore, they learned from some neighbors that several individuals, including WITNESS #2 and an MPD officer, subsequently identified as SUBJECT OFFICER, had been at his home. They also noticed that someone had in fact, entered their home. Later that night, COMPLAINANT spoke to SUBJECT OFFICER about the incident. The detective acknowledged that he had entered Complainant's

home but refused to answer COMPLAINANT's questions regarding why he had done so without his permission.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on March 14, 2011. The Complaint Examiner heard the testimony of WITNESS #4, WITNESS #2, COMPLAINANT, and SUBJECT OFFICER. The following exhibits were introduced at the hearing:

Complainant Exhibit 1:	OPC Complaint Form 11-10-2007
Complainant Exhibit 3 ¹ :	OPC Statement of COMPLAINANT, 11-27-2007
Complainant Exhibit 4:	OPC Statement of WITNESS #1, 1-25-2008
Complainant Exhibit 6:	Statement of WITNESS #4, 1-10-2008
Complainant Exhibit 7:	OPC Memorandum of Interview of WITNESS #2, 12/19/07
Complainant Exhibit 10:	OPC Witness Statement of SUBJECT OFFICER, 6-26-00
Subject Officer Exhibit 1:	PD 854: Investigation Notes

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on September 30, 2010, and an evidentiary hearing conducted on March 14, 2011, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On October 20, 2007, WITNESS #1 and her son WITNESS #3 got into an argument which escalated, resulting in physical contact between COMPLAINANT and WITNESS #3.
2. COMPLAINANT and WITNESS #1 called the police to help intervene with WITNESS #3.
3. As a result of the argument, COMPLAINANT and WITNESS #1 decided it would be best for WITNESS #3 to go stay with his grandmother, WITNESS #4.

¹ All of complainant's exhibits were exhibits in the Report of Investigation. Prior to the hearing, both sides stipulated to the admissibility of these exhibits. Exhibit numbers followed the numbering system of the Report of Investigation. Therefore, there are some missing exhibit numbers, which reflects the parties' selective admission of exhibits from the Report of Investigation.

4. WITNESS #4 took WITNESS #3 to the MPD Youth Investigation Branch, where SUBJECT OFFICER interviewed WITNESS #3 about the incident.
5. The police told WITNESS #5 and WITNESS #4 not to go to the FAMILY house without police escort.
6. The following day, October 21, 2007, WITNESS #5 arranged for a police escort and contacted WITNESS #4 about going to the FAMILY home to retrieve WITNESS #3's school uniform and books.
7. SUBJECT OFFICER responded to a radio run and met WITNESS #5, WITNESS #4, and WITNESS #2 (her son) at the FAMILY home.
8. Several officers from the Fifth District of the MPD were there as well.
9. WITNESS #3 did not accompany WITNESS #5 and WITNESS #2 and WITNESS #4 to the FAMILY home.
10. WITNESS #5 remained several blocks from the FAMILY home in order to avoid confrontation.
11. COMPLAINANT and WITNESS #1 were not home when SUBJECT OFFICER and WITNESS #2 and WITNESS #4 arrived.
12. SUBJECT OFFICER and WITNESS #2 and WITNESS #4 knocked on the FAMILY door and no one answered.
13. WITNESS #2 called WITNESS #1's cell phone. He left a message informing her that the COMPLAINANT and WITNESS #1 needed to come home immediately.
14. WITNESS #4 informed SUBJECT OFFICER that the window next to the front door is typically left unlocked.
15. SUBJECT OFFICER instructed WITNESS #2 to attempt to climb through the window. WITNESS #2 did so, and then unlocked COMPLAINANT and WITNESS #1's front door.
16. Then, WITNESS #4 and SUBJECT OFFICER both joined WITNESS #2 inside the home by walking through the front door.
17. WITNESS #2 again called WITNESS #1 and left a message informing her that he was inside her house with the police.

18. COMPLAINANT and WITNESS #1, who had been in Baltimore for the day, did not return home until later that evening.
19. When COMPLAINANT and WITNESS #1 returned home, they determined that someone had been in their home and called 911.
20. COMPLAINANT and WITNESS #1 learned from the police department that SUBJECT OFFICER had been at their home earlier in the day.
21. COMPLAINANT filed a complaint against SUBJECT OFFICER.

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; (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; or (5) retaliation against a person for filing a complaint pursuant to [the Act].”

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

The central question in this case is did SUBJECT OFFICER need a warrant in order to enter the COMPLAINANT and WITNESS #1’s home on October 21, 2007, such that his warrantless entry into the home amounted to harassment? An MPD Special Order issued on January 6, 1986 and entitled *Warrantless Searches of Crime Scenes*, states that “[w]arrantless

searches of a home are *per se* unconstitutional except for a few judicially sanctioned exceptions.” Without a warrant, SUBJECT OFFICER was permitted to enter the home and to allow WITNESS #2 and WITNESS #4 to enter the home only if the entry was a) consensual; b) if he had probable cause; or c) if there were exigent circumstances. *U.S. v. Dawkins*, 17 F.2d 399, 403 (D.C. Cir. 1994).

Complainant successfully proved by a preponderance of the evidence that SUBJECT OFFICER’s entry was unlawful and amounted to harassment because none of the circumstances that would allow entry without a warrant was present on October 21, 2007. Both parties agree that SUBJECT OFFICER entered the home and that he permitted individuals who had no right to do so to enter and remove items from the home. Through the testimony of Complainant’s witnesses at the hearing as well the cross examination of SUBJECT OFFICER, Complainant proved that SUBJECT OFFICER’s decision to enter the home, though quite possibly well-intentioned, could not be justified by any of the exceptions to the ordinary rule requiring a warrant. Based on the evidence before this Complaint Examiner, it appears that SUBJECT OFFICER entered the home and permitted others to enter the home primarily in order to retrieve the belongings of Complainant’s stepson who had relocated to his grandmother’s home the night before. SUBJECT OFFICER might have also wanted to verify that Complainant’s wife was safe. However, the evidence proves by a preponderance of the evidence that his concern about Complainant’s wife was not sufficiently supported to justify entry without a warrant.

Though SUBJECT OFFICER asserted that WITNESS #1 consented to the entry in his Objections, he failed to put forth that argument either in his statement to OPC or in his testimony at the hearing. Instead, he asserted that there were exigent circumstances. His assertions that exigent circumstances existed, permitting him to enter the home, were unpersuasive and disproven by the evidence put forth by Complainant. Under *U.S. v. Johnson*, the D.C. Circuit held that that “the test for exigent circumstances is whether the police had an ‘urgent need’ or ‘an immediate major crisis’ in the performance of the duty affording neither time nor opportunity to apply [for a warrant].” 802 F.2d 1459, 1461 (D.C. Cir. 1986). Even the case that SUBJECT OFFICER cites to justify his entry fails to provide a lawful rationale for his entry into the FAMILY home. Under *Brigham City v. Utah*, the Supreme Court held that police may enter a home without a warrant under the exigency requirement when they have an objectively reasonable basis for believing that “there is a need to assist persons who are seriously injured or threatened with such injury.” 547 U.S. 398, 403 (2006). The Court holds that this is an objective, not a subjective analysis. *Id.* at 404.

By an objective standard, SUBJECT OFFICER did not have reasonable belief that there were exigent circumstances such that he could overcome his obligation to obtain a warrant. Looking at the facts presented to him at the scene, the circumstances fail to reasonably suggest that WITNESS #1 was seriously injured or threatened with injury within the home on October 21, 2007. First, SUBJECT OFFICER came to the FAMILY home in response to a radio run for a call to retrieve property. As SUBJECT OFFICER testified, he came to the home not in response to a call for a possible assault, but merely to assist with clothing. As WITNESS #4

testified, she contacted the police so that she could retrieve her grandson's clothing from the FAMILY home. She had been informed that she needed to ask the police to assist when she came for the clothing. At no time subsequent to the events of October 20, 2007 did any member of the WITNESS #4's family contact the police to ask them to check on WITNESS #1's safety.

Once at the scene, the evidence proves by a preponderance of the evidence that the family members on the scene, WITNESS #4 and WITNESS #2, were not themselves alarmed about WITNESS #1's safety. Instead, as WITNESS #2 stated in his interview with OPC, Complainant Exhibit 7, he had called WITNESS #1 two times on her phone, merely telling her she needed to come home so that they could retrieve the clothing they sought. Complainant himself also heard the messages and confirmed the messages first requested that he and his wife come home and then stated that WITNESS #2 and WITNESS #4 were inside the home. Neither of the messages stated that the family was concerned about her and needed her to contact them and let them know she was unharmed. Instead, the family was focused on the property.

At the hearing, it was clear that WITNESS #4 is sincerely concerned about her daughter's well-being. As a concerned mother, she most likely communicated her fears to SUBJECT OFFICER on October 21, 2007. While her Statement, Complainant Exhibit 6, does not indicate that she spoke to SUBJECT OFFICER about her concerns about WITNESS #1 on the day in question, at the hearing, she testified that she communicated those fears to SUBJECT OFFICER that day. WITNESS #2 was also most likely concerned about his sister on the day in question. Again, his statement fails to indicate that he communicated those concerns to SUBJECT OFFICER. At the hearing, when asked if he communicated those concerns to SUBJECT OFFICER, he merely answered that "I probably did; I'm not sure."

Even assuming both WITNESS #4 and WITNESS #2 communicated their concerns to SUBJECT OFFICER, their specific concerns about WITNESS #1 could not have provided SUBJECT OFFICER with a reasonable belief that WITNESS #1 was injured and in need of assistance within the home. Though WITNESS #4 stated that on that day that she was worried about her daughter, her anxiety at that specific time does not warrant an emergency entry into the home since it was far from significant or specific. When asked at the hearing if she was worried about her daughter at that time, she responded merely: "I was worried about my daughter all the time; I'm still worried about her." Similarly, when asked if he was concerned about WITNESS #1 on that particular day, WITNESS #2 answered at the hearing that he was concerned because given the violence he believed Complainant had perpetrated against his nephew, "...I'm thinking that he may do something to my sister and my mother, as well." Both individuals stated that they had generalized concerns about WITNESS #1's safety on that day, not particularized concerns that she was injured within the home at that time.

WITNESS #4's actions once inside the home illustrate her priorities on that day, and those that she must have conveyed to SUBJECT OFFICER. At the hearing, WITNESS #4 testified that the first thing she did once inside the FAMILY home was to gather WITNESS #3's belongings. And she further testified about why she asked SUBJECT OFFICER to enter the home: "...I told the officer to come in. He didn't want to come in. He was very reluctant, but I

insisted that he come in because I didn't want any problems out of this man here [gesturing at COMPLAINANT]...So to protect myself, and I didn't want nobody saying that I had taken anything from there, I insisted the officer come in there with me." If she had been seriously concerned about her daughter's safety, one would expect that she would search the home to see if WITNESS #1 was injured inside the home and incapacitated. However, she went about her business of gathering belongings, entering rooms merely to locate her own and her grandson's property: "We looked in the downstairs bathroom, the living room and the kitchen for the phone and the vacuum, but did not find them."

Similarly, WITNESS #2's testimony about what he did inside the home suggests that he was not truly concerned that his sister was hurt inside the home. When asked what he did inside the home, WITNESS #2 stated: "I think I was to go upstairs and look for my nephew's uniforms and his books because he had to go to school the next day."

SUBJECT OFFICER's own behavior at the scene suggests his concern about WITNESS #1's safety was secondary to his desire to help retrieve belongings. If SUBJECT OFFICER truly believed that exigent circumstances existed because WITNESS #1 might be seriously injured within the home, one would have expected to him to prioritize safety and the search in entering the home and moving about the home. Instead, he permitted an unarmed civilian to enter the home before a member of the Metropolitan Police Department. He testified that he was too large to enter the window and that kicking down the door seemed unreasonable. Taking the extraordinary step to enter a home without a warrant suggests that SUBJECT OFFICER must have strongly believed there was someone inside who needed assistance. If that was the case, wouldn't it also follow that he would have taken precautions when he entered? For example, he could have found another officer who was smaller to enter the home. He could have kicked down the door despite the expense related to doing so. He could have asked the other officers to enter with them. Instead, he directed WITNESS #2 to enter and he and WITNESS #2 and WITNESS #4 moved about the home even though there were other officers at the scene who could have assisted.

The evidence about SUBJECT OFFICER's actions within the home varies dramatically from one witness to the next. SUBJECT OFFICER stated in his OPC interview that he conducted a sweep of the home, looking upstairs and downstairs in the basement and only then, did he suggest that they collect the belongings. At the hearing, SUBJECT OFFICER similarly stated that he went through the house, stating, "[t]here was no one in there. There was no one injured." However, the evidence presented by Complainant contradicts SUBJECT OFFICER's description of his actions. WITNESS #4 stated SUBJECT OFFICER was with her at all times, though he did, at one point, call down to the basement. She stated that "[h]e was right there with me, but he was like sort of looking for [WITNESS #1]." When asked, "[w]as there ever a time when [SUBJECT OFFICER] left you and went into other rooms?" She responded, "No. No. No." WITNESS #4 explained that SUBJECT OFFICER was not off searching on his own and that she only would have gone into the COMPLAINANT and WITNESS #1's bedroom, for example, to look for a cell phone on the dresser. When asked if SUBJECT OFFICER conducted

a sweep of the house, she explained that he did not enter all the rooms looking for WITNESS #1. Instead, she said that she was “just trying to get out of there as quickly as possible.” This testimony is entirely consistent with her statement contained in Complainant Exhibit 6. Similarly, WITNESS #2 testified that he thought SUBJECT OFFICER stayed with him as he retrieved clothing. SUBJECT OFFICER himself could not talk specifically at trial about what type of search he undertook of the FAMILY home. In response to questions about where he searched, he stated that he “*believed* [he] looked in each room,” and that he “believed” that he separated from WITNESS #4 at various times. His inability so specifically recall what efforts he made to search the home for WITNESS #1 weakens his credibility, favoring the WITNESS #2 and WITNESS #4s’ recollection of SUBJECT OFFICER’s actions inside the home on the day in question.

The evidence shows that though SUBJECT OFFICER made some efforts to verify that WITNESS #1 was not in the home, his conduct was inconsistent with an officer who entered a home under exigent circumstances presented by a need to assist an injured individual.

SUBJECT OFFICER’s testimony failed to prove that he himself analyzed the factors relevant to a lawful entry into Complainant’s home. When asked what standard by which he determines whether or not to enter a home without a warrant, SUBJECT OFFICER responded with merely a subjective, gut response, not guided by any principle, procedure, or law: “I believe that in this case, you saw the testimony of WITNESS #4, I’d like to put it to you, if she would have said I’m concerned about my daughter, this violent episode happened the day before. My grandson was choked. He was sexually threatened by someone with a long criminal history. His mother has a long criminal history too, I’m concerned about her. I tried to call her. She’s not there. I believe that’s more than enough reason to go inside. And also, like I said earlier, if I didn’t go inside and there was someone bleeding to death inside, what would the *Washington Post* say the next day? White officer lets black woman die and does absolutely nothing about it.” While SUBJECT OFFICER may well have had the best of intentions entering the home, those intentions were not based on a reasonable belief that someone inside was in danger or injured. Contrary to SUBJECT OFFICER’s assertions, this is a legal inquiry. This is a legal inquiry that requires exigent circumstances -- not merely a compelling story -- to justify a warrantless entry into a residence.

Although SUBJECT OFFICER did not undertake any malicious actions on October 21, 2007 and may well have been moved out of concern for WITNESS #1’s safety, his entry into the FAMILY home was an unlawful warrantless entry since none of the exceptions to the ordinary rule that an officer must obtain a warrant to enter a home was present. Though SUBJECT OFFICER asserted that there were exigent circumstances that permitted warrantless entry, Complainant has proven by a preponderance of the evidence that such circumstances did not exist. By entering into Complainant’s home without a warrant or exigent circumstances, SUBJECT OFFICER infringed upon Complainant’s constitutional rights without a legitimate law enforcement purpose. Therefore, SUBJECT OFFICER’s conduct amounted to purposeful, knowing, or reckless harassment under D.C. Code 5-1107(a); D.C. Mun. Regs. Tit. 6A, MPD

Special Order 01-01 and in violation of MPD General Order 120.01, MPD Special Order issued on January 6, 1986, entitled *Warrantless Searches of Crime Scenes*.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Sustained
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Submitted on April 29, 2011.

Laurie S. Kohn
Complaint Examiner