

SEARCHES AND SEIZURES

WILLIAMSTOWN POLICE DEPARTMENT POLICY & PROCEDURE NO. 1.08	EFFECTIVE DATE: 06/01/2021
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New section on strip and body cavity searches added to end.	REVIEW DATE: 11/21/2023

GENERAL CONSIDERATIONS AND 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.¹ 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 policies on the following topics: **1.11 - Arrests**, **1.07 - Stop and Frisk and Threshold Inquiries**, **1.09 - Search Warrant Affidavits**, **2.02 - Use of Informants** and **6.01 - Collection and Preservation of Evidence**.

POLICY

It is the policy of the Police Department that:

- Warrants shall be obtained for all searches, whenever possible and practicable; and
- 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.

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Stoner v. California, 376 U.S. 483, 84 S.Ct. 889 (1964).

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.²

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.

PROCEDURES

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:

- Property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

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U.S. v. Campbell, 581 F.2d 22 (C.A. NY).

- 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;
- 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;
- The dead body of a human being; and
- 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
3. Requisites of Warrant (Per G.L. c. 276, section 2)

A search warrant shall:

- a. Designate and describe the building, house, place, vessel or vehicle to be searched;
- b. Particularly describe the property or articles to be searched for;
- c. Be substantially in the form prescribed in G.L. c. 276, section 2A; and
- d. 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

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Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967).

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 superior 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.

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;⁴
 - 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.;⁵
 - 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.

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G.L. c. 276, section 3A; Commonwealth v. Cromer, 365 Mass. 519 (1974).

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Commonwealth v. Grimshaw, 413 Mass. 73, 595 N.E.2d 302 (1992).

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.⁶

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.⁷

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:

- The officers will not be admitted voluntarily;
- The officers or any other persons are in danger of physical harm;

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Richards v. Wisconsin, 117 S.Ct. 1416 (1997); Commonwealth v. Gondola, 28 Mass. App. Ct. 286, 550 N.E.2d 880 (1990).

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Commonwealth v. Sepulveda, 406 Mass. 180, 546 N.E.2d 879 (1989).

- The occupants are escaping; or
- 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 presence⁸ or where to follow the knock and announce procedure:

- Would be likely to endanger their safety or the safety of others;
- Would be likely to enable the wanted person(s) to escape; or
- 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.⁹

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:

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Commonwealth v. Antwine, 417 Mass. 637, 632 N.E.2d 818 (1994).

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Commonwealth v. Chamberlin, 86 Mass.App.Ct. 705 (2014).

- 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 policies on **Collection and Preservation of Evidence** and **Evidence and Property Control**;
- 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;¹⁰
- 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

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G.L. c. 276, section 3A.

Return listing all such property and state that it was seized during the execution of that warrant); and

1. 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

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.¹¹ See Section III(I) below for the legal requirements to seize items in plain view. [**1.2.4 (g)**]

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:

- 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);¹² or
- 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

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Commonwealth v. Bond, 375 Mass. 201, 375 N.E.2d 1214 (1978).

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Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979).

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.

C. 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 or 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 policy and procedure on ***Threshold Inquiries***.

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:
 - Seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest was made;
 - In order to prevent its destruction or concealment; and/or

- To remove any weapons that the arrested person might use to resist arrest or to effect his/her escape;¹³

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.¹⁴

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.

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G.L. c. 276, section 1.

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Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990).

c. Any item or object recognizable as criminal evidence discovered in plain view during a justifiable "protective sweep" may be properly seized.¹⁵

5. An arrest shall not be used as a pretext in order to make a search.

D. SEARCHES IN EMERGENCY OR EXIGENT CIRCUMSTANCES
[1.2.4 (d); 1.2.4 (e)]

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.¹⁶
 - 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.¹⁷
 - 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.

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Commonwealth v. Bowden, 379 Mass. 472, 399 N.E.2d 482 (1980).

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Thurlow v. Crossman, 336 Mass. 248, 143 N.E.2d 812 (1957).

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Commonwealth v. Guaba, 417 Mass. 746, 632 N.E.2d 1217 (1994).

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 reentry 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.¹⁸

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.¹⁹

3. Fresh and Continued Pursuit: The U.S. Supreme Court case of *U.S. v. Santana*²⁰ 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;²¹
- 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.

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Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978); Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984).

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Commonwealth v. Marchione, 384 Mass. 8, 422 N.E.2d 1361 (1981).

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U.S. v. Santana, 427 U.S. 39, 96 S.Ct. 2406 (1976); Commonwealth v. Moran, 370 Mass. 10, 345 N.E.2d 380 (1976).

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Commonwealth v. Jewett, 471 Mass. 624 (2015).

1. Where the above or other emergency factors are not present, police may stake out the building or premises until a warrant is obtained.²²

E. SEARCH BY LAWFUL CONSENT [1.2.4 (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**

- 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.
- *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.²³
- *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.²⁴

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U.S. v. Adams, 621 F.2d 41 (1st Cir. 1980).

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U.S. v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1973); Commonwealth v. Maloney, 399 Mass. 785, 506 N.E.2d 1147 (1987).

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- *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.²⁵ 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.²⁶
 - *Children*: Generally, a child may not give consent to a police search of premises or property owned by the child's parents.
 - *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.²⁷
 - *Landlord*: Generally, a landlord cannot give consent to the search of a tenant's apartment.²⁸ However, a landlord may give consent to searches of common areas such as hallways and stairwells.²⁹
 - *Hotels*: A hotel or motel owner or manager cannot give consent to a search of a guest's lodgings.³⁰
- b. **Consent must be freely and voluntarily given; and**³¹
- Officers shall notify the person from whom consent is sought of their right to refuse to give consent.³²

²⁵ Commonwealth v. Martin, 358 Mass. 282, 264 N.E.2d 366 (1970); Commonwealth v. Rooney, 365 Mass. 484 (1974).

²⁶ Commonwealth v. Ortiz, 422 Mass. 64, 661 N.E.2d 926 (1996).

²⁷ U.S. v. DiPrima, 472 F.2d 550 (1st Cir. 1973); U.S. v. Robinson, 999 F.Supp. 155 (D. Mass. 1998).

²⁸ Commonwealth v. Rodriguez, 364 Mass. 87 (1973).

²⁹ Niro v. U.S., 388 F.2d 535 (1st Cir. 1968).

³⁰ Commonwealth v. Ploude, 44 Mass.App.Ct. 137 (1998).

³¹ Stoner v. California, 376 U.S. 483, 84 S.Ct. 889 (1964).

³² Commonwealth v. McGrath, 365 Mass. 631, 310 N.E.2d 601 (1974).

- A consent to search may be given orally but preferably, it should be in writing.³³ See Department Consent to Search Form.
- Consent cannot be presumed from silence.
- Consent must be free of any coercion, intimidation, or threat, so officers must avoid even the appearance of intimidation or duress.
- Officers shall not gain consent through the use of misrepresentation or fraud.
- 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.**³⁴

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, nonconsensual 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 [1.2.4 (c)]**

1. Officers are prohibited from stopping motor vehicles without reasonable suspicion of criminal activity or motor vehicle violations.³⁵

Commonwealth v. Sanna, 424 Mass. 92, 674 N.E.2d 1067 (1997) (Although there is no legal requirement that a person be advised of their right to refuse to give consent to a police search, this is one of the factors that the court will consider in determining whether the consent was voluntarily given.)

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Commonwealth v. Reed, 417 Mass. 558, 631 N.E.2d 552 (1994).

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Commonwealth v. McGrath, 365 Mass. 631 (1974).

³⁵

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979).

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.³⁶

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.³⁷

c. *Exigent Circumstances Search:* A warrantless search of a vehicle may be made when the following elements are satisfied:³⁸

- The vehicle must be lawfully stopped on a public way or is found parked in a public place,³⁹
- There is probable cause to believe that the vehicle contains contraband or other evidence at the initiation of the search, and
- Exigent circumstances are present, movable vehicle exception.

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Commonwealth v. Gonsalves, 429 Mass. 658, 711 N.E.2d 108 (1999) rejecting Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977); Commonwealth v. Silva, 366 Mass. 402, 318 N.E.2d 895 (1974).

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Commonwealth v. Clermy, 37 Mass. App. Ct. 774, 643 N.E.2d 1059 (1995).

³⁸

U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982); Commonwealth v. Cast, 407 Mass. 891, 556 N.E.2d 69 (1990).

³⁹

Commonwealth v. Wunder, 407 Mass. 909, 556 N.E.2d 65 (1990).

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.⁴⁰

d. *Consent*: A search may be conducted with the voluntary consent of the person in lawful control of the vehicle.⁴¹

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.⁴² 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.⁴³

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 policy 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.

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Commonwealth v. Ortiz, 376 Mass. 349, 380 N.E.2d 669 (1978); Commonwealth v. A Juvenile (No.2), 411 Mass. 157, 580 N.E.2d 1014 (1991); Commonwealth v. Bakoian, 412 Mass. 295, 588 N.E.2d 667 (1992).

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Commonwealth v. Lanoue, 356 Mass. 337, 251 N.E.2d 894 (1969).

⁴²

Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983).

⁴³

Commonwealth v. Cavanaugh, 366 Mass. 277, 317 N.E.2d 480 (1974); Commonwealth v. Doulette, 414 Mass. 653, 609 N.E.2d 473 (1993).

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.⁴⁴

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 policies on ***Detainee Processing*** and ***Protective Custody***. 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

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:⁴⁵

- a. There must be a prior lawful entry;
- b. Such entry must bring the officer within "*plain view*" of the item seized; and

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Commonwealth v. Gonsalves, 429 Mass. 658, 711 N.E.2d 108 (1999) rejecting Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977).

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Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990).

- 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.);⁴⁶
 - b. Contraband (articles which may not be legally possessed, such as counterfeit money or controlled substances, etc.);⁴⁷
 - c. Fruits of any crime (such as stolen property);⁴⁸
 - 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).⁴⁹

J. ABANDONED PROPERTY [1.2.4 (g)]

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

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Commonwealth v. Accaputo, 380 Mass. 435, 404 N.E.2d 1204 (1980).

⁴⁷

Id.

⁴⁸

Id.

⁴⁹

Commonwealth v. Scalise, 387 Mass. 413, 439 N.E.2d 818 (1982).

1. Trash in collection area accessible to the public.⁵⁰
2. The contents of a hotel room wastebasket once an individual has vacated the room.⁵¹
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.⁵²
4. Items thrown on the ground by a suspect.⁵³

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.⁵⁴ The "house" that is protected by the Fourth Amendment includes the grounds and buildings immediately surrounding the dwelling.⁵⁵
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.⁵⁶

L. SEARCHES BY PERSONS OTHER THAN LAW ENFORCEMENT OFFICERS

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Commonwealth v Pratt, 407 Mass. 647, 555 N.E.2d 559 (1990).

51

Abel v. U.S., 362 U.S. 217, 80 S.Ct. 683 (1960).

52

Commonwealth v. Lanigan, 12 Mass. App. Ct. 913, 423 N.E.2d 800 (1981).

53

Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 633 N.E.2d 1058 (1995);
Commonwealth v. Marrero, 414 Mass. 1102, 606 N.E.2d 915 (1992).

54

Hester v. U.S., 265 U.S. 57, 44 S.Ct. 445 (1924); Commonwealth v. John G. Grant & Sons, Inc., 403 Mass. 151, 512 N.E.2d 522 (1988).

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Rozencrantz v. U.S., 356 F.2d 310 (1st Cir. 1969).

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Oliver v. U.S., 466 U.S. 170, 104 S.Ct. 1735 (1984); Hester v. U.S., 265 U.S. 57, 44 S.Ct. 445 (1924).

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.⁵⁷

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.⁵⁸

M. STRIP AND BODY CAVITY SEARCHES

1. Definitions:

- Strip Search – An inspection of private areas of the body without any scrutiny of body cavities.
- Visual Body Cavity Search – A visual inspection of the anal and genital areas.
- Manual Body Cavity Search – The most intrusive type of search involving the touching or manipulation of an anal or genital body cavity.

2. Authority for Strip or Visual Body Cavity Search

- A strip or visual body cavity search requires probable cause that the suspect possesses contraband or a weapon that would not be discovered during a regular search.
- A strip or visual body cavity search of juveniles is discouraged. If such a search is necessary due to the possibility of danger to the officers, the juvenile or the public every effort shall be made to arrange for a parent or legal guardian to be present as an observer or to perform the search themselves.
- Only in circumstances where there is imminent danger to the officers, the juvenile or the public will officers perform a strip or visual body cavity search of a juvenile.

3. Procedures for Strip or Visual Body Cavity Search

- These searches must be conducted in a professional manner, and in a way as to not humiliate the person being searched.
- These searches should be performed and/or observed only by police personnel of the same gender or gender identity as the person being searched.

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Commonwealth v. Leone, 386 Mass. 329, 435 N.E.2d 1036 (1982).

⁵⁸

Id.

- If doubt exists as to a person's gender identity, officers will ask the person to be searched their preference as to gender of the searching and/or observing personnel.
 - These searches should be done in a private room wherever possible. No persons other than those performing the search and one observer should be able to see the person being searched.
 - The search may be documented by video to demonstrate it was performed in accordance with policy. Whenever possible this should be an overall view of the room and all persons present.
 - It is recommended that the individual be requested to first remove clothing from the upper half of their body, then replace that clothing, then remove clothing from the lower half of their body (including shoes), then replace that clothing. In this manner a thorough search may be performed without the person being totally unclothed at any time.
 - In an emergency, as when a weapon or contraband must be recovered in the field, these searches will be performed in the least intrusive manner possible.
4. Authority for Manual Body Cavity Search
- It must be supported by a high degree of probable cause.
 - There must be a showing of a particularized need for such a search.
 - It must be authorized by a search warrant issued by a judge.
5. Procedures for Manual Body Cavity Search
- If a visual body cavity search shows evidence that contraband or a weapon is being secreted within the persons anal or genital cavity, there are three lawful options for a manual body cavity search:
 1. In cases where there is a danger to the person being searched, such as that drug packaging could rupture or that a concealed weapon might injure the person, they should be transported to a hospital. The removal should be performed by a medical clinician upon either the consent of the person being searched or the issuance of a search warrant signed by a judge.
 2. Request that the person being searched voluntarily remove the object. Their consent to do so eliminates the need for a warrant. Their refusal to do so provides the basis to seek a judicial warrant.
 3. Apply for a search warrant from a judge. The prior refusal of the person being searched to voluntarily remove the contraband or weapon provides the "particularized need" a

judge must have to issue a warrant for a manual body cavity search. The direct observation of the contraband or weapon within the body cavity during the visual body cavity search will provide the “high degree of probable cause” required.

6. Reporting requirements

- All strip searches and visual body cavity searches performed by police personnel require a written report setting forth all pertinent information as to the circumstances of the search. This should include the probable cause that the suspect possesses contraband or a weapon that would not be discovered during a regular search.
- All reports of strip searches and visual body cavity searches performed by police personnel of juveniles will also include documentation of efforts to contact a parent and/or guardian to observe or perform the search, the results of those efforts, and if unsuccessful and the search is performed by police personnel instead it will include documentation of the imminent danger to the officers, the juvenile or the public that justified such a course of action.
- All reports of manual body cavity searches will also include information on the particularized need and high degree of probable cause required to justify this manner of search.