

WARRANTLESS ENTRIES INTO PRIVATE HOMES BY MPD OFFICERS



REPORT AND RECOMMENDATIONS OF THE POLICE COMPLAINTS BOARD

TO

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THE COUNCIL OF THE DISTRICT OF COLUMBIA, AND
CHIEF OF POLICE CATHY L. LANIER**

June 12, 2013

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I. INTRODUCTION AND OVERVIEW

Pursuant to the Fourth Amendment of the United States Constitution, every citizen is guaranteed the right to be free from unreasonable searches and seizures. When the police have probable cause to search a dwelling, they may obtain a judicially sanctioned warrant.¹ The United States Supreme Court has held, however, that in rare instances, as in the case of consent or exigent circumstances, a police officer can search a home without a warrant.²

Over the years, the Office of Police Complaints (OPC) has received dozens of complaints alleging that officers of the Metropolitan Police Department (MPD) improperly entered the private homes of citizens without a warrant. At least 12 of those citizen complaints appeared to raise valid concerns about unlawful entries into private homes by MPD officers. In these cases, the officers apparently believed that a search warrant was not necessary and that their actions were justified. In the three illustrative complaints cited below, the officers' actions violated the complainants' constitutional rights and may have resulted, in part, from MPD not providing its members with adequate guidance or training on what constitutes an exigent situation permitting warrantless entry into a private residence. The Department also does not require its officers to document when they have entered into a home pursuant to exigent circumstances.

Based on a review of complaints investigated and resolved by OPC, the Police Complaints Board (PCB), the governing body of OPC, recommends that MPD: (1) develop and implement a general order setting out the exigent circumstances under which an MPD officer may enter a home without a warrant; (2) develop and provide more thorough and better training to recruits on the law of entry and searches under exigent circumstances while continuously monitoring changes in the law and providing updated instruction to incumbent officers; (3) discipline officers who violate the Fourth Amendment and require them, at a minimum, to receive additional training, thus maximizing the likelihood that these officers will not engage in such conduct again; and (4) require officers to document, in writing, the basis for entering a residence pursuant to the exigent circumstance exception.³

¹ U.S. Const. amend. IV.

² Exigent circumstances permit law enforcement officers to conduct an otherwise permissible search without first obtaining a warrant. *Kentucky v. King*, 131 S.Ct. 1849, 1854 (2011). Law enforcement officers may also conduct a search if they have the consent of persons who have a reasonable expectation of privacy in the home. *See, e.g., Minnesota v. Olson*, 495 U.S. 91 (1990); *Katz v. U.S.*, 389 U.S. 347 (1967).

³ PCB makes these recommendations pursuant to D.C. Code § 5-1104(d) (2013), which authorizes the Board to recommend to the Mayor, the Council of the District of Columbia, and the Chiefs of Police of MPD and the D.C. Housing Authority's Office of Public Safety reforms that have the potential to reduce the incidence of police misconduct. The report and recommendations are supported by four of the five members of PCB, Kurt Vorndran, Iris Chavez, Karl M. Fraser, and Margaret A. Moore. The fifth member of the Board, MPD Assistant Chief Patrick A. Burke, has abstained from taking a position on the report and recommendations. The PCB is grateful to the following persons who assisted in preparing the report and accompanying recommendations: OPC's executive director, Philip K. Eure, who supervised the project; OPC's special assistant, Nicole Porter; Susan P. Weinstein, contract attorney; and OPC former law interns Paul Johnson, a 2013 graduate of Howard University School of Law, and Kathryn Bendoraitis, a rising third-year law student at George Washington University Law School.

If implemented, these recommendations would not only aid officers in carrying out their duties and protect the public, but they can also be expected to reduce over the long term the number of citizen complaints lodged against MPD members and limit the District's civil liability.⁴

II. COMPLAINTS RECEIVED BY OPC

To provide context for PCB's proposals, below are examples of citizen complaints investigated by OPC in which the agency found reasonable cause to believe that MPD officers entered residents' homes without permission and without obtaining a search warrant.

- The female complainant alleged that she was at home with her two daughters and granddaughter when four MPD police detectives came to her front door and asked to speak with her. Upon entering the house with the complainant's permission, one of the detectives asked the woman if she knew certain people. The detective also provided the complainant with a telephone number and asked if it was hers. The woman replied that she did not know anyone by those names and that the telephone number did not belong to her. The detectives then asked the complainant's daughter whether she knew the people in question and if she recognized the telephone number. The daughter stated that she also did not know anyone by those names but added that the number was her old cell phone number. At that point, one of the detectives asked the complainant if he could search her home. When the woman refused because the police did not have a search warrant, the detective called his supervisor. After reaching his supervisor, the detective told the complainant that he was ordered to conduct a "walk through" of the house. The detectives searched the entire house, believing that an order from their supervisor and knowing that the daughter's old cell phone number was being used by questionable individuals justified a warrantless search of the complainant's home. OPC referred the matter to a complaint examiner after finding reasonable cause to believe that the search was improper, thereby constituting police misconduct. The complaint examiner sustained the harassment allegations against the four detectives and the MPD supervisor, determining that the officers lacked probable cause to search the complainant's house and exigent

⁴ In its comments on a previous draft of this report, MPD states that the report "inaccurately depicts a systemic problem," adding that "current policy and procedures are sufficient to prevent warrantless entries into private homes." Contrary to MPD's claim, however, the purpose of this report is to address concerns arising out of inappropriate warrantless entries into homes made by some officers on the force. The PCB report does not purport to address a "systemic" problem. Such an analysis is beyond the scope of this report. In any event, there is no set number of citizen complaints that is needed in order for PCB to issue a policy recommendation on any given subject. For example, in the report entitled, "Minors in the Care of Arrested Persons" (issued May 24, 2005), PCB recommended that MPD create a written policy regarding the handling of minors who are left unattended after the adult responsible for the care of the minors has been arrested. That report came about as a result of a single sustained OPC complaint examiner decision. MPD adopted the Board's recommendation. The instant report and set of recommendations are therefore consistent with the agency's statutory mandate under D.C. Code § 5-1104(d), *see supra* note 1.

circumstances did not exist. The subject officers received PD Form 750s, or letters of dereliction, in their files.⁵

- The male complainant said that he and his wife were not at home when she received a phone call from her brother. The wife ignored the call because she believed that her brother was calling about an incident from the previous day in which the husband's 15-year-old stepson was removed from their home by MPD officers. When the wife later checked her voicemail, she discovered that her brother had left a message asking her to come home immediately. A second message from her brother indicated that he was inside their home. When the complainant and his wife returned to their residence, they learned from neighbors that several individuals, including the wife's brother and an MPD officer, had been inside their home. Later that night, the complainant spoke about the incident on the phone with the MPD officer who acknowledged having entered the complainant's home. The officer, however, refused to answer the complainant's questions about why he had done so without permission. According to the officer's statement that was provided in connection with OPC's investigation, he believed that exigent circumstances were present because the complainant's mother-in-law had told him that she was fearful that the complainant's wife might be in the home and possibly unsafe because of the complainant's history of violence. The wife's brother did not indicate that he was a resident at the home. Upon completion of its investigation, OPC found reasonable cause to believe police misconduct had occurred and referred the matter to a complaint examiner for adjudication. The complaint examiner sustained the harassment allegation against the subject officer and determined that there were no exigent circumstances warranting entry into the complainant's home. The subject officer received a PD Form 62-E, or job performance documentation, in his file.⁶
- The male complainant was sitting in the living room of his house when the children of his girlfriend were escorted into his home by an MPD officer who entered the premises without permission. The complainant had not allowed the officer to enter his home, and the officer admitted that he obtained entry without consent. The officer asserted, however, that the entry was justified because the girlfriend's young children had been playing in the street by themselves and he was concerned that they were being neglected. Claiming that exigent circumstances existed, the officer brought the

⁵ According to MPD General Order 120.21, "Disciplinary Procedures and Processes," effective April 13, 2006, a PD Form 750 is "a written notice used to cite members for misconduct as determined by their Commanding Officers," and "is used as a record of derelict performance in matters that have not reached a serious level of concern or impact." The form must "[d]escribe the specific violation(s) [and] [i]dentify measures needed to correct the deficiencies." The document may also be considered in performance evaluations and "deciding greater degrees of disciplinary action." Infractions warranting the use of PD 750s include violations such as "[I]ateness appearing for an assignment; [f]ailure to appear for an assignment; [c]ourt-related derelictions; [m]inor crash-related derelictions; or [u]niform or equipment deficiencies." Pursuant to section V.I. of the general order, MPD's Office of Professional Responsibility (OPR) tracks all disciplinary actions. Section VI.B.6. requires that all commanders and directors forward a copy of any corrective action letter to the director of the Discipline Review Division, and section VI.B.7 orders OPR to keep the records of the disciplinary action for three years after issuance. After that time, officers may apply to have their letters removed from their files.

⁶ Per MPD General Order 201.20 section III.7, a PD Form 62-E is "[a]n optional Police Department form that supervisors may use to record observations of a subordinate's job-related behaviors."

youngsters into the home to ascertain whether any adults had, in fact, been neglecting the children. Finding reasonable cause to believe that misconduct had occurred, OPC referred the matter to a complaint examiner. The complaint examiner sustained the harassment allegation against the subject officer, determining that the exigency exception to the warrant requirement does not allow an officer to enter a dwelling based on an emergency that the officer perceives to have occurred outside of a home. Discipline is pending with MPD.

- The female complainant stated that she was at home along with her boyfriend, her mother, her two sons, and her two nephews. The family members were in the living room while the woman's boyfriend was outside on the front porch. Two MPD detectives, a male and a female, parked in front of the complainant's house and approached the boyfriend, asking him if the complainant was home. The boyfriend told the detectives to "hold on" and went inside the residence to get his girlfriend. When the boyfriend started to shut the door behind him, the male detective reportedly "ran up behind him and pushed the door open so that [he] could not shut it." At that point, the complainant told the detective, "Get out. What are you doing?" The male detective entered the living room and approached the woman. The female detective stood in the complainant's doorway. The male detective told the complainant that he was serving her with a subpoena for a court appearance the next day, but the woman replied that she would not accept service because she had already received it in the mail. The complainant then allegedly said to the detective, "Get the fuck out. All of this is not necessary. No one said you could come in, and you just came in." The detective placed the subpoena on the woman's lap, but the complainant reacted by saying she was not going to touch it. The detective then asked the complainant to sign for the subpoena, but she refused and asked the detective to leave her house. At that point, the detective removed that subpoena from her lap, placed it next to the complainant on the couch, and walked out of the home. The woman immediately ripped up the subpoena and threw it on the front porch. The detective took photographs of the torn-up subpoena and left. As a result of its investigation, OPC found reasonable cause to believe that the male detective harassed the complainant since there was no legitimate purpose for him to enter the home without a warrant. The complainant in this case withdrew her complaint after OPC referred it to a complaint examiner. Nonetheless, this case further underscores the need for better training on what justifies warrantless entry into private homes.

In addition to these four complaints, from 2007 to the present, OPC received at least eight other citizen complaints that appeared to raise valid concerns about unlawful entries into private homes by MPD officers.⁷ Of those eight complaints, one was successfully mediated, one was sustained against the officer on other grounds, one was determined by the complaint examiner to be unfounded, one was withdrawn by the complainant, and another was referred to the

⁷ PCB notes that its review focused primarily on warrantless entries that appeared to be unlawful. OPC has received approximately 50 other citizen complaints and 30 citizen inquiries. In the majority of those cases, the agency either determined that the warrantless entry by the officer was appropriate, or closed the complaint or inquiry on other grounds (i.e., complainant failure to file a formal complaint, filing of complaint was not timely, lack of cooperation by the complainant, complaint later withdrawn, etc.).

Department because the complaint was filed outside of OPC's 45-day statutory filing period. The remaining three citizen complaints are currently under investigation.

In its comments on a draft of this report, MPD stated that these 12 complaints "represent a very small portion of all matters referred to the OPC." It is true that these citizen complaints constitute only a small percentage of the total number of complaints filed with the agency. Warrantless entry complaints, however, make up approximately 13.7% of those complaints referred to OPC's complaint examination process since 2009. In addition, OPC complaint examiners have sustained a citizen complaint involving a warrantless entry into a private home every single year since 2010.

Moreover, according to MPD, approximately eight lawsuits have been filed against the Department since 2009 alleging that its officers improperly entered into a home without a warrant. MPD reports that one lawsuit was dismissed in favor of the Department, one lawsuit resulted in summary judgment for the plaintiff, and the remaining matters are still in litigation. Notwithstanding these civil actions, the filing of administrative complaints with OPC suggests, at a minimum, the need for a closer examination of MPD policies and practices related to warrantless entries and searches of homes.

III. CURRENT POLICIES AND PRACTICES

MPD General Order 702.03 sets forth the policies and procedures for officers to use in obtaining and executing search warrants. This general order provides information on, among other things, the need to afford citizens the constitutional guarantee of being free from unreasonable searches and seizures and the key elements necessary for establishing probable cause when an officer wishes to obtain a search warrant.

Based on this general order, it is clear that MPD is aware of and appropriately concerned with constitutional requirements when its members obtain and serve search warrants. Unlike some other jurisdictions, however, MPD appears to provide little guidance to its officers on the specific exceptions to the general prohibition against warrantless entries into a private residence, as well as what constitutes "exigent circumstances."

It should be pointed out that the Department has issued a special order that provides helpful information on a certain type of exigency -- a warrantless search based on the need to provide emergency aid to those inside the premises.⁸ The directive also references another type of exigency recognized by the courts, the "hot pursuit" of a suspected felon, and notes that officers may search a home if given consent by a person who has a reasonable expectation of privacy at the location. That special order, however, does not provide much detail about the other judicially recognized emergencies that permit entry into a private home. One possible reason could be due to the age of the document. The special order was issued in January 1986 and does not appear to have been updated to reflect changes in case law since that time. In addition, the nearly 30-year-old order is entitled, "Warrantless Searches of Crime Scenes." This suggests that the special order only pertains to warrantless searches involving crime scenes, and

⁸ See MPD Special Order 86.01, "Warrantless Searches of Crime Scenes," (effective Jan. 6, 1986).

therefore may be overlooked by officers needing written guidance on warrantless entries or searches of homes in situations where a crime did not occur on the premises.

MPD states that it is “in the process of incorporating Special Order 86-01 into General Order 702.3 as part of a routine review of all orders.” PCB believes, however, that given the numerous exceptions to the search warrant requirement and the distinct issues that warrantless entries and searches of private homes raise, a separate general order would more clearly define officers’ obligations under the law.

In addition to concerns about the lack of a general order dealing specifically with exigent circumstances, PCB believes that the Department may not have conducted adequate training on when a warrantless search falls within constitutional boundaries.⁹ Interviews with members of MPD’s training staff revealed that the Department’s lesson plans for instruction at the police academy contain minimal information on exigent circumstances, and additional and updated information is only provided when there is a significant change in the law.¹⁰ At the academy, MPD provides a cursory review (*i.e.*, one sheet) on the exigent circumstances exception to the warrant requirement, which lists “three general categories of situations that are considered.” They are: (1) danger or physical harm to the officer or destruction of evidence (*e.g.*, a barricade or hostage situation); (2) danger to a third person (*e.g.*, observation of a fight taking place when responding to a call about a loud party); or (3) hot pursuit of dangerous suspects (*e.g.*, running after a suspect wanted for a shooting, and the officer believes that the suspect remains armed). The guidance states that “the belief that there is [sic] exigent circumstances must be objective. . . . Would a reasonable officer, having the same knowledge, reach the conclusion that circumstances were exigent in nature?”¹¹ Although this is a good start, the Department’s training curriculum should provide more detailed information and set aside additional classroom time for such an important topic. In addition, these materials should be continuously updated. The most recent case cited in the document is from 2006, but some important and relevant United States Supreme Court cases have been decided since that time. On a related note, training personnel have told OPC that, unlike some other law enforcement agencies, MPD does not require its officers to document when they have entered a private dwelling in an emergency situation, unless the entry was forcible. Clearly, the Department should do more to assist and protect its officers who must carry out this sometimes complex area of the law.

In each of the previously listed OPC complaints, the MPD officers maintained that their warrantless entries and subsequent searches were justified.¹² The officers’ beliefs, however, were incorrect. Considering that a number of officers, including one supervisor, were involved in the OPC cases cited as examples, the MPD force could benefit from more and better guidance on this issue.

⁹ MPD disputes PCB’s characterization of the Department’s training efforts. In its comments, MPD stated, “Contrary to the OPC assertion, it is impossible to specifically cite every instance, and what additional related material should be included in the lesson plan or directive related to exigent circumstances. What is clear is that MPD teaches related constitutional law, case law, and information to its members; and with this solid footing members of the Department exercise their authority as police officers with diligence and restraint.”

¹⁰ Phone interviews by contract attorney Susan P. Weinstein with MPD staff (Jan. 11, 2013, and Mar. 15, 2013).

¹¹ *Id.*

¹² This information is based on the official statements of the subject officers taken by OPC investigators.

IV. LEGAL AND POLICY CONCERNS

The Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures and requires law enforcement officers to have probable cause in order to obtain a judicially sanctioned search warrant.¹³ The United States Supreme Court has set forth rare exceptions to the warrant requirement,¹⁴ one of which is exigent circumstances, where “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”¹⁵

These exigencies also must be supported by probable cause in order for a warrantless, non-consensual search of a home to be lawful.¹⁶ The Court of Appeals for the District of Columbia Circuit has held that “[t]he test for exigent circumstances is whether the police had ‘an urgent need’ or ‘an immediate, major crisis in the performance of duty afford[ing] neither time nor opportunity to apply to a magistrate.’”¹⁷ In determining whether exigent circumstances exist, courts consider a number of factors, including the severity of the crime that the suspect is believed to have committed, whether the suspect is believed to be armed with a weapon, and the likelihood of the suspect’s escape if law enforcement does not act swiftly.¹⁸

The Fourth Amendment is regarded by some as one of the most important provisions of the Bill of Rights, and it provides citizens with a high expectation of privacy in their homes.¹⁹ As Supreme Court Justice Louis Brandeis stated in his oft-cited 1928 dissent in *Olmstead v. United States*,²⁰ the drafters of the Constitution “conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.”²¹ The Fourth Amendment ensures an individual’s protection against abuses of power, and violations of this essential constitutional right should not be taken lightly. Consequently, officer awareness regarding when and how to conduct warrantless searches is critically important to achieve fair and effective policing.

¹³ U.S. Const. amend. IV.

¹⁴ Other exceptions (excluding consent by an individual who has a reasonable expectation of privacy in the home) are delineated in *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) (officers may enter a home to prevent the imminent destruction of property); *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (officers may enter a home to conduct emergency assistance or protect an occupant from imminent injury); and *United States v. Santana*, 427 U.S. 38, 42 (1976) (officers may enter a home when in “hot pursuit” of a fleeing suspect).

¹⁵ *Kentucky v. King*, 131 S. Ct. at 1854 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)) (internal quotation marks omitted).

¹⁶ *U.S. v. Dawkins*, 17 F.3d 399, 403 (D.C. Cir. 1994).

¹⁷ *U.S. v. Johnson*, 802 F.2d 1459, 1461 (D.C. Cir. 1986) (quoting *Dorman v. United States*, 435 F.2d 385, 391 (D.C. Cir. 1970)).

¹⁸ *Dorman*, 435 F.2d 392-94.

¹⁹ See *Payton v. New York*, 445 U.S. 573, 587-90 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”)

²⁰ 277 U.S. 438, 471 (128) (Brandeis, J., dissenting).

²¹ *Id.* at 478.

Moreover, although MPD technically disciplined the officers who were found to have violated the Fourth Amendment by placing written notices in their personnel files, it is unclear whether the Department also provided them with training or counseling on why their actions were improper. A note in an officer's file establishes an official record of problematic conduct and documents patterns of behavior that supervisors should consider when assessing the officer's performance and promotion potential. Standing alone, however, a written notice does not provide the member with guidance on why the behavior was improper nor does it provide direction to officers to ensure that they will not repeat the conduct in the future.²²

In the complaints discussed above, the violations of citizens' rights might have been best addressed by placing, at the very least, a written notice in the MPD member's file that included a requirement for the officer to undergo behavior-focused training.²³ By speaking to the officers about why their actions were improper and explaining the correct way that they should have handled the situation, MPD can improve the likelihood that its members will have a better understanding of the law of exigent circumstances and that they will take appropriate steps when confronted with similar situations in the future.

V. BEST PRACTICES

A number of law enforcement agencies in the United States provide their officers or deputies with detailed, written policies and procedures on the subject of warrantless searches. This guidance furnishes officers with much needed direction, protects residents from illegal searches, advances constitutional policing, and helps defend against claims of police abuse.

OPC found a number of law enforcement agencies that have published their general orders, procedures, or protocols for entering a home without a warrant on their websites. The following three cities' documents are particularly helpful: Tucson, Arizona; Minneapolis, Minnesota; and Seattle, Washington. Tucson has the most comprehensive general order on the subject, but the policies of all three cities can be instructive to MPD. The Department can also use portions of its own, recently adopted General Order 304.19, as a model.²⁴

A. *Tucson, Arizona*

²² It should be noted that PCB was not privy to the contents of the notices in the officers' files and, as a result, does not know whether the notices included provisions for mandatory training. PCB's inability to review this information as part of its oversight responsibilities demonstrates the need for the agency to have access to underlying police department records. Earlier this year, three members of the District Council introduced legislation that would, among other things, grant PCB the authority to monitor and publicly report on "[t]he proposed discipline and the actual discipline imposed in any sustained citizen complaints." Legislative Bill 20-0063 (D.C. 2013). Passage of the bill would provide PCB with better access to underlying police department records in order to give the public a more comprehensive picture of the specific nature of, and basis for, any discipline imposed in sustained citizen complaints. Such access would also enable PCB to develop more targeted recommendations for police reform.

²³ Again, it is unclear whether the written notices included training requirements.

²⁴ See Metropolitan Police Department General Order 304.19, "Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public," (effective Jul. 19, 2012), in which MPD sets forth the circumstances under which a member may seize a recording device from a citizen. Detailed information on this general order is provided on page 10 of this report.

The Tucson Police Department's General Order 2235 lists categories under which an officer may enter a home without a search warrant.²⁵ In cases where there is no consent, the Department lists four instances in which an officer may conduct a warrantless search of a home, detailing the elements and scope of each category: (1) Public Safety or Emergency Search of a Residence – This exception is based on the need for immediacy, such as when an individual may be hurt or in need of medical assistance. The officer must have reasonable grounds to believe that an emergency is at hand, and the “search may extend only to those areas where it would be reasonable, in light of the nature of the emergency, to search;”²⁶ (2) Protective Sweep/Exigency – This exception allows an officer to make a warrantless, protective sweep of a residence when he or she is effecting an arrest inside of a residence and “reasonably perceive[s] an immediate danger to [his or her] safety;”²⁷ (3) Hot Pursuit Search of a Residence – This exception allows an officer to enter a residence when he or she is in active or “hot” pursuit of a fleeing suspect, and the search is limited to the areas in which the suspect may be hiding;²⁸ and (4) Destruction of Evidence/Evanescent Evidence (Section 2235.9) – This exception relies on facts that demonstrate “ongoing destruction, or the immediate danger of destruction, of contraband or crime-related evidence.”²⁹

B. *Minneapolis, Minnesota*

Section 9-200 of the Minneapolis Police Department's Policy and Procedure Manual addresses searches and seizures.³⁰ Before setting forth the rules to which officers must adhere, this section of the manual incorporates by reference the police department's Search and Seizure Guide and Training Manual.³¹ The manual indicates that Minneapolis police officers receive additional training and education on the topic. The policy states that police officers must always have a warrant to search a dwelling, unless consent or exigent circumstances exists.³²

The manual lists a number of circumstances under which a warrantless search is valid, including: (1) in cases of “hot pursuit;” (2) for the protection and preservation of life; and (3) to prevent the destruction of evidence.³³ Moreover, for all searches of a dwelling, even those conducted in the absence of a search warrant, the Minneapolis Police Department requires officers to document the entry or search and the legal justification for the officers' actions.³⁴

C. *Seattle, Washington*

Section 6.180 of the Policies and Procedures Manual of the Seattle Police Department states that when a search is conducted without a warrant, the police “officer bears the burden of documenting that an exception to the warrant requirement applies.”³⁵ Pursuant to the

²⁵ See Tucson Police Department General Order 2235, “Searches of Residences,” effective May 2001, revised Jan. 2013.

²⁶ *Id.*, 2235.6.

²⁷ *Id.*, 2235.7.

²⁸ *Id.*, 2235.8.

²⁹ *Id.*, 2235.9.

³⁰ See Minneapolis Police Department Policy and Procedure 9-200, “Search and Seizure,” effective April 1993, revised July 2000.

³¹ *Id.*, Section II.

³² *Id.*, Section III. C. 1.

³³ *Id.*

³⁴ *Id.*, Section III. C. 2.

³⁵ See Seattle Police Department Policy and Procedure 6.180, “Searches – General,” effective May 16, 2012.

Department’s policy, an officer may “conduct an immediate, warrantless search or seizure under emergency conditions, if there is probable cause to believe that delay in getting a warrant could result in the loss of evidence, escape of a suspect, or harm to police or [the] public.”³⁶ The manual then provides a list of six questions considered by courts when assessing the propriety of searches conducted pursuant to exigent circumstances.³⁷

The questions are:

- (1) Was the offense serious or one of violence?
- (2) Was the suspect armed?
- (3) Was the probable cause strong enough to believe the suspect committed the crime?
- (4) Was there strong probable cause to believe the person was on the premises?
- (5) Did the police identify themselves and give the suspect a chance to surrender prior to entry?
- (6) Was there an ongoing investigation or decision to arrest prior to the suspect fleeing into the premises?³⁸

The manual also states that entry is allowed when a person’s “health, welfare, or safety” is at stake due to domestic violence. These guidelines provide safeguards for officers when deciding whether a warrantless search would be permitted.

D. *Washington, DC*

Although MPD’s General Order 304.19 deals with citizens who videotape or photograph officers who are carrying out their duties, MPD would be wise to use the general order as a model when drafting a new warrantless search protocol. The policy section of this general order recognizes, at the outset, that members of the public have certain rights under the Constitution.³⁹ MPD then specifies the limited circumstances under which a member may seize a recording device from a citizen. For example, Section II.E. provides officers with guidance on what to do if they have probable cause to believe that an electronic device contains evidence of a criminal act. This section provides a definition of probable cause and a citation to case law on the subject.⁴⁰ It also sets forth the procedure to follow when an officer has probable cause to believe that an electronic device contains evidence of a criminal act, the citizen declines to give the device to the officer, and the officer believes that exigent circumstances to seize the device exist.⁴¹ Pursuant to this section, if the officer believes that the evidence would be lost absent a seizure of the recording device, the officer “shall contact the Watch Commander, Criminal Investigations Division (CID),” and follow specific instructions before obtaining the device.⁴² The general order further outlines in another section the circumstances under which the MPD member may view or listen to a recording, with or without exigent circumstances.⁴³

³⁶ *Id.*, Section II. B. 1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ MPD General Order 304.19, Section I.

⁴⁰ *Id.*, Section II.E.1 and II.E.2.

⁴¹ *Id.*, Section II.E.4

⁴² *Id.*

⁴³ *Id.*, Section II.F.1-4.

With respect to discipline, representatives of independent police review agencies in Denver, Colorado, Portland, Oregon, and Seattle, Washington, among others, have told OPC that when similar types of constitutional violations occur in their jurisdictions, the police department treats the infractions as a training or counseling issue for the first offense, and documents in the personnel file whether the officer had been counseled or retrained. In general, these jurisdictions first focus on rectifying the behavior. If the same officer commits a similar, subsequent violation after being counseled, the police department typically addresses the incident by imposing discipline that can range from issuing a letter of reprimand to issuing time off without pay.⁴⁴

MPD has a similar, progressively-based discipline approach. Consistent with these practices, an official from the International Association of Chiefs of Police (IACP) noted that the best way for a police agency to address these types of violations is through extra training for the offending officers and to all of its officers, if possible. In the view of this IACP representative, in addition to documenting poor job performance, MPD should provide its officers with counseling or training so that they can fully understand why their actions were not proper, thereby reducing the possibility of repeat behavior.

VI. RECOMMENDATIONS

Based on a review of some complaints that OPC investigated, MPD's existing policies and practices, and the need to protect the constitutional rights of people in the District of Columbia, PCB makes the following recommendations:

1. **MPD should develop and distribute a general order on the subject of exigent circumstances.** Similar to the policy statements in MPD's General Orders 702.3, which addresses obtaining and executing search warrants, and 304.19, which deals with seizures of recording devices, the new general order's policy statement should also state MPD's commitment to ensuring citizens' constitutional rights. MPD should also consider using, as a basis, the applicable sections of General Order 304.19 and the relevant policies of the police departments of Minneapolis, Seattle, and most notably, Tucson. As in Tucson, MPD should consider listing categories of exigencies and elements necessary to justify a search under each exception. The new general order should clearly define the conditions under which the member may enter a residence pursuant to exigent circumstances. Likewise, as in Seattle, MPD's new general order should possibly include a series of questions that officers should ask themselves prior to determining whether an exigency to enter and search exists. Courts consider such questions when assessing the propriety of warrantless searches based on exigent circumstances. The Department should also consider incorporating relevant sections of Special Order 86.01 into its new general order.

In this new general order, as in MPD's General Order 304.19, the Department should also provide a definition of probable cause and explain the procedures for

⁴⁴ Discussions between Susan P. Weinstein and representatives from police review agencies in Denver, Colorado; Portland, Oregon; and Seattle, Washington, among others.

officers to follow when they have probable cause and when exigent circumstances exist. Finally, it is recommended that MPD also familiarize itself with relevant policies and procedures used by law enforcement agencies other than the ones discussed in this report. Being aware of good practices employed by other police departments will allow MPD continually to hone its general order on warrantless searches, ensuring that it stays timely and relevant.

- 2. MPD should develop and provide better training, both at the academy and in-service, on what constitutes exigent circumstances.** In each of the four OPC complaints highlighted in this report, MPD officers believed that their warrantless entries or searches were justified and within the law. As evidenced by the two most recent Supreme Court cases from 2009 and 2011, the law with respect to exigent circumstances under the Fourth Amendment is being refined constantly.⁴⁵ MPD would benefit from instructing its officers on this continuous evolution. Proper training on the subject will increase officer performance, limit civil liability for the District, and protect the public from unconstitutional searches. The police academy and in-service trainings should include lectures on the state of the law and incorporate videos and role-play scenarios that seek to replicate situations encountered by MPD officers. Real life scenarios, particularly fact patterns based on the OPC complaints discussed in this report, can be effective in teaching officers to serve the public better. MPD officers can keep further abreast of new developments in this area through email alerts and written handouts distributed at roll calls.
- 3. MPD should appropriately discipline officers when they conduct warrantless entries or searches in the absence of exigent circumstances.** In two of the four OPC complaints discussed in this report, MPD officers received written notices in their files as discipline for improperly entering a home. MPD should attempt to deter recurrences of unconstitutional policing by including along with any such notices a mandatory training component for offending officers, thereby increasing the prospects for full compliance with the Fourth Amendment in the future.⁴⁶ In the event that an officer continues to engage in the same type of behavior, MPD should appropriately sanction the member using progressive discipline.
- 4. MPD should require officers to document, in writing, a search or entry into a private residence based on exigent circumstances.** As in Seattle, MPD should require officers to document entries made into private dwellings based on exigent circumstances. In addition, similar to the requirements in Minneapolis, such a practice, if adopted, should require officers to articulate the justification for the search or entry of a residence.

⁴⁵ *Kentucky v. King*, cited in footnotes 2 and 12; and *Michigan v. Fisher*, cited in footnote 12.

⁴⁶ Again, it should be noted that OPC was not privy to the contents of any notes in the officers' files and, in fact, MPD may have required corrective training.

VII. CONCLUSION

MPD aims “to safeguard the District of Columbia and protect its residents and visitors by providing the highest quality of police service with integrity . . . [and] compassion.”⁴⁷ It can demonstrate commitment to this mission by providing officers with the proper tools (*i.e.*, an explicit policy and better training) on when warrantless searches are permitted. According to police accountability expert Samuel Walker, “[t]rust and cooperation are lost when the police engage in unconstitutional and unprofessional conduct Such actions and misconduct alienate the individuals directly affected, and their stories spread among family, friends, and neighbors.”⁴⁸ By creating a general order in this area, properly training the force, keeping officers abreast of new developments in the law, and appropriately training or disciplining officers who violate constitutional search requirements, MPD will be better able to police the District of Columbia with the trust and support of the community it serves.

⁴⁷ The police department’s mission can be found on MPD’s website at www.mpdc.dc.gov/page/mpdc-mission-and-goals.

⁴⁸ Samuel Walker, *The Consent Decree Does Not Hamper Crime Fighting*, East Bay Express, September 26, 2012, available at <http://www.eastbayexpress.com/oakland/the-consent-decree-does-not-hamper-crime-fighting/Content?oid=3346845>.