



# Fitchburg State University Police Department

**Subject: SEARCHES AND SEIZURES**

**Reference:** IACLEA: 2.2.4; 2.2.5  
MPAC: 1.2.4; 74.3.1

**Rescinds:** Section: 54,56,59,and 71

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**By Order of:** Michael J Cloutier, Chief of Police

**General Order**

# 2.2.4

## GENERAL CONSIDERATIONS & GUIDELINES

The term "searches and seizures" includes the examination of persons or places for the discovery of contraband, property stolen or otherwise unlawfully obtained or held, or of evidence of the commission of crime, and the taking into legal custody of such property or evidence for presentation to the court. Failure to comply with the legal technicalities which govern these procedures results in more failures to obtain convictions than any other source.

The Fourth Amendment of the **U.S. Constitution** provides as follows:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Article XIV of the **Massachusetts Constitution** provides as follows:

*Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or object of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.*

It is very frustrating to a police officer to learn that evidence which would most certainly lead to a finding of guilty, has been ruled inadmissible and excluded because of the manner in which it was obtained. In order to ensure that their efforts will not become lost in the maze of legal

technicalities, it is imperative that all police officers thoroughly understand the basic constitutional and statutory requirements involved in searching for and seizing criminal evidence.

The Fourth Amendment to the U.S. Constitution prohibits "unreasonable" searches and seizures and the Supreme Court has consistently held that unless they come within one of the few carefully limited exceptions to the search warrant requirement, warrantless searches and seizures are considered unreasonable. Searches with prior judicial approval with a valid search warrant are preferred. The burden of showing that a valid exception exists rests upon the government when the circumstances of a warrantless search are challenged in the courts.

The following procedures have been prepared to provide basic guidelines that are both legal and practical in the technical area of searches and seizures. In their implementation officers should consider all related department general orders on the following topics: Arrests, Stop and Frisk and Threshold Inquiries, Search Warrant Affidavits, the Use of Informants and the Collection and Preservation of Evidence.

### **POLICY**

It is the policy of the Fitchburg State University Police Department that:

1. Warrants should be obtained for all searches, whenever possible and practicable; and
2. Searches shall be conducted in strict observance of the constitutional rights of the parties involved, and with due regard for the safety of all officers, other persons and property involved.

### **PROCEDURES**

#### **I. DEFINITIONS**

- A. **Affidavit:** A formal declaration or statement of facts, in writing, made voluntarily and confirmed by oath or affirmation before a person having the legal authority to administer such oath or affirmation.
- B. **Exigent Circumstances:** Situations in which law enforcement officials will be unable or unlikely to effectuate a search or seizure for which probable cause exists unless they act swiftly and without prior judicial authorization. (*IACLEA 2.2.5 d*)
- C. **Probable Cause:** The facts observed, information obtained from others and personal knowledge and experience that is sufficient to lead a reasonable and prudent person to believe that a particular crime has been, is being, or is about to be committed, and that sizable evidence of crime is likely to be found in a specific location or on a specific person and which would justify a judge or magistrate to issue a search warrant.

#### **II. THRESHOLD INQUIRES (*IACLEA2.2.5 b*)**

A police officer, when observing a person with illegal design, in appropriate circumstances and in an appropriate manner, may temporarily stop and briefly detain a person for the purpose of inquiring into possible criminal behavior even though the officer does not have probable cause to make a lawful arrest at that time.

In addition, an officer may frisk such a person for weapons as a matter of self-protection when s/he reasonably believes that the suspect is engaged in criminal activity **and** is armed and dangerous. The purpose of this temporary detention for questioning is to enable the police officer to determine whether to make an arrest - whether to investigate further - or whether to take no police action at that time because the officer is satisfied with the explanation given.

If an officer fails to adequately enforce a "stop" it could result in the escape of a dangerous criminal, or pose a serious threat to the lives and safety of other persons. Conversely, the use, display, or threatened use of actual force to carry out an "investigatory stop" when such force was not justified under the circumstances, could result in a finding by the court that an arrest had occurred without the necessary element of probable cause and any evidence obtained as a result might be excluded. It should also be noted that a premature or unnecessary "stop" can sometimes negatively impact a good investigation which could have resulted in a subsequent valid arrest and a successful conviction.

Although police officers should never hesitate to make an investigatory stop and a necessary frisk upon appropriate circumstances in order to meet the practical needs of effective law enforcement, they shall avoid the indiscriminate or unjustified use of this authority. Such police action is not only frowned upon by the Courts but it also detracts from the professional image of the police among the citizens of the community in which they serve.

- A. It is a basic police duty and responsibility to check on suspicious persons or suspicious circumstances, particularly in the nighttime and in crime-prone areas.
- B. A brief investigative stop and inquiry is warranted under the following circumstances:
  - 1. When a police officer knows that a crime has been committed;
  - 2. When a police officer reasonably believes that a crime has been or is being committed;
  - 3. When a police officer seeks to prevent a crime which s/he reasonably believes is about to be committed.
- C. A police officer has the authority to stop a person for an investigative inquiry in any place where the officer has a right to be, including:
  - 1. Any public place;
  - 2. Any place or area open to the public;
  - 3. Any private premises entered with a valid warrant, or by consent, or under emergency circumstances.
- D. There is no precise formula for determining the validity and legality of an investigatory stop but it must be based upon a reasonable belief or suspicion on the part of the officer that some activity is crime-related and that the person under suspicion is connected with or involved in that criminal activity.
  - 1. It does not require probable cause for arrest;

2. It may be based upon the officer's own observations or information supplied by others;
  3. The information on which the officer acts should be well-founded and reasonable;
  4. A hunch or pure guesswork, or an officer's unsupported intuition is not a sufficient basis.
- E. No single factor alone is normally sufficient but the following are some of the factors which may be considered in determining the reasonableness of investigative stops by a police officer in the field:
1. The personal observations and the police training and experience of the officer;
  2. The officer's knowledge of criminal activity in the area;
  3. The time of day or night and the place of observation;
  4. The general appearance and demeanor of the suspect and any behavior which indicates possible criminal conduct;
  5. The suspect's proximity to the scene of a recently reported crime;
  6. The knowledge of the suspect's prior criminal record or of his association with known criminals;
  7. Visible objects in the suspect's possession or obvious bulges in his clothing;
  8. Resemblance of the suspect to a person wanted for a known crime;
  9. Information received from police sources or from other reasonably reliable sources of information.
- F. The fact that the individual has aroused the police officer's suspicion should cause the officer to make an approach cautiously, alert for any possibility of danger:
1. A "routine" check is never routine.
  2. A police check of suspicious circumstances may uncover the commission of a serious crime or the presence of a dangerous criminal;
  3. If the stopped suspect has just committed a major crime, s/he may be an immediate threat to the officer's safety or s/he may suddenly attempt to flee from the scene.
- G. If a police officer reasonably believes that their own safety or that of others is in danger, the officer may frisk or pat-down the person stopped and may also search the area within that person's immediate control in order to discover and take control of any weapon that may be used to inflict injury:
1. It is not necessary that the officer be absolutely certain that such person is armed but must perceive danger to her/himself or others because of articulable facts leading to the stop or which occurred after or during the stop;

2. If the officer has reasonable belief or suspicion, based upon reliable information or personal observation, that a weapon is being carried or concealed in some specific place on the person of the suspect, the officer should immediately check that area before performing a general pat-down;
  3. A frisk **may not** be made as pretext to search for evidence of crime, it must be a protective measure;
  4. The frisk must initially be limited to an external pat-down of the suspect's outer clothing but if such outer clothing is bulky, such as a heavy overcoat, these garments may be opened to permit a pat-down of inner clothing;
  5. If the officer feels an object which could reasonably be a weapon, the officer may conduct a further search for that particular object and remove it;
  6. If after completing the pat-down of the suspect the officer does not feel any object which could reasonably be a weapon, the search is discontinued;
  7. If while frisking a stopped person the officer discovered an illegal firearm, contraband, stolen property or evidence of a crime and probable cause to arrest develops, an arrest should be made and a full-scale incident report to that arrest should be made.
- H. When a police officer makes a decision to stop a person for an investigative purpose, unless in uniform, the officer should identify her/himself as a police officer as soon as it is safe and practical to do so and also announce the purpose of the inquiry unless such information is obvious:
1. An investigatory or threshold inquiry should begin with exploratory questions regarding the suspect's identity and his purpose;
  2. Every officer should acquire the ability to initiate an investigatory inquiry in a calm, conversational manner in order to gain as much information as possible without placing the suspect on the defensive;
  3. Even in a brief conversation with a suspect, an alert and perceptive officer can often detect that something is wrong and that further police investigation is required;
  4. An officer should always bear in mind, however, that s/he must have a firm foundation for initial suspicions in order to justify an investigative detention and inquiry.
- I. If the suspected person fails or refuses to stop when so directed by a police officer, reasonable force and physical restraint may be necessary depending upon the circumstances:
1. When combined with the observations and information which led the officer to reasonably suspect criminal activity may be in progress, if the suspect runs or tries to evade the officer that additional factor may give rise to probable cause to arrest. *Comm. v. Ling*, 370 Mass. 238, 346 N.E. 2d 703 (1976);

2. Reasonable force in such cases is the minimal amount of physical force required to overcome the resistance;
  3. If an officer is attacked, however, they may use sufficient and reasonable force to defend themselves and to ensure their own personal safety.
- J. Once a stop is made, any questioning of the suspect should be conducted at that location, unless circumstances such as the gathering of a hostile crowd, heavy traffic or the necessity to use the police radio, when the suspect may be placed in the rear seat of a police vehicle;
1. As part of a threshold inquiry, police may detain a suspect for a short time so that an eyewitness may be brought to the scene to make an in-person identification, *Comm. v. Salerno*, 356 Mass. 642, 255 N.E. 2d 318 (1970);
  2. If a stopped person is told to move to another location or if he tries to leave but the officer orders him to stay where he is, the person may, at that point, be considered "in custody" (although not under arrest).
    - a. Once a person is in custody, additional questioning by police must be preceded by giving the Miranda warnings and eliciting a waiver.
- K. No hard and fast rule can be formulated to determine the period of time required for an investigative detention but it should be reasonably brief under the particular circumstances:
1. Generally, it should be no longer than the period of time necessary to check the suspect's identity and the reliability of his story, unless information is obtained which establishes probable cause to make an arrest;
  2. The period of investigative detention should be sufficiently brief so that the "stop" cannot be construed as an "arrest", which would require probable cause.
  3. Officers should make every attempt to limit such stops to **twenty (20) minutes**.
- L. When an investigative stop involves a motor vehicle, the vehicle may be stopped and its occupants may be briefly detained and questioned by the police if there is a reasonable suspicion of criminal activity based upon specific and articulable facts which justify the need for immediate police action:
1. All police officers must be especially alert and watchful when making an investigative stop of a motor vehicle as many officers have been seriously injured, some fatally, in taking this police action;
  2. Police officers, in making such stops, should take reasonable protective precautions for their own safety, such as directing the occupants to alight from the vehicle and frisking them for weapons when justification for such frisk exists, *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977);
  3. Even after frisking the occupants, if the officers have reason to believe that there is still a possible danger, they should inspect those areas of the motor vehicle readily

accessible to an occupant that may contain a dangerous weapon.

4. The occupants of a stopped vehicle may be frisked if there is reasonable belief that they may be **armed and dangerous** and that the police officers or others nearby may be endangered. *Comm. v. Hawkes*, 362 Mass. 786, 291 N.E. 2d 411 (1973).
5. A protective search of the interior of a motor vehicle must be limited to what is minimally necessary to determine whether the suspect is armed and to remove any weapon discovered. *Comm. v. Silva*, 366 Mass. 402, 318 N.E. 2d 895 (1974);
6. A protective search for weapons in a motor vehicle must be confined to the area from which the occupant might gain possession of a weapon. *Comm. v. Almeida*, 373 Mass. 266, 366 N.E. 2d 756 (1977).
7. It should be noted that "random" stops of motor vehicles in the absence of reasonable suspicion of motor vehicle violations or criminal activity constitutes an unreasonable seizure in violation of the Fourth Amendment and any evidence obtained as a result of such impermissible stops are excludable in court. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979).
8. The highest court in Massachusetts has ruled that the odor of burnt marijuana, *absent other evidence*, is not enough for police to order a person to get out of a car or to search the car without a warrant. *Comm. V. Cruz* SJC-10738 (April 19, 2011).

### III. SEARCH WARRANTS

#### A. OBTAINING A SEARCH WARRANT

##### 1. **Legal Requirements (Per G.L. c. 276, section 1)**

A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for the following property or articles:

- a. Property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;
- b. Property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;
- c. Property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to

search and seizure under sections forty-two through fifty-six, inclusive, of chapter one hundred and thirty eight;

- d. The dead body of a human being; and
- e. The body of a living person for whom a current arrest warrant is outstanding.

**NOTE:** The word "property" as used in this section shall include books, papers, documents, records and any other tangible objects.

2. A search warrant may also authorize the seizure of evidence.

3. Requisites of Warrant (Per G.L. c. 276, section 2)

- a. A search warrant shall:
  - i. Designate and describe the building, house, place, vessel or vehicle to be searched;
  - ii. Particularly describe the property or articles to be searched for;
  - iii. Be substantially in the form prescribed in G.L. c. 276, section 2A; and
  - iv. Be directed to a sheriff or his/her deputy or to a constable or police officer, commanding him/her to search in the daytime, or if the warrant so directs, in the nighttime, the building, house, place, vessel or vehicle where the property or articles for which [s]he is required to search are believed to be concealed, and to bring such property or articles when found, and the persons in whose possession they are found, before a court having jurisdiction.
- 4. An officer requiring a search warrant should consult with his/her supervisor and obtain his/her advice and guidance before proceeding to court. If the court is not in session, the officer-in-charge shall communicate with an authorized court official to make the necessary arrangements to secure a search warrant.
  - a. If legal assistance is required for the preparation of the search warrant affidavit, the District Attorney's office should be contacted.
  - b. Every search warrant issued and any action taken on such warrant should be recorded in accordance with standard departmental procedures and in accordance with 515 CMR 5.07(1).
    - i. **Arrest and Search Warrant Procedures for SSPOs** ( 515 CMR 5.7(1))
      - a) Any special state police officer seeking a search or arrest warrant from a court of competent jurisdiction to be served at a location not within the statutory jurisdictional boundaries of the employing agency, shall notify



the Department's Troop Commander, or his or her designee, in the County where the warrant will be served, prior to service of the warrant.

- b) A special state police officer serving an arrest or search warrant, at a location not within the statutory jurisdictional boundaries of the employing agency, shall be accompanied by a sworn member of the Department, or if authorized by the Troop Commander, or his or her designee, a sworn member of a local police department of competent jurisdiction. In no case shall an arrest or search warrant be served by a special state police officer of any agency, at a location not within the agency's jurisdictional boundaries, without a sworn member of the Department or a sworn member of a local police department present at time and place of service, excepting instances of articulable exigent circumstances.
  - c) A qualified officer of each agency noted in M.G.L. c. 22C, §§ 56 through 68, shall report the following information monthly to the Department for each warrant issued. Type of warrant, warrant number, reason for issuance, authorizing Court, names of arrestees, locations of buildings, dwellings or vehicles searched and identity of the sworn member of the Department or local police department present at time of warrant service. Only those search and/or arrest warrants which agencies have applied for at courts of competent jurisdiction by submission of affidavits or sworn statements are required to be reported in this manner.
- c. The Family Educational Rights and Privacy Act (FERPA) generally requires that search warrants for student records not be executed until the student whose records are the target of the search is notified and has an opportunity to respond.
- i. FERPA authorizes the non-consensual disclosure of information that has been designated as "directory information" in accordance with regulatory requirements. "Directory information" includes information such as a student's name, address, telephone listing, etc., and could include a student's class schedule as information that "would not generally be considered harmful or an invasion of privacy if disclosed." However, if the institution has not complied with the notice requirements for directory information set forth in 34 CFR ' 99.37, then it may not disclose this information without the student's prior written consent.
  - ii. FERPA also allows the non-consensual disclosure of personally identifiable information from education records if the disclosure is to "comply with a judicial order or lawfully issued subpoena." 34 CFR section 99.31(a)(9)(i). However, the institution must first make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with:

- a) Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or
  - b) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence of the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.
- iii. FERPA does not prohibit the institution from locating a student for a law enforcement officer or anyone else if a staff member happens to know where the student is and, therefore, does not have to release or retrieve the information from an education record, such as the student's recorded class schedule, in order to do so. Otherwise, there is nothing in FERPA that would prevent law enforcement officials or other persons from serving subpoenas on students at school.
- a) When an outside law enforcement agency wants to serve any subpoenas, warrant, or other judicial order on campus, it is preferred that they check in with the University Police Department, who will assist as lawfully practical.
  - b) Officers assisting shall make a call for service and complete an Offense Report (OF) after the warrant or judicial order is served.
  - c) Officers shall brief the outside law enforcement agency of the requirements under FERPA.

**B. EXECUTING SEARCH WARRANTS**

1. After a search warrant is obtained, a police officer shall:
  - a. Check the warrant to ensure that it is signed and it clearly describes the place to be searched and the articles to be seized;
  - b. Execute the warrant immediately, or within a reasonable time, but in any case, **within seven days** from date of issuance;
  - c. Execute the warrant in the daytime unless it specifically provides for nighttime search. Nighttime for this purpose is from **10:00p.m. until 6:00 a.m.**;
  - d. A search begun in the daytime may continue into the nighttime if such activity is reasonable and not for the purpose of harassment.
2. **Service of Search Warrant**

- a. Upon arrival at the location to be searched, officers shall check to make certain that the premises are in fact those described in the warrant.
- b. Upon entering, show a **copy** of the warrant (not the original) to the person or persons lawfully on the premises unless the circumstances are such that this is not practical.
- c. The number of officers assigned to execute a search warrant should be dependent upon the particular circumstances. It is a good practice for at least one of the searching officers to be in police uniform, unless this would jeopardize the success of the search.
- d. A search warrant should not be executed in or on any premises in the absence of the owners, unless there is good reason to believe that the occupants do not intend to return for an extended period of time (or that they do not intend to return at all); or that the property or articles designated in the search warrant will be removed or destroyed if the premises are not searched immediately. In all such cases, the manner of entry shall be made with the least possible destruction of property and a copy of the warrant left in a conspicuous place on the premises.

### 3. **Knock and Announce Rule**

- a. When serving a warrant at a private dwelling, police officers must **knock, identify themselves as police officers, announce** that they have a warrant to search the premises and demand entrance, except in limited circumstances.
- b. Officers may knock on the door and gain entry by deception or by means of a ruse, if this will result in a safe, practical and successful execution of the search warrant with less destruction of property.
- c. Officers shall always seek entry as peacefully as possible, but forcible entry is authorized if, after waiting a reasonable time, it becomes apparent that:
  - iv. The officers will not be admitted voluntarily;
  - v. The officers or any other persons are in danger of physical harm;
  - vi. The occupants are escaping; or
  - vii. Evidence is being, or is in danger of being destroyed.

### 4. **No Knock Entry**

- a. An immediate, forcible entry (or one gained by a ruse or trick) is authorized -- and the usual knock and announce procedure may be disregarded if the searching officers are in possession of reliable information that the person inside

the dwelling to be entered has knowledge of the officers' purpose and presence or where to follow the knock and announce procedure:

- i. Would be likely to endanger their safety or the safety of others;
  - ii. Would be likely to enable the wanted person(s) to escape; or
  - iii. Would be likely to result in the evidence being destroyed during the period between their announcement of purpose and subsequent forcible entry.
- b. Officers shall apply for a "No Knock and Announce" Warrant, if they have reason to believe the knock and announce rule should not be observed when the warrant will be executed.

**NOTE:** If the circumstances which would justify disregarding the knock and announce rule are no longer present when the warrant is executed, the knock and announce rule must be followed.

- c. Upon gaining entry, the searching officers should immediately identify themselves as police officers and should state that it is their purpose to serve a valid search warrant issued by the court.

## **5. Search Responsibilities**

The police officer responsible for the execution of a search warrant:

- a. Shall not exceed the authority granted by the warrant;
- b. Shall make a diligent effort to find all the property listed in the warrant;
- c. Shall not search beyond the area described in the warrant unless consent is obtained or exigent circumstances exist. (If the warrant authorizes a search of the first floor of a building, a search of the second floor is unlawful.);
- d. Shall search only those areas capable of containing the property listed in the warrant (if the warrant authorizes a search for a large TV set, do not search in a small bureau drawer);
- e. Shall carry out the search with the least possible damage to the premises;
- f. Shall remain on the premises only for the time reasonably necessary to thoroughly search for and seize the property listed in the warrant;
- g. Shall terminate the search when the listed property has been found or when it reasonably appears that such property is not on the premises;
- h. Shall make adequate provisions for the security of the searched premises before leaving unless the person in control of such premises refuses or rejects such police protection;

- i. Shall immediately and directly transport to the police station all seized property and ensure that it is properly marked, recorded and safeguarded in accordance with the departmental order on **Collection and Preservation of Evidence and Evidence and Property Control; (Chapter 14)**
- j. Shall complete the Return section of the warrant and deliver it to the court as soon as reasonably possible after the completion of the search, **but no later than seven days** from the date it was issued;
- k. Shall note on the warrant the action taken with an inventory of all property seized by authority of the warrant. (If evidence not described in the warrant is seized, attach a separate sheet to the return listing all such property and state that it was seized during the execution of that warrant); and
- l. Shall make a full departmental report of all action taken on a search warrant, to be submitted to the officer-in-charge before returning the warrant to the court.

**6. Plain View (IACLEA 2.2.5 c)**

When police officers lawfully enter a dwelling with a valid search warrant, they may seize objects reasonably believed by them to be connected with criminal activity if in plain view even though not mentioned in the search warrant. See Section IV (I) below for the legal requirements to seize items in plain view.

**7. Search of Persons on the Premises**

- a. In order to ensure an orderly and safe search, all persons present on the premises when the police arrive may be detained and prevented from moving about. However, at least one of the occupants should be permitted to witness all aspects of the search, if this is practical under the particular circumstances
- b. Persons not named in or referred to in the search warrant may not be searched unless either:
  - i. Probable cause exists in regard to the individual to be searched (however mere presence at a location where criminal activity has taken place is not enough to constitute probable cause); or
  - ii. The officer has reasonable suspicion to believe that such person is armed and then [s]he may be frisked for weapons.

**8. Search of Area Outside Scope of Warrant**

If during the execution of a search warrant it appears that there is probable cause to believe that seize-able property is located in an area of the premises outside of the scope of the present warrant, a new warrant shall be obtained immediately,

unless consent is granted or exigent circumstances are present. While the new warrant is being sought, any occupants of the premises may have their activities restricted.

**9. Photographs of Search Location**

- a. Before and after executing a search warrant, officers should take photographs or video of any rooms, places, or vehicles to be searched.
- b. One overall photograph of each room before and after the search should be sufficient.
- c. Only department-issued cameras should be utilized in taking the photographs or videos.

**IV. SEARCHES WITHOUT A WARRANT**

**A. EXCEPTIONS TO THE WARRANT REQUIREMENT**

1. Officers may make a warrantless search only when one of the following major exceptions to the search warrant applies:
  - a. Warrantless stopping, questioning and frisking (investigative detention);
  - b. Search incident to arrest (including protective sweep);
  - c. Exigent or emergency circumstances search (including "hot pursuit");
  - d. Consent searches;
  - e. Motor vehicle searches;
  - f. Pre-incarceration and inventory searches;
  - g. Protective custody searches; and
  - h. Administrative searches.
2. The following are not considered invasions of any privacy interest and, therefore, do not come under the search warrant requirement of the Fourth Amendment generally:
  - a. The "plain view" doctrine;
  - b. The "open fields" doctrine; and

- c. Abandoned property.
- 3. A police officer should never rely on one of these exceptions whenever it is possible, under the particular circumstances, to obtain a search warrant in advance.
- 4. In every case where a search is conducted without a warrant, the police officers involved shall make a written report of the circumstances to include all important facts relative to the incident and an inventory of any evidence seized, in accordance with departmental procedures.

B. WARRANTLESS STOPPING, QUESTIONING, AND FRISKING (INVESTIGATIVE DETENTION)

Both the Fourth Amendment and G.L. c. 41, section 98 authorize police officers to briefly detain suspicious persons, to question such persons and, if the officer reasonably believes the person may be armed and dangerous, to pat frisk that person for weapons. These procedures are sometimes referred to as a "threshold inquiry." This type of warrantless search and seizure is covered in depth in the departmental order Section II above.

C. SEARCH INCIDENT TO LAWFUL ARREST

- 1. **Criteria:** A warrantless search of an arrested person may be conducted under the following conditions:
  - a. The arrest is lawful and the search is reasonably related to the circumstances of the arrest;
  - b. The search is conducted only for the purposes of:
    - i. Seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest was made;
    - ii. In order to prevent its destruction or concealment; and/or
    - iii. To remove any weapons that the arrested person might use to resist arrest or to effect his/her escape;
  - c. The search is limited in scope to the person of the arrestee and the immediate surrounding area. Immediate surrounding area means that area from which the arrestee can either obtain a weapon or destroy evidence; and
  - d. The search is substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest; however, if safety requires, the officer may delay the search and conduct it at a safe location.

2. **Use of Force:** The officer conducting the search may use the degree of force reasonably necessary to:
    - a. Protect himself/herself and others present;
    - b. Prevent escape; and
    - c. Prevent the destruction of evidence.
  3. **Search of Possessions & Clothing:** A search may also be made of items actually in possession of the arrested person and clothing worn at the time of arrest if such search is related to the offense for which the arrest was made.
  4. **Protective Sweep**
    - a. In addition to a careful search of the area within the arrested person's immediate control, an examination of the entire premises may also be justified at the time of or immediately following a valid arrest if there is a reasonable belief that it was imperative for the officers' safety because of the presence of others in the house or apartment.
    - b. This search is limited to areas where an accomplice or other person who might come to the aid of the arrestee might reasonably be hiding.
    - c. Any item or object recognizable as criminal evidence discovered in plain view during a justifiable "protective sweep" may be properly seized.
  5. **An arrest shall not be used as a pretext in order to make a search.**
- D. SEARCHES IN EMERGENCY OR EXIGENT CIRCUMSTANCES (IACLEA 2.2.5 d)
1. **Criminal Acts:** A police officer is authorized to conduct a search without a warrant when faced with an emergency situation where delay would endanger his/her or the public's safety or might result in the escape of the offender or the destruction of evidence.
    - a. The authority of the police to make warrantless entries in emergency situations, whether criminal or not criminal is based upon their fundamental responsibility to preserve the peace and to protect the public safety.
    - b. The doctrine that permits warrantless entries and searches because of emergency or exigent circumstances requires justification by the police that it was impractical for them to obtain a search warrant in advance and that the warrantless search was truly necessitated by the emergency circumstances which could not have been anticipated.



- c. While conducting a lawful search justified by emergency or exigent circumstances, a police officer may seize any incriminating evidence inadvertently discovered in plain view.
- 2. **Public Safety:** Many emergencies justifying a warrantless entry and search do not necessarily involve criminal acts; for example, when a police officer hears a call for assistance, when [s]he observes smoke or flame, or when [s]he learns of an actual or potential natural or man-made calamity or disaster, [s]he has the duty and obligation to respond immediately.
  - a. *Burning Buildings:* A warrantless entry into a burning building is permissible in an emergency and officials may remain for a reasonable time to investigate the cause of the fire and any evidence of arson discovered is admissible at trial. Any re-entry after the fire has been extinguished and officials have left the scene should be made pursuant to a search warrant, unless the re-entry is justified by a recognized exception to the warrant requirement such as consent, emergency or abandonment.
  - b. *Explosives / Other Dangerous Weapons:* When an officer has reasonable cause to believe premises contain things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property may, without a search warrant, enter and search such premises to the extent reasonably necessary for the prevention of such death, bodily harm or destruction.
- 3. **Fresh and Continued Pursuit:** The U.S. Supreme Court case of U.S. v. Santana set out factors supporting justification of exigent circumstances under this doctrine including:
  - a. There is fresh and continued pursuit of the suspect;
  - b. A felony or jailable misdemeanor was involved;
  - c. There was a strong possibility that the suspect was armed;
  - d. The suspect was known or reasonably believed to be in the building;
  - e. There was a likelihood that the suspect might escape unless immediately apprehended; and
  - f. There was sufficient justification for failure to obtain a search warrant.
- 4. Where the above or other emergency factors are not present, police may stake out the building or premises until a warrant is obtained.

E. SEARCH BY LAWFUL CONSENT (IACLEA2.2.5 a)

- 1. Because such issues as who may give lawful consent to a police entry and search or whether the consent was given voluntarily will be carefully scrutinized by the court, police

should not unduly rely on such consent. On the other hand, when properly elicited, consent to a search may expedite a criminal investigation. Police may engage in a warrantless search after obtaining consent even in circumstances where they do not have probable cause.

2. For there to be a valid consent to search, the following **three elements** must be satisfied:

a. **The consenting party must have sufficient lawful authority over the premises or property to be able to give consent to a search of that premises or property; and**

- i. Consent may be obtained from any person who has the right of ownership, possession or control of the premises or property. If there is serious doubt a search warrant should be obtained.
- ii. **Jointly Owned Property:** Generally, if property, such as a house, apartment or business, is owned jointly by two or more persons, any one of them may consent to a search of the common areas of the premises.
- iii. **Spouse:** A spouse may give consent to a police search of a jointly owned home, even without the knowledge or permission of the other spouse.
- iv. **Parent:** A parent may give consent to search premises under the parent's control although it involves searching a child's room and the parent has general access to the child's room. However, where the child, whether or not an adult, has exclusive access, often locked, to certain areas or property, the parent's consent may not be enough.
- v. **Children:** Generally, a child may not give consent to a police search of premises or property owned by the child's parents.
- vi. **Roommate:** A roommate may be able to give consent to a police search of common areas of the apartment but the roommate probably cannot give consent to a search of areas exclusively reserved for the suspect, such as his/her bedroom, luggage or closet.
- vii. **Landlord:** Generally, a landlord cannot give consent to the search of a tenant's apartment. However, a landlord may give consent to searches of common areas such as hallways and stairwells.
- viii. **Hotels:** A hotel or motel owner or manager cannot give consent to a search of a guest's lodgings.

**NOTE:** *Comm v Neilson* 423 Mass.75 (1996) [A case that originated by the action of a Fitchburg State University Officer], States that a "dormitory room is

a student's home away from home"; and that a "dormitory room is analogous to an apartment or a hotel room". That Campus administrators **cannot** give consent to police to search a room as part of their "health and safety" checks. (IACLEA 2.2.5 f)

Offices and Administrative Offices should also be viewed, as a space where the staff and faculty members have an expectation of privacy and would require consent, a warrant, or exigency.

**b. Consent must be freely and voluntarily given; and**

- i. Officers shall notify the person from whom consent is sought of their right to refuse to give consent.
- ii. A consent to search may be given orally but preferably, it should be in writing. See Department Consent to Search Form.
- iii. Consent cannot be presumed from silence.
- iv. Consent must be free of any coercion, intimidation, or threat, so officers must avoid even the appearance of intimidation or duress.
- v. Officers shall not gain consent through the use of misrepresentation or fraud.
- vi. Consent shall be requested prior to search and after the police officers have identified themselves.

**c. The officers must be lawfully present at the time consent is requested.**

3. A consent search shall be limited to the area specified.
4. Consent may be revoked at any time and the search shall cease upon revocation, unless additional factors or information have come to light, which justify a continued warrantless, non-consensual search. For example, evidence found prior to revocation of consent may be retained and used as a basis for an immediate arrest or as probable cause for a further search (if exigent circumstances exist) or for obtaining a search warrant.

**F. MOTOR VEHICLE SEARCHES (IACLEA 2.2.5e)**

1. Officers are prohibited from stopping motor vehicles without reasonable suspicion of criminal activity or motor vehicle violations.
2. If it is at all possible and practicable, a search warrant should always be obtained in the prescribed manner in advance of a motor vehicle search, as this procedure is generally preferred by the courts.

3. A warrantless search of a motor vehicle may be conducted under the following circumstances:

- a. **Warrantless Stopping, Questioning, and Frisking of Motor Vehicle Operator or Occupants:** A "stop and frisk" type of protective search when the officer reasonably believes that his/her safety or the safety of others is in danger in order to determine whether a suspect is armed, with the search confined to the area of the motor vehicle from which a suspect might gain possession of a weapon.
- b. **Search of Motor Vehicle Incident to Arrest of Operator or Occupant:** A search incident to a lawful arrest limited to the area from which the person could obtain a weapon or reach destructible evidence.
- c. **Exigent Circumstances Search:** A warrantless search of a vehicle may be made when the following elements are satisfied:
  - i. The vehicle must be lawfully stopped on a public way or is found parked in a public place,
  - ii. There is probable cause to believe that the vehicle contains contraband or other evidence at the initiation of the search, and
  - iii. Exigent circumstances are present, movable vehicle exception.

**NOTE:** Where exigent circumstances exist, the courts do not require the police to post a guard and seek a warrant prior to searching the vehicle.
- d. **Consent:** A search may be conducted with the voluntary consent of the person in lawful control of the vehicle.
- e. **Roadblocks:** Roadblocks stops (for example, to detect drivers under the influence of alcohol) are permissible if the selection of motor vehicles to be stopped is not arbitrary, if the safety of the public is assured by taking necessary precautions, if the motorists' inconvenience is minimized and the roadblock procedure is conducted pursuant to a plan devised by law enforcement supervisory personnel. In addition, if police have a description of a suspect vehicle, they may stop all vehicles fitting that description.
- f. **Plain View Observations:** If a police officer has lawfully stopped a motor vehicle and is questioning the operator, any incriminating item in or on the vehicle observed in plain view, including anything observed with the use of a flashlight, may furnish probable cause to search the vehicle and seize the item observed without a warrant.
- g. **Motor Vehicle Inventory:** If the vehicle is impounded, the vehicle shall be searched and all personal property found in the vehicle shall be inventoried and kept in safe custody in accordance with the departmental order on Motor Vehicle Inventories.

- h. **Administrative Searches:** Motor vehicles are subject to various types of administrative searches which do not require search warrants. For example, the annual motor vehicle inspection procedure is, in effect, a warrantless search.
- 4. All police officers shall be especially watchful and alert when stopping and searching a motor vehicle or its occupants as many officers have been seriously injured, some fatally, in taking this police action which should never be considered "routine."
- 5. In stopping and searching motor vehicles, officers shall take all reasonable precautions for their personal safety, such as directing the occupants to alight from the vehicle and frisking them for weapons when the officer has a reasonable belief that they may be armed and dangerous.

#### G. BOOKING INVENTORY SEARCHES

Prior to incarcerating a detainee in a police lockup, police shall conduct an inventory search of his/her person and inspection of his/her belongings in accordance with the departmental orders related to **Detainee Processing and Protective Custody, Chapter 8**. This shall be done to uncover and safeguard any weapons or implements the detainee could use to injure himself or herself or others, to safeguard valuables and to protect the police against false claims of theft or loss of the detainee's belongings.

#### H. ADMINISTRATIVE SEARCHES

The police may, under certain circumstances, engage in warrantless searches or inspections as part of their administrative functions. For example, it is proper to search a person who is about to visit a detainee.

#### I. PLAIN VIEW DOCTRINE (IACLEA2.2.5 c)

- 1. Officers may seize contraband or evidence without a warrant under the "plain view" exception to the warrant requirement if the following conditions are met:
  - a. There must be a prior lawful entry;
  - b. Such entry must bring the officer within "plain view" of the item seized; and
  - c. The item seized must be "immediately apparent" as contraband or evidence of crime.
- 2. Lawful entry includes:
  - a. Entry with a valid warrant;

- b. Entry to make a lawful warrantless arrest;
  - c. Entry as a result of lawful consent; and
  - d. Entry in an emergency to render necessary aid or assistance.
3. Items are immediately apparent as contraband if the officer has probable cause to believe they are:
- a. Instrumentalities or means by which any crime was committed, (such as weapons, masks, tools, etc.);
  - b. Contraband (articles which may not be legally possessed, such as counterfeit money or controlled substances, etc.);
  - c. Fruits of any crime (such as stolen property);
  - d. Other evidence of any crime (such as clothing or other items fitting the description of the criminal offender); or
  - e. Property which bears a reasonable relationship to the purpose of the search (such as documents establishing who owns the premises searched if ownership is an element of the crime).

J. ABANDONED PROPERTY

Abandoned or discarded property may be searched by the police and seized. Examples of abandoned property include:

- 1. Trash in collection area accessible to the public.
- 2. The contents of a hotel room wastebasket once an individual has vacated the room.
- 3. An apartment or hotel room may be searched without a warrant provided the guest or tenant has left with an intention not to return and the landlord or owner has given permission to search.
- 4. Items thrown on the ground by a suspect.

K. OPEN FIELDS

- 1. An open field is that portion of privately owned land surrounding a person's dwelling that is too remote or removed from the physical dwelling to be considered part of the "house"

such that it is protected by the Fourth Amendment. The “house” that is protected by the Fourth Amendment includes the grounds and buildings immediately surrounding the dwelling.

2. Open fields may be searched without a warrant even though the terrain in question is not easily accessible to the public and even though the owner may have posted “No Trespassing” signs and may even have a locked gate.

L. SEARCHES BY PERSONS OTHER THAN LAW ENFORCEMENT OFFICERS (IACLEA 2.2.5f)

1. **Private Individual:** Evidence obtained by a private individual, as a result of searching someone else’s property, who is not acting as an employee or agent of the government, is admissible.
2. **Police Officer Acting as Security Guard:** Evidence discovered as a result of the warrantless search conducted by a police officer acting as a private security guard is not admissible if [s]he acts beyond the scope of the private employer's business.
3. **University Employee (Non Police Department):** Evidence discovered by a University employee in the course of their duties, and turned over to the university police department will be admissible, as long as they were not directed by a university police officer to search and seize such item.

Approval:

\_\_\_\_\_  
Chief of Police

\_\_\_\_\_  
Date