



AGENDA REPORT

TO: Mayor Libby Schaaf, City Council President Rebecca Kaplan and the Honorable City Council
FROM: Regina Jackson, Chair Oakland Police Commission

SUBJECT: OPD Supervised Release Search Policy (DGO R-02)
DATE: June 25, 2019

RECOMMENDATION

The Oakland Police Commission Recommends That The City Council Adopt A Resolution Adopting Oakland Police Department General Order R-02, Searches Of Individuals On Supervised Release, As Recommended By The Oakland Police Commission.

EXECUTIVE SUMMARY

On August 10, 2018, the Oakland Police Commission (Commission) received notice from the Oakland Police Department (OPD) that the Department was ready to finalize revisions to the OPD Supervised Release Search Policy (DGO R-02). The Commission requested that the OPD present this policy revision to the full Commission for review pursuant to the Commission's Charter authority to "Propose changes, including modifications to the Department's proposed changes, to any policy, procedure, custom, or General Order of the Department... which contains elements expressly listed in federal court orders or federal court settlements which pertain to the Department and are in effect at the time this Charter Section 604 takes effect" (Oakland City Charter §604(b)(4)).

The OPD presented their proposed changes to DGO R-02 at the August 23, 2018 meeting of the Police Commission, at which time, the Commission proposed several changes to the OPD's revision. Both the OPD and the Commission's proposed changes were presented to the Oakland City Council at its December 24 meeting, at which time Council rejected both proposals and asked the OPD and the Commission to collaborate to resolve the differences between the two proposals.

After extensive work between an Ad Hoc Committee on DGO R-02 created by the Commission to work specifically on this policy revision and the OPD policy team, the differences between the OPD and Commission proposals have largely been addressed. However, the Commission strongly believes that the final version of the policy as presented by the OPD does not go far enough in stating the adverse community impact of unjustified inquiries about an individual's Supervised Release status; and requires more specificity with respect to the definition of Violent Offenses for which such a search is warranted and clear limitations on time between a check of

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an individual's Supervised Release Status, and any stop or search conducted by the OPD. The Commission therefore recommends that the City Council accept the Commission's version of DGO R-02 and reject the version presented by the OPD.

BACKGROUND AND LEGISLATIVE HISTORY

DGO R-02 Legislative History

On August 10, 2018, then-Chair of the Police Commission, Mr. Thomas Smith, received notice from the OPD that they had prepared a revision of General Order R-02 – Searches of Persons on Supervised Release, and on August 23, 2018 the draft was presented to the full Commission at a regular meeting. Thus began a process which culminated at the December 14, 2018 City Council meeting, where the Council rejected drafts of R-02 from both the Commission and the OPD. The Council directed OPD and the Commission to collaborate further and return to the Council after additional work on resolving the differences between the two drafts of the policy.

Developments Between January 2019 and Present Day

On January 24, 2019, OPD presented a new draft of R-02 to the Commission at a regular meeting. The Commission formed an ad-hoc committee to work with OPD on the policy, consisting of Commissioner Prather, Commissioner (now Chair) Jackson, and then-Chair Smith.

On February 11, 2019, OPD and the ad hoc committee met and discussed the policy. Collaboration produced a revised OPD draft, which was sent to the Commission on February 21, 2019. The Commission discussed DGO R-02 at several regular meetings, and on April 11, 2019 the Commission voted to adopt a version of the policy, different in several respects from the version produced by OPD, as the official Commission version. This vote triggered the required submission of changes to OPD's policies to the City Council under Charter section 604(b)(4). OPD was afforded four weeks, until May 10, 2019, to respond.

During this time, OPD and the Commission's ad-hoc committee worked diligently on resolving differences. Another meeting was held with members of the ad-hoc committee and OPD Executive Staff, and further collaboration moved the two drafts closer. Unfortunately, OPD and the Commission could not resolve all outstanding differences before the Commission's regular meeting on May 9, 2019. At that meeting, the Commission voted to adopt a version of the policy, different not only from OPD's proposal but also from the version adopted on April 11, 2019 as the Commission's official version.

ANALYSIS AND POLICY ALTERNATIVES – DIFFERENCES BETWEEN OPD'S VERSION AND THAT OF THE COMMISSION

The policy put forth by the Commission, attached to this report as Attachment A, incorporates policy fundamentals desired by both the OPD and the Commission. However, it also addresses

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specific concerns of Commissioners and public comments made during Commission meetings relating to community perceptions of adverse community impacts caused by police discretion to inquire as to an individual's supervised release status, and concerns about the lack of accountability where OPD members are not given specific articulatable timelines and definitions for complying with the policy's intent. The primary points that the Commission believes are better addressed through the Commission's proposed R-02 policy include a statement of community values in section B-3 relating to inquiries as to an individual's supervised release status; and increased specificity as to the definition of Violent Offenses (A-2) and the timeline for knowledge of searchable Supervised Release status prior to conducting such a search.

Changes to OPD Policy Related to Inquiries of Individual's Supervised Release Status

The Commission recognizes that one of the primary community impacts of DGO R-02 – Searches of Persons on Supervised Release occurs not when a search is conducted, but when a member of the police inquires as to an individual's Supervised Release status. Specifically, several Commissioners and members of the community who spoke on this issue during Commission meetings emphasized community perceptions of disparate treatment of individuals from different groups that starts with the inquiry as to an individual's status to determine whether such a search is necessary or proper. The Commission therefore believes it is critical that section B-3 (Inquiring About Supervise Release Status) of the policy include a strong statement as to the community impacts of police inquiries as to an individual's Post-Release Community Supervision status. The language chosen by the Commission to address this issue begins:

"Inquiring about an individual's Supervised Release status, at the beginning of an interaction without proper justification is unjust. Such an immediate inquiry is viewed by the community as an improper assumption by the Officer that the individual has a criminal history." (Section B-3, Police Commission proposed changes to DGO R-02).

The Commission strongly believes that the inclusion of this language in the final version of DGO R-02 is an important statement to OPD members as to the community impact of such inquiries; and a statement to the public about the OPD's recognition of these impacts.

Changes to OPD Policy Related to Specificity with Respect to Definitions and Timelines

In addition to the emphasis on community impacts noted above, the Commission also expressed a clear intent to set definitions and timetables within the policy of sufficient specificity as to constrain OPD members' discretion to circumvent the intent of the policy revision.

For these purposes, the Commission version of R-02 as presented in Attachment A includes a modification of the definition of violent offenses (section A-2) to include the definition of violent felony as defined in Penal Code §667.5(c), the only place that such offenses are defined in California law.

Additionally, in section C-1 relating to the knowledge that an officer must have as to an individual's Supervised Release status prior to conducting a search under this DGO, the Commission believes that the window between when the officer becomes aware that individual is subject to a Supervised Release Search Clause and when that search is conducted must be

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specific and of limited duration to minimize any over-broad use of officer discretion to subvert the intent of the policy. The version of R-02 included for consideration by Council therefore contemplates that all searches of individuals subject to Supervised Release Search Clauses must occur within 72 hours of when that individual's status has been confirmed by the searching officer through one of the mechanisms contemplated by the policy.

FISCAL IMPACT

There are no fiscal impacts associated with this report.

PUBLIC OUTREACH / INTEREST

This policy is the product of extensive outreach with diverse interest groups such as OPD members, the Alameda County District Attorney's Office, the Commission, and community interest groups.

COORDINATION

Preparation of this report was coordinated with the assistance of the City of Oakland's Police Commission and the Office of the City Attorney.

SUSTAINABLE OPPORTUNITIES

Economic: There are no economic opportunities associated with this report.

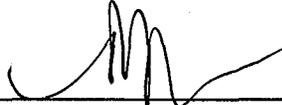
Environmental: There are no environmental opportunities associated with this report.

Social Equity: All Oakland residents and visitors benefit from clear policies and procedures that help OPD ensure procedurally just and operationally efficient police services.

ACTION REQUESTED OF THE CITY COUNCIL

The Oakland Police Commission Recommends That The City Council Approve A Resolution Regarding Oakland Police Department General Order R-02, Searches of Individuals on Supervised Release.

Respectfully submitted,



Regina Jackson
Chair, Oakland Police Commission

Reviewed by:
Mike Nisperos, Interim Executive Director
Community Police Review Agency

Prepared by:
Jan "Juanito" Rus, CPRA Policy Analyst
Community Police Review Agency

Attachments (1):

A – DGO R-02 – Police Commission Proposed Version from May 9, 2019

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DEPARTMENTAL GENERAL ORDER

R-02: SEARCHES OF INDIVIDUALS ON PROBATION, PAROLE, MANDATORY SUPERVISION AND PRCS (POST-RELEASE COMMUNITY SUPERVISION)

Effective Date: XX XX 19
Coordinator: Training Division

Individuals on probation with certain court-imposed search clauses and individuals on probation, parole, mandatory supervision and post-release community supervision (PRCS) may be subject to warrantless searches as a term and/or condition of their supervised release by law enforcement. While these searches are a legitimate law enforcement tool, the Department emphasizes that the mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

For the purpose of this Policy, probation, parole, mandatory supervision and PRCS are collectively referred to as "Supervised Release."

COMMAND INTENT

The intent of this Policy is to enhance the effectiveness of Officers¹ when coming into contact with those individuals on Supervised Release and to provide clear guidelines for the use of Supervised Release searches. The Department values the abilities of officers to make sound judgments and decisions when using law enforcement tools available to them – such as Supervised Release searches – to ensure Officer, community and subject safety. At the same time, the Department recognizes that those on Supervised Release, as well as the community at large, consider warrantless searches to be overly intrusive.

Accordingly, the Department seeks to build community trust through transparency of Department operations by requiring Officers to document articulable facts supporting a decision to affect a warrantless search.

A. DEFINITIONS

A - 1. Non-Violent Offenses

"Non-Violent Offenses" are defined as offenses in which violence or use of a weapon is not a factor. Examples include simple possession of controlled substances or property crimes such as petty theft.

A - 2. Violent Offenses

Offenses involving the use of force, the threat of force, the use or possession of a weapon, sexual violations against the person of another, human trafficking, and the use of force or threats to public safety. Battery on a Peace Officer (Penal Code § 243(b)), Reckless Evasion in a Vehicle (Vehicle Code § 2800.2(a)), or a violent felony as defined in Penal Code § 667.5(c.), fall into the categories of violent crimes, weapons offenses, sex crimes and/or

¹ "Officer" or "Officers" refer(s) to sworn members of the Department of any rank.

crimes involving threats to public safety. These categories of crimes are collectively referred to as "Violent Offenses."

A - 3. Cursory Search

A "Cursory Search", also known as a pat search or search for weapons, is further defined as a limited search of the outer clothing in a manner designed to determine whether the person being searched is in possession of any weapons or items which may be used as such. Cursory searches typically require reasonable suspicion that the person being searched is armed and/or dangerous, and are governed by applicable case law and Department policy.²

A - 4. Full Search

A "Full Search" of a person is defined as a "relatively extensive exploration"³ of the person being searched, including their clothing, their pockets, and containers in their possession. A Full Search of a person is most typically conducted incident to that person's arrest.

B. SUPERVISED RELEASE SEARCHES AND THE COMMUNITY

B - 1. Purpose of Supervised Release Searches

Warrantless searches of individuals on Supervised Release shall⁴ further a legitimate law enforcement purpose. Such searches shall not be:

1. Arbitrary;
2. Capricious; or
3. Harassing

B - 2. Procedural Justice Considerations

Officer contact with individuals on Supervised Release provides Officers with an opportunity to practice the tenets of procedural justice: voice, neutrality, respect, and trustworthiness.

B - 3. Inquiring About Supervised Release Status

Inquiring about an individual's Supervised Release status, at the beginning of an interaction without proper justification is unjust. Such an immediate inquiry is viewed as the community as an improper assumption by the Officer that the individual has a criminal history. To that end, Officers shall not immediately inquire whether an individual is on Supervised Release unless there is an Immediate Threat⁵ to Officer safety or the safety of others. Any subsequent inquiries about probation, parole, mandatory supervision and PRCS status shall be framed in a respectful manner.

² See for example *Terry v. Ohio*, 392 US 1 (1968) and OPD Training Bulletin I-O.02, *Legal Aspects of Searching Persons*.

³ *US v. Robinson*, 414 US 218, 236 (1973)

⁴ Manual of Rules 175.77: SHALL - Indicates that the action is mandatory.

⁵ An "Immediate Threat" is defined in Departmental General Order K-3 (I)(D).

C. REQUIREMENTS FOR SUPERVISED RELEASE SEARCHES

Supervised Release searches shall be conducted in consideration of the totality of the circumstances surrounding the encounter.

C - 1. Knowledge of Searchable Supervised Release Status

Officers shall have knowledge and confirm that knowledge that an individual is currently on Supervised Release, with a clause or condition which allows the Officer to conduct a warrantless search, prior to conducting any such warrantless search. Officers may learn of, and confirm, an individual's Supervised Release status: from a check of law enforcement databases such as AWS, CRIMS⁶, CLETS⁷, and CORPUS; by direct contact with the individual's Supervised Release officer/supervisor; or from direct contact with another Department Officer who fulfilled one of the two above methods of confirmation.

In situations where an Officer has prior knowledge of the individuals' searchable Supervised Release status, the Officer shall confirm the validity of the individual's Supervised Release status via a records check prior to effecting any warrantless search.

For purposes of this Section, confirmation within the prior 72 hours shall be deemed sufficient. Officers shall also document the basis of their knowledge and confirmation, in conformance with Section D-1.

In situations where an individual communicates to an Officer that the individual is on Supervised Release with a warrantless search condition, the Officer shall still confirm the validity of the individual's Supervised Release status via a records check. If the individual is mistaken concerning his or her Supervised Release status, the Officer shall provide the correct information and document the results in the appropriate report.

C - 2. Individuals on Supervised Release for Non-Violent Offenses

When considering conducting a warrantless search condition for an individual on Supervised Release for a Non-Violent Offense, Officers shall consider articulable facts which demonstrate that the individual is connected in some way to criminal activity or that the individual is an Imminent Threat to Officer or citizen safety. Absent a connection to criminal activity or a threat to the Officer or citizen safety, the warrantless search condition **shall not** be invoked.

The mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

⁶ CRIMS is the recommended database for confirming probation status.

⁷ CLETS is the recommended database for confirming parole status.

C - 3. Traffic Stops of Individuals on Supervised Release for Non-Violent Offenses

When officers contact an individual on Supervised Release for a Non-Violent Offense during a vehicle stop for any infraction and there are no articulable facts present which demonstrate that the individual is connected in some way to criminal activity, or that the individual is an Imminent Threat to Officer or citizen safety, Officers **shall not** search that individual or his/her vehicle pursuant to any Supervised Release search clauses or conditions.

C - 4. Individuals on Supervised Release for Violent Offenses

Individuals contacted or detained who are found to be on searchable Supervised Release for Violent Offenses may be searched pursuant to the terms of their Supervised Release conditions.

C - 5. Cursory and Full Searches

In those instances where a Cursory Search is justified and the individual to be searched is on Supervised Release and the terms and/or conditions of an individual's Supervised Release allow for a warrantless search, a Full Search may be conducted of the area which would be subject to a Cursory Search.

D. MEMORIALIZING FACTS OF THE SEARCH

D - 1. Required Documentation

Officers conducting a Supervised Release search shall, at a minimum, document the following in the appropriate report:

1. The circumstances of the encounter/detention;
2. How and when it was determined that the individual was Supervised Release and, if the Officer made this determination based on prior knowledge, the basis for that knowledge;
3. How the Supervised Release status and warrantless search condition was verified including, if verified via a Mobile Data Terminal (MDT), a paste of this information from the MDT to the body of the report (if feasible);
4. Any articulable facts which informed the decision to search; and
5. The type(s) of search completed and disposition.

D - 2. Use of Portable Digital Recording Devices During the Encounter

Officers shall follow Department General Order I-15.1 (II)(A) regarding the activation of an Officer's portable digital recording device during encounters with individuals on Supervised Release.

By order of
Anne E. Kirkpatrick
Chief of Police

Date Signed: _____

2019 JUN 27 PM 8:31 OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

**RESOLUTION ADOPTING OAKLAND POLICE DEPARTMENT
GENERAL ORDER R-02, SEARCHES OF INDIVIDUALS ON
SUPERVISED RELEASE AS RECOMMENDED BY THE
OAKLAND POLICE COMMISSION**

WHEREAS, the Oakland Police Department (OPD) has a responsibility to serve all the people of Oakland, and to treat all members of the public with respect; and

WHEREAS, The Oakland Police Commission (Commission) was created by the voters of Oakland in 2016 to be the voice of the community in matters of police policy and practice; and

WHEREAS, both the Commission and the OPD recognize that individuals who are searched and other community members can view both searches and unprompted inquiries as to an individual's supervised release status as intrusive; and

WHEREAS, both the Commission and the OPD seek to build community trust through transparency of Department operations by requiring officers to document articulable facts supporting a decision to search; and

WHEREAS, OPD is in agreement with the Police Commission that there are systemic biases in criminal justice which can be exacerbated by court-mandated programs such as supervised release; and

WHEREAS, on August 23rd, 2018, a draft of this policy was presented to the full Police Commission at a regular meeting which began a process culminating at the December 14, 2019 City Council meeting, where the Council rejected drafts of R-02 from both the Commission and the OPD, and the City Council directed OPD and the Commission to collaborate further and return to City Council; and

WHEREAS, Article VI, Section 604(b)(4) grants the Commission authority to make changes to policies, procedures, customs or General Orders which govern, among other things, profiling based on any protected characteristics identified by federal, state or local law or which contain elements expressly listed in federal court orders or federal court settlements which pertain to the

Department; and

WHEREAS, on January 24th, 2019, OPD presented a new draft of R-02 to the Police Commission in an attempt to bridge the gap between the two versions which had been submitted to the Council; the Commission formed an ad-hoc committee to coordinate policy discussions with OPD which met on February 11, 2019; and

WHEREAS, following the ad-hoc committee meeting OPD produced a revised DGO R-02 draft policy, which was sent to the Commission; the Commission discussed DGO R-02 at several regular meetings and on April 11th 2019 the Commission voted to adopt a version of the policy – different in several respects from the version produced by OPD; and

WHEREAS, the Commission's April 11, 2019 vote triggered the required submission of changes to OPD's policies to the City Council under Charter section 604(b)(4); and

WHEREAS, OPD and the ad-hoc committee continued to meet and discuss policy differences but could not resolve all differences before the Commission's regular meeting on May 9th, 2019 at which time the Commission voted to adopt a version of the policy – different not only from OPD's proposal but also from the version adopted on April 11, 2019 – as the Commission's official version; and

WHEREAS, the Commission believes the OPD's version of Departmental General Order R-02 provides insufficient emphasis on the harms of unprompted inquiries as to an individual's supervised release status; and

WHEREAS, the Commission believes that the OPD's version of Departmental General Order R-02 fails to provide the specificity in mandated timelines and definitions required for appropriate disciplinary action for violations of the policy's intent; therefore be it

RESOLVED: That the City Council recognizes that OPD consistently needs to balance building community trust in conjunction with the need to address crime; and be it

FURTHER RESOLVED: That the Commission and the OPD recognize that building community trust requires transparency and good judgment in the application of law enforcement tools such as supervised release searches; and be it

FURTHER RESOLVED: That the City Council adopts the Commission's version of Department General Order R-02, "Searches of Individuals on Supervised Release" provided below as **Exhibit A**; and be it

FURTHER RESOLVED: That any further changes to the OPD Department General Order R-02 must be adopted in accordance with City Charter Section 604 (b) of the City Charter, Powers and Duties of the Police Commission.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID, TAYLOR, THAO
AND PRESIDENT KAPLAN

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

Exhibit A



DEPARTMENTAL GENERAL ORDER

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Effective Date: XX XX 19

Coordinator: Training Division

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Accordingly, the Department seeks to build community trust through transparency of Department operations by requiring Officers to document articulable facts supporting a decision to affect a warrantless search.

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² See for example *Terry v. Ohio*, 392 US 1 (1968) and OPD Training Bulletin I-O.02, *Legal Aspects of Searching Persons*.

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For purposes of this Section, confirmation within the prior 72 hours shall be deemed sufficient. Officers shall also document the basis of their knowledge and confirmation, in conformance with Section D-1.

In situations where an individual communicates to an Officer that the individual is on Supervised Release with a warrantless search condition, the Officer shall still confirm the validity of the individual's Supervised Release status via a records check. If the individual is mistaken concerning his or her Supervised Release status, the Officer shall provide the correct information and document the results in the appropriate report.

C - 2. Individuals on Supervised Release for Non-Violent Offenses

When considering conducting a warrantless search condition for an individual on Supervised Release for a Non-Violent Offense, Officers shall consider articulable facts which demonstrate that the individual is connected in some way to criminal activity or that the individual is an Imminent Threat to Officer or citizen safety. Absent a connection to criminal activity or a threat to the Officer or citizen safety, the warrantless search condition **shall not** be invoked.

The mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

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C – 4. Individuals on Supervised Release for Violent Offenses

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C – 5. Cursory and Full Searches

In those instances where a Cursory Search is justified and the individual to be searched is on Supervised Release and the terms and/or conditions of an individual's Supervised Release allow for a warrantless search, a Full Search may be conducted of the area which would be subject to a Cursory Search.

D. MEMORIALIZING FACTS OF THE SEARCH

D - 1. Required Documentation

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1. The circumstances of the encounter/detention;
2. How and when it was determined that the individual was Supervised Release and, if the Officer made this determination based on prior knowledge, the basis for that knowledge;
3. How the Supervised Release status and warrantless search condition was verified including, if verified via a Mobile Data Terminal (MDT), a paste of this information from the MDT to the body of the report (if feasible);
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By order of
Anne E. Kirkpatrick
Chief of Police

Date Signed: _____