

	<b>ROSENBERG POLICE DEPARTMENT</b>	
	<b>General Order 7.04 Search Incident to Arrest and Other Warrantless Searches</b>	
	<b>Effective Date: 05-13-2013</b>	<b>Replaces: N/A</b>
	 <b>Approved:</b> Chief of Police	
	<b>Reference: TBP 7.07, 10.14, and 10.15</b>	

**I. POLICY**

In order to ensure that constitutional rights are protected, officers will obtain search warrants upon probable cause in all appropriate criminal cases except for the following circumstances. Search warrants are discussed under Policy 7.05.

Searches without a judicial warrant are strictly limited to those circumstances where the courts have granted officers limited exceptions. One of those exceptions was described in Policy 7.02, where, if during an investigative stop, an officer has reasonable suspicion that an individual may be armed with a weapon - the officer may conduct a limited pat-down of the individual's clothing to protect the officer. Other exceptions to the search warrant requirement are provided in this policy.

**II. PURPOSE**

To establish guidelines for searches incident to arrest and other searches without a warrant.

**III. SEARCH INCIDENT TO ARREST**

- A. The general rule is that a reasonable search may follow a valid arrest. The officer has the authority to make a search which may extend to articles carried by the suspect and to the suspect's immediate surroundings. The purpose of this search is to remove any weapons from the arrested person which could be used against the officer while in custody, to remove any items that might facilitate an escape, and to prevent the destruction of any evidence by the arrested person.
- B. A search incident to an arrest must occur in such a way that it and the arrest are part of a continuous, uninterrupted transaction. Two conditions are necessary for this to occur:
  - 1. The search must be made as soon as practical after the arrest.
  - 2. The search must be made at or near the place of the arrest.

- C. An officer making a search incident to an arrest may search only the following permissible places:
1. The entirety of the person being arrested.
  2. The area within the immediate control of the person being arrested into which the suspect might reach for a weapon or for evidence.
- D. Accessories carried by the suspect may be searched incident to a full custodial arrest for they are within the area in which the defendant might reach to grab a weapon or an item of evidence.
- E. Vehicles may be searched contemporaneous with the arrest of the occupant or driver only if:
1. The arrested vehicle occupant is unsecured and within arm's reach of the passenger compartment at the time of the search, or
  2. The officer has a reasonable belief that *evidence related to the crime of the arrest* is located within the passenger compartment.
  3. Once an occupant has been secured and is unable to effectively reach the passenger compartment, the authority to search the vehicle for safety reasons is removed. Officers may conduct a search of a vehicle passenger compartment in such circumstances if other warrantless search exceptions apply or by obtaining a search warrant.
- F. Strip searches
1. Strip searches shall not be conducted of persons arrested for traffic violations, Class C or B misdemeanors; unless the officer has an articulable, reasonable suspicion to believe that the person is concealing a weapon or contraband. Reasonable suspicion may be based on, but is not limited to, the following criteria.
    - a. Nature of the offense.
    - b. Arrestee's demeanor and appearance.
    - c. Circumstances of the arrest or evidence of a major offense in plain view or during the course of the arrest.
    - d. Arrestee's criminal record, particularly a history of narcotics offenses or violence.
    - e. Detection of suspicious objects beneath the suspect's clothing during a search incident to an arrest.

2. Strip searches shall be performed by persons of the same sex as the person arrested and at the jail or lock-up where the search cannot be observed by persons not physically conducting the search. No strip searches will be conducted in the field.
3. In every case, the on-duty or on-call supervisor must review the need and expressly authorize the strip search.
4. When authorized by the supervising authority, strip searches may be conducted only in the following:
  - a. in conformance with approved hygienic procedures and professional practices.
  - b. in a room specifically authorized for this purpose.
  - c. by the fewest number of personnel necessary and only by those of the same sex.
  - d. under conditions that provide privacy from all but those authorized to conduct the search.
5. Following a strip search, the officer performing the search shall submit a written report to the supervisory authority that details, at a minimum, the following:
  - a. Date and place of the search
  - b. Identity of the officer conducting the search.
  - c. Identity of the individual searched.
  - d. Those present during the search.
  - e. The identity of the approving supervisor
  - f. A detailed description of the nature and extent of the search.

#### G. Body-cavity searches

1. Department personnel do not conduct body cavity searches other than an individual's mouth. If an officer has reasonable cause to believe a body cavity search is needed to detect weapons, drugs, or other contraband, the following procedures apply:
  - a. The on duty police supervisor is notified;
  - b. A search warrant is secured;
  - c. The detainee is transported to an appropriate Medical facility.
  - d. The search is conducted by the on-duty emergency room physician, while officers stand by to take control of any evidence and provide security to the physician conducting the search.
  - e. Body cavity searches are documented in the officer's arrest report and will detail the officer's justification for such search, the approving supervisor's name, the location and persons present during the search, and the results of the search. A copy of the report and warrant is forwarded to the Chief of Police for review and filing.

2. Prior to transporting the prisoner to the medical facility, the officer shall inform the prisoner of his or her intention to conduct a body-cavity search thus giving the prisoner the opportunity to voluntarily surrender the suspected contraband.

#### **IV. OTHER WARRANTLESS SEARCHES**

##### **A. Consent Searches**

A search warrant is not necessary where a person who has authority or control over the thing or place searched consents to the search. Note that the officer doesn't have to have reasonable suspicion nor probable cause to request a consent search: he or she may merely ask for permission from someone with control over the item or premises. If that person grants permission, the search may take place. The sole justification for a consent search is the existence of knowing, intelligent, and voluntary consent.

1. Consent searches must observe the following rules:
  - a. Generally, the person granting consent must use, access, or control the property. A person having use, access or control of only a part of a jointly-owned property can only give consent for a search of that part.
  - b. If two people have joint ownership of property, either may give consent if they are the only one present. If possible, have all the consenting parties present sign a written permission-to-search form. If both or multiple parties with joint ownership are present and any party objects to the search, the search cannot be performed.
  - c. A landlord, including a hotel or motel manager, cannot consent to a search of a tenant's premises, unless the tenant has been evicted or has abandoned the property.
  - d. A husband or wife, or one member of a cohabiting unmarried couple, may consent to a search of areas in common ownership or use if they are the only one present. If both or multiple parties with joint ownership are present and any party objects to the search, the search cannot be performed.
  - e. A parent may consent to a search of premises occupied by a child under the age of majority if the parent also has access to the premises. If a dependent child is present and is over the age of majority, he or she may legally object to the search of an area that is jointly owned or possessed.

- f. An employee cannot give valid consent to a search of his employer's premises unless he has been left in custody of the premises.
- g. An employer may generally consent to a search of premises used by employees, except premises used solely by another employee (e.g., a locker).
- h. Consent must be given voluntarily. If an officer requests consent from a person under circumstances which a reasonable person would consider coercive, the search would not be consensual and the officers should seek a warrant. The officer may have the burden of demonstrating voluntariness.
- i. A person who initially gives consent may withdraw it at any time. Officers shall then secure the premises and seek a warrant if probable cause exists.
- j. Refusal to give consent, in itself, cannot justify further law-enforcement action.
- k. The scope of a consent search is limited to the area for which consent has been given, and within this area officers may search only into areas where the objects sought could reasonably be hidden.

## 2. Documentation of Consent Searches

- a. Although verbal consent is valid, Police officers will carry and use the Voluntary Consent to Search form. The form should be completed and signed by the consenting parties. All Consent to Search Forms shall be forwarded to the Records Unit for filing.
- b. If a person gives verbal consent but refuses to give written consent, Police officers should consider the severity of the case along with viable options (i.e., obtaining a search warrant or some other exception to the search warrant requirement) before proceeding with the search.
- c. If a Police officer proceeds to search on verbal consent, it should be remembered that the burden of proof is always on the government.
- d. Police Officers will not only have to prove the consent was voluntary, but that it was actually given (officer's word against defendant). Officers should attempt to take additional steps to eliminate this argument (i.e., tape record the verbal consent, have an impartial third party witness the consent by signing the form).
- e. Police Officers should make every effort to minimize conditions which could be offered as "threat or intimidation"; such as:

- i. Number of Police officers present (especially in uniform);
- ii. Amount of force used to detain or arrest - i.e., displaying firearms, use of handcuffs, etc.;
- iii. Language and tone of voice used in requesting consent;
- iv. Other non-verbal communications.

## B. Emergency searches

1. A search warrant is not necessary in an emergency. An emergency is sometimes termed "exigent circumstances."
2. Police Officers may make a warrantless search of any person or anything, whether personal belongings, vehicles, or buildings, anytime they have a probable cause to believe it is necessary to save a life, prevent injury, or prevent the destruction of evidence.
3. Police Officers who observe criminal activity occurring inside a private place from outside the private place may not always be able to secure a proper warrant in a timely manner and will adhere to the following guidelines:
  - a. If the offense is a misdemeanor, Police officers will not enter unless:
    - i. Valid consent is given by a person with apparent authority to grant such permission, or
    - ii. There is reason to believe there is an immediate need to protect the safety of some person inside the location.
    - iii. Circumstances where alcohol and/or illegal drugs are present, and the health and safety of minors is a legitimate concern.
  - b. If the offense is a felony, Police officers will not enter unless:
    - i. Valid consent is given by a person with apparent authority to grant such permission.
    - ii. There is probable cause to believe the destruction of contraband or other evidence is imminent if it is not immediately recovered, or
    - iii. There is reason to believe there is an immediate need to protect the physical safety of some person inside the location.
  - c. Where Police officers enter private property under felony

circumstances as described above, and misdemeanor violations are also observed, they may take appropriate action with regard to all criminal conduct regardless of the kind of offense or the age of the individuals engaged in any criminal or status offense.

4. If officers enter premises with probable cause to believe that critical evidence may be destroyed or removed unless immediate action is taken, they may enter without a warrant, secure premises, and obtain a search warrant before proceeding further unless they have obtained consent to search, or some new circumstances arise necessitating another warrantless search.

#### C. Plain view

A plain-view seizure is, technically, not a search. To make a plain-view seizure of property (contraband, fruits, or instrumentalities of the crime), two requirements must be met:

1. From a lawful vantage point, the officer must observe contraband left in open view; and
2. It must be immediately apparent to the officer that the items he or she observes may be evidence of a crime, contraband, or otherwise subject to seizure.

#### D. Plain feel

During a lawful frisk (stemming from a lawful stop), if an officer detects an object that is or might reasonably be an item that is contraband or other criminal evidence, then the object may be seized. Threatening items such as weapons may always be removed during frisks. Non-threatening items may be removed only if their contraband or evidentiary nature is immediately apparent.

#### E. Abandoned property and open fields

A search warrant is not required for property that has been abandoned.

1. To constitute abandoned property, three conditions must apply:
  - a. Property was voluntarily abandoned.
  - b. The abandonment was not a result of police misconduct.
  - c. Property was discarded outside the area in which someone has a reasonable expectation of privacy.
2. Open fields are not protected by the Fourth Amendment, but officers must distinguish them from curtilage, searches of which require a warrant. Curtilage is the area of a dwelling which is necessary, convenient, and

habitually used by the family for domestic purposes. The extent of curtilage of a private residence is determined by whether the area is enclosed; the nature and use of the area; the proximity of the area to the home; and any measures taken by the owner to protect the area from observation. Note that under some circumstances surveillance (e.g., aerial surveillance) of activities within curtilage may take place without a warrant.

## V. VEHICLES

A. In recent years, the U.S. Supreme Court has modified and expanded the conditions under which officers may search vehicles. Preferably, officers shall search vehicles under the authority of a warrant whenever sufficient time exists to obtain one. Nevertheless, warrantless searches of vehicles may take place under a number of conditions and circumstances. It is imperative that officers understand the different types of vehicle searches and their limitations.

### B. Definitions

1. For the purposes of this section, a motor vehicle is any vehicle operating or capable of being operated on public streets or highways, from trucks to automobiles to mobile homes. A vehicle that has been immobilized in one location for use as a storage facility or home is not a motor vehicle for Fourth Amendment purposes.
2. For the purposes of this section, a search is an examination of a motor vehicle with an investigative motive, that is, to discover evidence or to examine the vehicle identification number (VIN) to ascertain ownership.

### C. When warrantless vehicle searches may be performed

1. As noted earlier, warrants shall be obtained to search vehicles, if feasible, unless an emergency exists. Any vehicle that has been disabled with little chance of its being driven away shall be searched with a warrant. In all other cases, vehicles may be searched without a with the following limitations:
  - a. With a warrant, a search may extend anywhere within the vehicle, unless limited by the warrant itself.
  - b. When probable cause exists, a search may extend anywhere within the vehicle, unless the probable cause is limited to a specific part of the vehicle.
  - c. When consent has been obtained from the driver, officers may search the vehicle subject to any limitations specified by the consenting person. Consent shall be obtained and recorded using audio/video equipment, and noted via Police Radio for dispatch to log. Consent should also be obtained in writing, when feasible.

- d. Searches incident to the arrest of an occupant shall be limited to any area within reach of the arrestee. The area within reach is deemed to be the passenger compartment. The trunk, engine compartment, and any locked compartments shall not be searched unless immediately accessible to the suspect. (See Section III above for a fuller treatment of searches incident to arrests and restrictions. Once an individual is restrained or removed from the immediate area of the vehicle, the authority to search the area within reach is removed.)
- e. Frisks for weapons shall be confined to the passenger area. Any place not immediately accessible to the occupants, such as a locked glove compartment, shall not be frisked. If the contents of a container are immediately accessible to the subject, a closed container may be searched for weapons. Note that an officer can order the suspect from the vehicle and frisk both the suspect and the vehicle.
- f. An entry into the vehicle to examine the VIN or otherwise determine ownership must be limited to these purposes.
- g. An emergency search of the vehicle may be conducted but the extent of the search must not exceed whatever is necessary to respond to the emergency.
- h. Note: If the initial search under the above conditions gives rise to probable cause that evidence, contraband, fruits, or instrumentalities of the crime might be found elsewhere in the vehicle, officers may search those areas that might reasonably contain such items.

#### D. Containers within the vehicle

- 1. As a rule, no container within a vehicle shall be searched unless it might contain the item(s) sought.
- 2. Procedures for unlocked containers
  - a. In a probable cause search, containers may be opened wherever found in the vehicle.
  - b. When the passenger area is searched incident to an arrest, containers within the passenger area may be opened.
  - c. During a consent search, containers may be opened provided that the terms of the consent either so permit or reasonably imply permission.
  - d. Containers found in or discarded from a vehicle under circumstances not amounting to probable cause or in connection with a search incident to an arrest shall not be searched but shall be secured until a warrant is obtained.

- e. The abandonment doctrine does apply to containers thrown from a vehicle by a suspect.
3. Procedures for locked containers
- a. Under most conditions, locked containers shall be opened under a warrant unless one of the following circumstances has been met:
    - i. Consent has been given.
    - ii. Probable cause exists to search the vehicle and the object of the search might be found in the container. (Even in this circumstance, a warrant is preferred.)
    - iii. Inventory, only if a key is present.

E. Conduct of the vehicle search

- 1. When possible, searches of vehicles shall be conducted contemporaneous with the stopping or discovery of the vehicle. As a general rule, vehicle searches shall be conducted as soon as reasonably possible.
- 2. When possible, officers shall avoid damaging a vehicle or its contents, and shall minimize the intrusiveness of the search and any inconvenience suffered by the passengers or owner.
- 3. As vehicles may contain sharp or pointed objects, and perhaps even syringes or other materials with body fluids on them, officers shall take precautions to minimize exposure to communicable diseases.

F. Vehicle Inventory Search

While not a search for evidence or contraband, a vehicle inventory may be conducted if the vehicle is to be impounded. Vehicle impound procedures are provided in Policy 7.16.