


MELROSE POLICE DEPARTMENT		Department Manual: Policy No. 1.11
Subject: <div style="text-align: center;">Search & Seizure</div>		
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: <div style="text-align: center;">41.4.1</div>		GENERAL ORDER
Effective Date: December 1, 2022 Revised: January 18, 2024	Issuing Authority <div style="text-align: center;"><i>Kevin Faller</i></div> <div style="text-align: center;">Kevin Faller Chief of Police</div>	

I. GENERAL CONSIDERATIONS AND GUIDELINES

The purpose of this policy is to define and outline the procedures involving search and seizures. Failure to understand and comply with the provisions of the Fourth Amendment of the U.S. Constitution, Article 14 of the Massachusetts Declaration of Rights, and those of Massachusetts General Laws, can result in the inability to obtain convictions in criminal cases. Except with certain limited exceptions defined within this policy, a Police Officer should obtain a valid search warrant prior to conducting a search.

The laws and court decisions governing search and seizure are enormous and constantly evolving. It would be impossible to devise a policy which covers every possible situation. Therefore, it is imperative that the members of the Melrose Police Department keep themselves abreast of the laws and court decisions in the area of search and seizure. Any Federal or Massachusetts court decision, statute or Constitutional Amendment which conflicts with this policy shall supersede the area of this policy with which it conflicts.

Cases related to this policy: Comm v. Hawkins, 361 Mass.384 (1972), Comm v. Forde, 367 Mass 798 (1975), Comm v. Motta, 424 Mass. 117 (1997), Comm v. Neilson, 423 Mass 75 (1996), Comm v. Clermy, 421 Mass. 325 (1995), Comm v. Madera, 402 Mass. 156 (1988), Comm v. Supelveda, 406 MASS. 180 (1989), Comm v. Antwine, 417 Mass. 637 (1994), Comm v. Kitchings, 40 Mass. App. Ct. 591, (1996), Comm v. McGeogheon, 389 Mass. 137 (1983), Comm v. Harris, 383 Mass. 655 (1981), US v. Dunn, 107 S.Ct. 1134 (1987), Comm v. Paszko, 391 Mass. 164 (1984).

II. POLICY

It is the policy of the Melrose Police Department that warrants should 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, persons, and property involved.

III. DEFINITIONS

Affidavit: A formal declaration or statement of facts made voluntarily and confirmed by oath or affirmation before a person having the legal authority to administer such oath or affirmation.

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.

Probable Cause: The facts observed, information obtained from others, and personal knowledge and experience that would lead a reasonable and prudent person to believe that a particular crime has been, is being, or is about to be committed, and that seizable evidence of the crime is likely to be found in a specific location or on a specific person.

Curtilage: It is always difficult to say when and where Curtilage begins and ends. In *US v. Dunn*, 107 S. Ct. 1134 (1987), the court stated that extent-of-curtilage questions should be resolved with particular reference to the following four factors:

- The proximity of the area to the home
- Whether the area is within an enclosure surrounding the home
- The nature and uses to which the area is put, and
- Steps taken by the resident to protect the area from observation by a passerby.

In general, curtilage is that area immediately surrounding the dwelling house, to include garages, sheds and similar structures.

IV. OBTAINING A SEARCH WARRANT

When Obtaining a Search Warrant Officers must:

1. Follow the provisions of MGL Chapter 276, section 1.
2. Prepare an affidavit for the search warrant that complies with provisions of MGL Chapter 276, section 2A to include:
 - The specific location and description of the building, house, place, vessel, vehicle, or persons to be searched.
 - A particular description of the property or articles to be searched for.
3. Consult with his/her superior and obtain his/her guidance and approval. The supervisor shall review the affidavit for completeness and accuracy before proceeding to court. If the court is not in session, the officer-in-charge or affiant shall communicate with an authorized court official to make the necessary arrangements to secure a search warrant.

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- It is strongly recommended that the District Attorney's Office be consulted before preparing any search warrant affidavit.
- Every search warrant issued, and any action taken on such warrant, should be recorded in the form of an incident report. A copy of the warrant, affidavit and return shall be filed along with the incident report.

V. EXECUTING A SEARCH WARRANT

After obtaining a Search Warrant, a police officer shall:

- 1 Check the warrant to ensure that it is signed, and it clearly describes the place to be searched and the articles to be seized.
- 2 Execute the warrant as soon as practicable, but in any case, within seven days from date of issuance.
- 3 Execute the warrant in the daytime unless it specifically provides for nighttime search. Nighttime for this purpose is from 10:00PM until 6:00AM.

Note: A search begun in the daytime may continue into the nighttime if such activity is reasonable and not for the purpose of harassment.

- 4 Officers shall knock and announce their presence and purpose.
- 5 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.
- 6 Shall not attempt entry unless the search warrant or a copy of the search warrant is in hand at the premise to be searched.
- 7 Upon entering, officers shall show a copy of the warrant (not the original) to the person or persons lawfully on the premise unless the circumstances are such that this is not practical. A copy of the warrant shall be left at the premise searched and a photo shall be taken of the warrant in the location where it was left, if possible.
- 8 If any property damage occurs as a result of the search photographs should be taken of the damaged property.

NOTE: The number of officers assigned to execute a search warrant should be dependent upon the circumstances. It is good practice for at least one of the searching officers to be in uniform at the point of entry, unless this would jeopardize the success of the search.

A search warrant should not be executed in or on any premise in the absence of the owners, unless there is reason to believe that the occupants do not intend to return for an undetermined 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 premise is not searched

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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.

VI. KNOCK AND ANNOUNCE WARRANT

When serving a warrant at a private dwelling, police officers must knock, identify themselves as police officers, and announce that they have a warrant to search the premise before they demand entrance, except in limited circumstances.

Note: Officers may knock on the door and gain entry by deception or by means of a ruse if this will result in the safe and successful execution of the search warrant with less destruction to property. However, once the door is opened officers must still identify themselves and announce their purpose, see *Commonwealth v. Supelveda*, 406 MASS. 180 (1989).

Officers shall always seek to enter as peacefully as possible, but forcible entry is authorized if it becomes apparent that:

- The officers will not be admitted voluntarily (after waiting a reasonable amount of time).
- The officers or any other persons are in danger of physical harm.
- The occupants are escaping (exigent circumstances); or
- Evidence is being destroyed or is in danger of being destroyed (exigent circumstances).

VII. RESPONSIBILITIES AND DUTIES

The Police Officers involved in the execution of a search warrant:

- 1) May not exceed the authority granted by the warrant;
- 2) Shall make a diligent effort to find all the property listed in the warrant;
- 3) If practicable, should photograph, note and log the location and condition of evidence in its original position before handling it. If practicable, the function of photographing, noting and logging evidence should be conducted by one officer designated for this purpose
- 4) May not search beyond the area described in the warrant unless consent is obtained or exigent circumstances exist;
- 5) May search only those areas capable of containing the property listed in the warrant (ex. if the warrant authorizes a search for a large TV set, do not search in a small bureau drawer);
- 6) Should carry out the search with the least possible damage to the premises;
- 7) Should remain on the premises only for the time reasonably necessary to thoroughly search for and seize the property listed in the warrant;
- 8) Should terminate the search when the listed property has been found or when it reasonably appears that such property is not on the premises;
- 9) Should make adequate provisions for the security of the searched premises before leaving if someone responsible for the property will not be present or has not made their own arrangements;

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- 10) Should leave a copy of the warrant at the premise searched.
- 11) Should upon completion of the search transport directly 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;
- 12) Should 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 (MGL C.276 subsection 2a) or "as soon as may be" in the case of an warrant searching for alcohol (MGL C.138 subsection 42);
- 13) Shall note on the warrant the action taken, with an inventory of all property seized, by authority of the warrant. (If evidence not described in the warrant is seized, attach a separate sheet to the Return listing all such property and state that it was seized during the execution of that warrant); and;
- 14) Shall file a report detailing all action taken during the search warrant, to be submitted to his/her Division Commander or O.I.C. before returning the warrant to the court.
- 15) Note: The Affiant of the search warrant shall be present during the search and be responsible for the return of the affidavit and the proper inventory and safeguarding of the evidence seized.

VIII. SEARCH OF PERSONS DURING THE EXECUTION OF A SEARCH WARRANT

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. Persons not named in or referred to in the search warrant may not be searched unless either;

- Probable cause exists regarding the individual to be searched (however mere presence at a location where criminal activity has taken place is not enough to constitute probable cause); or
- The Officer has reasonable suspicion to believe that such person is armed and dangerous then (s)he may be frisked for weapons

IX. SEARCH OF AREA OUTSIDE THE SCOPE OF THE WARRANT

If during the execution of a search warrant it appears that there is probable cause to believe that seizable property is located in an area of the premises outside of the scope of the present warrant, a new warrant shall be obtained, unless consent is granted or exigent circumstances are present. While the new warrant is being sought, any occupants of the premises may have their activities restricted.

X. WARRANTLESS SEARCHES

Officers may make a warrantless search (in accordance with current court decisions) only when one of the following major exceptions to a search warrant applies:

- Frisk for weapons if the person is believed to be armed and dangerous.
- Search incident to arrest (including protective sweep).
- Exigent or emergency circumstances search
- Consent searches.
- Pre-incarceration and inventory searches.
- Administrative searches.
- 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;
- The “plain view” doctrine.
- The “open fields” doctrine; and
- Abandoned property.

XI. WARRANTLESS DETENTION

The Fourth Amendment, Article 14 of the Massachusetts Declaration of Rights and Chapter 41, section 98 of the Massachusetts General Laws authorize Police Officers to briefly detain suspicious persons, to question such persons and, if the Officer reasonably believes the person may be armed and dangerous, to frisk that person for weapons. These procedures are sometimes referred to as a “threshold inquiry” or a “stop and frisk.”

XII. SEARCH INCIDENT TO LAWFUL ARREST (41.4.1g)

A warrantless search of an arrested person may be conducted under the following conditions:

- The arrest is lawful;
- The search is conducted only for the purpose of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest was made;
- To prevent destruction or concealment of fruits, instrumentalities, contraband and other evidence of the crime for which the arrest was made; and/or
- To remove any weapons that the arrested person might use to resist arrest or to effect his/her escape.

The search is limited to (as currently allowed by law) the scope of the person of the arrestee and the immediate surrounding area, the area from which the arrestee can either obtain a weapon or destroy evidence. The search should be 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. 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.

XIII. USE OF FORCE TO CONDUCT A SEARCH

The officer conducting the search may use the degree of force reasonable necessary to:

- Protect himself/herself and others present;
- Prevent escape; and
- Prevent the destruction of evidence.

XIV. PROTECTIVE SWEEP

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.

- 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.
- Any item or object recognizable as criminal evidence discovered in plain view during a justifiable "protective sweep" may be properly seized.
- An arrest shall not be used as a pretext in order to make a search.

XV. SEARCHES WITH EXIGENT CIRCUMSTANCES (41.4.1e)

A Police Officer is authorized to conduct a search without a warrant when faced with an emergency or exigent situation where delay would endanger the officers' or the public's safety or might result in the escape of the offender or the destruction of evidence.

- 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.
- While conducting a lawful entry justified by emergency or exigent circumstances, a Police Officer may seize any incriminating evidence inadvertently discovered in plain view. 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 learns of an actual or potential natural or man-made calamity or disaster, [s]he has the duty and obligation to respond immediately.

Warrantless entry into a burning building is permissible in an emergency and officials may remain for a reasonable time to investigate the cause of the fire and any evidence of arson discovered is admissible at trial. Any re-entry after the fire has been extinguished and officials

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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.

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.

In *Commonwealth v. Forde*, 367 Mass 798 (1975), the SJC set out the following Forde Factors, which police must consider in determining whether “exigent circumstances” exist.

- The crime was one of violence or the suspect had been reported to be armed and dangerous;
- Unmistakable manifestation of probable cause to arrest;
- Strong reason to believe that the suspect is in the building;
- Likelihood that a delay would facilitate the destruction of evidence or property;
- Likelihood that the suspect would escape if not apprehended
- Whether the entry is peaceable and whether the entry is in the nighttime (the preferable entry will be in the daytime);
- Reasonable basis for believing that the delay would subject the police officers or others to physical harm.

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

Limitations on the Exigency Doctrine

In *Commonwealth V. Forde*, the SJC held that where the exigency is reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant, the exigency exception to the warrant requirement is not open to them.

Police will be confronted with the following limitations when attempting to use the Exigency Doctrine:

- The exigency could not have been anticipated or created by the police.
- Once the area is secured by police and the exigent circumstances no longer exist, additional searches must be made pursuant to a search warrant.

XVI. CRIME SCENE SEARCH (41.4.1d)

If exigent circumstances are not present at the crime scene or if the investigating officer is unable to obtain consent, the location or area should be secured and a search warrant shall be obtained.

XVII. CONSENT SEARCHES (41.4.1a)

Because such issues as who may give lawful consent to a police entry and search, or whether the consent was given knowingly and 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. For there to be a valid consent to search, the following element must be satisfied:

- The consenting party must have sufficient lawful authority over the premise or property to be able to give consent to a search of that premise or property. If there is serious doubt a search warrant should be obtained. The following are examples of situations which officers may encounter relating to consent;
 - **Jointly owned property:** Generally, if two or more people own property such as a house, apartment, or business jointly, any one of them may consent to a search of the common areas of the premises or areas where the person giving consent has joint access.
 - **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.
 - **Parent:** A parent may give consent to search premises under the parent's control although it involves searching a child's room and the parent has general access to the child's room. However, where the child, whether or not an adult, has exclusive access, often locked to certain areas or property, the parent's consent may not be enough.
 - **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.
 - **Landlord:** Generally, a landlord cannot give consent to the search of a tenant's apartment. However, a landlord may give consent to searches of common areas such as hallways and stairwells.
 - **Hotels:** A hotel or motel owner or manager cannot give consent to a search of a guest's lodgings.

Consent must be freely and voluntarily given.

- Consent to search may be given orally, but preferably it should be in writing (MPD Consent Forms may be utilized for this purpose).
- 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.

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- Consent should be requested prior to search and after the police officers have identified themselves.
- 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.

XVIII. MOTOR VEHICLE SEARCHES AND SEIZURES

Officers are prohibited from stopping motor vehicles without reasonable suspicion of criminal activity or motor vehicle violations. If it is practicable, a search warrant should be obtained in advance of a motor vehicle search. A warrantless search of a motor vehicle may be conducted under the following circumstances:

- After a vehicle has been lawfully stopped, warrantless frisking of the vehicle operator or occupants under a “stop and frisk” type of protective search is allowed 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. **41.4.1b**
- Search of motor vehicle incident to arrest of operator or occupant: a search incident to a lawful arrest is limited to the area from which the person could obtain a weapon or reach destructible evidence.
- Motor Vehicle Exception: a warrantless search of a vehicle may be made when the following elements are satisfied: **41.4.1c**
 - The vehicle must be lawfully stopped on a public way or is found parked in a public place, and;
 - There is probable cause to believe that the vehicle contains contraband or other evidence at the initiation of the search.

Note: see Commonwealth v. Motta, 424 Mass. 117 (1997) – the SJC held that "when a motor vehicle is stopped in a public place with probable cause, no more exigent circumstances are required by Article 14 beyond the inherent mobility of an automobile itself to justify a warrantless search of the vehicle."

- **Consent:** a search may be conducted with the voluntary consent of the person in lawful control of the vehicle.
- **Plain View Observations:** if a police officer has lawfully stopped a motor vehicle any incriminating item in or on the vehicle observed in plain view, including anything observed with the use of a flashlight, may furnish probable

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cause to search the vehicle and seize the item observed without a warrant, see *Commonwealth v. Motta*, 424 Mass. 117 (1997).

- **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. **41.4.1f**

XIX. 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 as prescribed in Chapter 72B – The Booking Process. This shall be done to uncover and safeguard any weapons or implements the detainee could use to injure himself/herself or others, to safeguard valuables and to protect the police against false claims of theft or loss of the detainee’s belongings. **41.4.1f**

XX. ADMINISTRATIVE SEARCHES 41.4.1g

The police may, under certain circumstances, engage in warrantless searches or inspections as part of their administrative functions. Warrantless inspections and searches of certain regulated businesses are permissible in accordance with Massachusetts General Laws. MGL chapter 94c regulates the administrative searching/inspection of pharmacies. MGL chapter 138 deals with the administrative inspections of liquor stores and MGL 140 deals with the administrative search/inspection of pawn shops, used auto part dealers, gun shops and similar regulated businesses. Officers conducting administrative searches must comply with Massachusetts General Law.

The searching of persons entering a secure area, such as an attorney meeting with a prisoner in the Department's holding facility, would also be considered an administrative search. Anytime non-police personnel request or have reason to enter a secure area of the police department they may be subject to a frisk for weapons and contraband prior to being allowed access to the secured area.

XXI. THE “PLAIN VIEW” DOCTRINE (41.4.1g)

When police officers lawfully enter a dwelling with a valid search warrant, they may seize objects connected with criminal activity if they are in plain view, even though not mentioned in the search warrant under certain circumstances. Officers may seize contraband or evidence without a warrant under the “plain view” exception to the warrant requirement if the following conditions are met:

- The officer(s) is lawfully on the premises [see *Commonwealth v. Neilson*, 423 Mass 75 (1996)];
- The discovery is inadvertently made; and
- The item seized must be “immediately apparent” as contraband or evidence of a crime.

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- o Lawfully on the premises includes:
 - Entry with a valid warrant.
 - Entry as a result of lawful consent; and
 - Entry in an emergency to render necessary aid or assistance.

XXII. ABANDONED PROPERTY (41.4.1g)

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

- Trash in collection area accessible to the public.
- 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, see *Commonwealth v. Paszko*, 391 Mass. 164 (1984).
- Items thrown on the ground by suspect.

XXIII. OPEN FIELDS (41.4.1g)

- An open field is that portion of privately owned land surrounding a person's dwelling that is too remote or removed from the physical dwelling to be considered part of the "house" such that it is protected by the Fourth Amendment.
- The "house" that is protected by the Fourth Amendment includes the grounds and buildings immediately surrounding the dwelling (or within the curtilage).
- 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.

XXIV. REPORTING REQUIREMENTS

In cases where a search is conducted with or without a warrant, the Police Officers involved shall make a written report to include the facts relative to the incident and an inventory documenting any evidence seized. Even in the event of a search where no contraband is discovered, such as in the case of a search conducted during a motor vehicle stop, the search should still be documented in the form of an incident report. The only exceptions to this rule are noted below:

- Booking/inventory searches;
- Administrative searches for access to restricted areas (ex. visitor to holding facility)

XXV. SEARCHES BY PERSONS OTHER THAN LAW ENFORCEMENT

Private Individual: evidence obtained by a private individual, as a result of searching someone else's property, which is not acting as an employee or agent of the government, is admissible.