

## Search and Seizure

### 306.1 PURPOSE AND SCOPE

Both the federal and state Constitutions provide every individual with the right to be free from unreasonable searches and seizures. This order provides general guidelines for Austin Police Department personnel to consider when dealing with search and seizure issues.

### 306.2 SEARCH AND SEIZURE

This order outlines the following types of searches and seizures:

- (a) Exigent circumstances
- (b) Consent
- (c) Search incident to a lawful arrest
- (d) Vehicle inventory
- (e) Probable cause
- (f) Protective frisk based on reasonable suspicion
- (g) Plain view
- (h) Strip/Body cavity search
- (i) Residences, open fields, and abandoned property

### 306.3 SEARCH AND SEIZURE

**Transgender-** An umbrella term that describes individuals whose gender identity is different from their assigned sex at birth.

**Female-to-Male (FTM)-** A person who transitions from "female-to-male", meaning a person who was assigned female at birth, but identifies and lives as a male. A "female-to-male" individual should be addressed using masculine pronouns (e.g.- he, him, his), regardless of surgical status.

**Male-to-Female (MTF)-** A person who transitions from "male-to-female", meaning a person who was assigned male at birth, but identifies and lives as a female. A "male-to-female" individual should be addressed using feminine pronouns (e.g.- she, her, hers), regardless of surgical status.

**Intersex-** Intersex individuals are born with chromosomes, external genitalia, and/or an internal reproductive system that varies from what is considered "standard" for either males or females.

**Gender-** The state of being male or female.

**Gender Non-Conforming (Individuals)-** Display gender expression or behavior that does not conform to dominant gender norms of male or female. Gender non-conforming individuals may not identify as male, female, or transgender. Gender non-conforming is also known as gender variant, gender atypical, or androgynous.

**TIGN-** Transgender, Intersex, and/or Gender Non-Conforming Individual.

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**Gender Identity-** An individual's internal sense of being male or female, or something not defined by traditional definitions of male or female.

**Gender Expression-** An individual's external and social characteristics and behaviors (such as appearance, dress, mannerisms, speech, and social interactions) that may be perceived as masculine or feminine.

### 306.3.1 SEARCH PROTOCOL

Nothing in this order supersedes officer safety tactics.

- (a) Officers will conduct person searches with dignity and courtesy.
- (b) Officers will conduct property searches in a manner that returns the condition of the property to its pre-search status as nearly as reasonably practicable.
- (c) Officers should attempt to acquire keys to locked property when a search is anticipated and the time and effort required to gain the keys makes it a practicable option.
- (d) It is the responsibility of each individual officer to search a prisoner for weapons or contraband anytime he gains custody of that prisoner, regardless of whether the prisoner was previously searched by another officer.
- (e) When safety permits:
  1. Officers should explain to the person being searched the reason for the search and how the search will be conducted.
  2. When practical, an officer of the same gender should be called to the scene when officers believe the subject is concealing items in a sensitive area, such as, evidence or narcotics in the groin, buttocks, or breast areas. This does not apply to items that pose an immediate threat to officer safety.
  3. If a subject requests a search by an officer of the same gender, an attempt should be made to have a same gender officer conduct the search.
  4. If a same gender officer is unavailable, the search should be conducted in front of a Mobile Audio Video (MAV) recording system, if available, or a second officer should be present.
  5. If the gender of the individual needing to be searched comes into question, officers should respectfully inquire as to whether the individual identifies as transgender. When an individual self-identifies as transgender, officers will not question this identity absent articulable, compelling reasons, nor will an officer inquire about intimate details of an individual's anatomy to determine gender. Officers needing to search a person who has disclosed that, or the officer recognizes by prior knowledge, the individual is Transgender, Intersex, and/or Gender Non-Binary/Gender Non-Conforming (TIGN), should, when practicable, conduct the search based on the gender with which the individual identifies. (For example, a Female-to-Male individual should, when practicable, be searched by a male officer, or by a female officer who conducts an opposite gender search. A Male-to-Female individual should, when practicable, be searched by a female officer, or by a male officer who conducts an opposite gender search).

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6. Officers will use the backside of their hands and fingers to frisk/search sensitive areas of the opposite gender to include the breast, crotch, and buttocks.

### 306.4 EXIGENT CIRCUMSTANCES

Exigent circumstances permitting entry into premises without a warrant or valid consent generally include any of the following:

- (a) The reasonable belief that a person within is in need of immediate aid.
- (b) The need to protect or preserve life or avoid injury.
- (c) Imminent escape of a suspect.
- (d) The reasonable belief that contraband is about to be removed or destroyed.
- (e) Public safety.

An exigency created by the officer's own conduct as an excuse for a warrantless entry is not permitted.

### 306.5 CONSENT

- (a) Entry into a location or vehicle for the purpose of conducting a search for any item reasonably believed relevant to any investigation is permitted once valid consent has been obtained. Officers should be aware that overuse of the consent search can negatively impact the Department's relationship with our community and only request a consent search when they have an articulable reason why they believe the search is necessary and likely to produce evidence related to an investigation. A search by consent is only allowed if the following criteria are met:
  1. The officer has explained the reason for the consent search request to their supervisor (or their Corporal/Detective if their supervisor is unavailable) and received their approval prior to requesting consent. If the officer is:
    - (a) Assigned to a specialized unit that has received specific training on consent searches; or
    - (b) The officer has completed the department's Interdiction for the Protection of Children (IPC) training and is actively conducting an IPC investigation; then the officer would not need supervisor approval prior to requesting consent.
  2. Consent is voluntary (e.g., clear, specific and unequivocal).
  3. Consent is obtained from a person who has the authority to give the consent (e.g., care, custody and control of the location or vehicle).
  4. The search does not exceed the scope of the consent given.
- (b) Consent must be obtained as the product of a free will. It cannot be obtained through submission to authority, either expressed or implied.
- (c) Although officers are not required to conduct searches within the plain view of suspects, those who have the authority to grant or revoke consent should be in a

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position to communicate a withdrawal of consent should they so desire. If consent was obtained by telephone from a person who has authority to grant the consent, the person should be provided with contact information to revoke the consent.

- (d) Absent other legal justification, any related search should be discontinued at any point that consent is withdrawn, even if the withdrawal is made by a different party who is at the scene and who also has authority over the area being searched.

### 306.5.1 RECORDING CONSENT

- (a) Consent requests and authorization for all vehicles, locations where there is a reasonable expectation of privacy, and subject stops shall be recorded by the Body Worn Camera (BWC). When the BWC system is unavailable, the DMAV system shall be used.
  - 1. Prior to the search, the officer shall read the Consent to Search Card to the subject.
  - 2. After the subject consents to the search, the officer can proceed with the search. If at any time after the search has begun the person revokes their consent, the officer will immediately stop and search no further unless sufficient probable cause has already been developed to warrant continuing with the search or a warrant has been obtained.
- (b) Employees will document in their report, supplement, or street-check anytime a consent search is used and that the consent was successfully recorded. If the recording is not successful the reason will be documented in the report, supplement, or street-check as well as in CAD history.
- (c) Employees will notify their immediate supervisor of the consent search as soon as practicable, but prior to the end of the tour of duty.

### 306.5.2 CHAIN-OF-COMMAND REVIEW OF CONSENT SEARCHES

The immediate supervisor shall send an email notification with the incident report number to the involved employee's chain-of-command up to the lieutenant. Each level in the chain, up to the lieutenant, will review the search and complete a case note to document their review. In the event the chain-of-command identifies concerns with the search, the reviewing lieutenant will notify the commander.

## 306.6 SEARCH INCIDENT TO ARREST

The general authority to search incident to a lawful custodial arrest is not qualified or limited by the type of arrest. Objects of the search are weapons, evidence, and/or means of escape.

- (a) Persons:
  - 1. When officers make a lawful arrest, they are permitted to conduct a contemporaneous search of the arrestee. Such a search safeguards the arresting officer and others nearby from harm while ensuring that the arrestee will not discard or destroy evidence.

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2. It is entirely reasonable for arresting officers to search the area where the defendant might reach in order to grab a weapon or evidence.
- (b) Vehicles:
1. A search of a vehicle interior may be made when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
  2. A search of a vehicle interior may be made when it is reasonable to believe that the vehicle contains evidence of the offense of arrest.
  3. If officers do not have a valid reason to search a vehicle after making an arrest (e.g. probable cause, inventory), a search warrant will need to be obtained.
  4. Officers may examine the contents of any opened or closed container within the passenger compartment, provided the container is within reaching distance of the arrestee and the arrestee is unsecured at the time of the search.
  5. Locked containers found within the vehicle passenger compartment may be seized and a search warrant obtained in a timely manner.

### **306.7 VEHICLE INVENTORY**

An inventory is a legitimate law enforcement activity that is not a search and that sometimes, incidentally, results in the discovery of evidence. Vehicle inventories will be conducted in accordance with General Order 350 (Vehicle Towing and Impound).

### **306.8 PROBABLE CAUSE**

- (a) Person:
1. When officers have probable cause to believe that evidence or contraband is located on a person they are permitted to conduct a search of the person.
- (b) Vehicles:
1. Officers may conduct a warrantless search of a readily movable vehicle (e.g., automobile, mobile home, boat or airplane) if there is probable cause to believe that evidence or contraband is inside and the search cannot safely be delayed in order to obtain a warrant.
    - (a) Officers must have probable cause that contraband is in the vehicle.
    - (b) A search of an automobile based on probable cause lawfully extends to all parts of the vehicle in which evidence or contraband could be concealed, including closed compartments, containers, and trunks.
    - (c) The scope of a warrantless search of a lawfully stopped vehicle based on probable cause is no narrower and no broader than the scope of a search under the authority of a warrant.

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### **306.9 FRISK (PAT-DOWN) FOR WEAPONS**

A frisk is a mere pat-down of the outer clothing, area, vehicle or container to which a detained person may have immediate access. The purpose of a limited weapons frisk after an investigatory stop is not to discover crime, but to allow the officer to pursue the investigation without fear of violence. An officer does not need to be absolutely certain that an individual is armed; the issue is whether a reasonably prudent person would justifiably believe that he or others were in danger.

(a) Persons:

1. A frisk is a limited patting of the outer surfaces of a person's clothing in an attempt to find weapons. A frisk can only be used by officers when they justifiably stop someone and have a reasonable fear for their safety, the safety of the public, or when a cautious and prudent officer under the same or similar circumstances would conduct a pat-down.
2. Normally, officers cannot put their hands under the suspect's outer clothing until they feel something they reasonably believe is a weapon. If the outer clothing is too bulky to allow officers to decide if a weapon is concealed underneath, outer clothing such as overcoats and jackets may be opened to allow a pat down of the inner clothing, such as shirts and trousers.
3. Packages, purses, briefcases and other containers may be frisked during the stop.
4. The scope of a protective frisk is limited to persons and places within arm's reach of a concealed weapon or toward which the subject might lunge.

(b) Vehicles:

1. A protective frisk may include the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, if the officer possesses reasonable belief that the suspect is dangerous and may gain control of a weapon at any time during the encounter.

### **306.10 PLAIN VIEW**

Because an individual does not have an expectation of privacy as to items that are in plain view, no search has taken place in a constitutional sense when an object is viewed from a location where the officer has a right to be.

(a) An item in plain view may generally be seized when all of the following conditions exist:

1. The object must be in plain view; and
2. Officers conducting the seizure must lawfully arrive at the position from which the object is plainly seen; and
3. Officers must have a lawful right of access to the object itself, apart from lawfully viewing the object; and
4. The object's incriminating character must be so immediately and sufficiently apparent that officers have probable cause to believe the object is contraband or evidence of a crime.

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### **306.11 STRIP/BODY CAVITY SEARCHES**

Strip and body cavity searches are sometimes necessary for the safety of persons and/or to secure evidence of criminal activity. However, such searches are highly intrusive and must be conducted only when the justification can be clearly articulated, and then done only with proper regard for human dignity and privacy.

- (a) All cases of strip or body cavity searches will be documented in an incident report or supplement and include (at a minimum):
  1. Facts known to the officer that justify a strip/body cavity search; and
  2. Name and employee number of supervisor authorizing the search; and
  3. Place that the search was conducted (e.g., bathroom of suspect's residence, jail, doctor's office); and
  4. Name and employee number of all persons involved in the search; and
  5. The areas searched and results of the search.

#### **306.11.1 STRIP SEARCHES**

Strip searches:

- (a) Will be conducted only with the approval of a supervisor.
- (b) Will be conducted in privacy, including only the number of officers necessary to maintain a safe situation.
- (c) Will be conducted **ONLY** by members of the same gender as the person to be searched. Should an officer of the same gender not be immediately available, the prisoner will either be secured until one can arrive, or the prisoner will be secured and transported to the jail where a jailer of the same gender will conduct the search.
- (d) If the individual to be strip searched is Transgender, Intersex, or Gender Non-Conforming, officers should ask that individual whether they prefer a male or female officer to conduct the strip search.

#### **306.11.2 BODY CAVITY SEARCHES**

Other than for checking the mouth area, these searches will not be conducted by officers of this department. Should the need arise for this type of search, the prisoner will be transported to the jail where proper hygienic/medical resources are available. Only jail personnel will conduct the cavity search.

### **306.12 RESIDENCES, OPEN FIELDS, AND ABANDONED PROPERTY**

#### **306.12.1 RESIDENCES**

Every person has a reasonable expectation of privacy inside his home and a search of a residence will not be conducted without a valid search warrant, exigent circumstances, or valid consent. Individuals do not, however, generally have a reasonable expectation of privacy in areas around

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the home where the general public (e.g., mail carriers and solicitors) would reasonably be permitted to go.

Once lawfully inside a residence, officers may conduct a protective frisk of a subject if the officer has a reasonable belief that the person is armed and dangerous. In addition, the Fourth Amendment permits a limited protective sweep of a residence when the searching officer possesses a reasonable belief that the area to be swept harbors an individual posing a danger to those on scene. The sweep should not last longer than is necessary to dispel the reasonable suspicion of danger.

### 306.12.2 OPEN FIELDS

Open fields do not provide the privacy expectation that is unique to the Fourth Amendment's safeguards of a "person's, houses, papers and effects." Officers must be mindful of the requisites of curtilage. The following are the factors the officers need to assess:

- (a) The proximity of the area to the home.
- (b) Whether the area is included within an enclosure surrounding the home.
- (c) The nature of the uses to which the area is put.
- (d) Steps taken by the resident to protect the area from observation by people passing by.

### 306.12.3 ABANDONED PROPERTY

Abandonment occurs when a person discards or denies ownership of property in a public right of way or public spaces. To ensure admissibility of evidence, the following factors should be considered:

- (a) When making a trash run officers need to consider curtilage factors that fall within open fields.
- (b) Officers need to have an affirmative link to create probable cause between the discarded property and the target of the investigation.
- (c) The abandonment must be voluntary and not a result of police misconduct.



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