



**DEPARTMENT OF PUBLIC SAFETY  
POLICIES & PROCEDURES**



**POLICY NUMBER**

**OPR:42**

**EFFECTIVE  
DATE:  
04/30/2018**

**ORIGINAL  
ISSUED ON:  
06/05/2007**

**SUBJECT: SEARCH AND SEIZURE**

**REVISION NO:**

**6**

**1.0 PURPOSE**

The purpose of this policy is to provide Department of Public Safety commissioned officers with basic guidelines for conducting lawful searches and seizures.

**2.0 POLICY**

It is the policy of the Department of Public Safety that its commissioned officers conduct searches and seizures within the guidelines of state and federal law.

**3.0 APPLICABILITY**

This policy is applicable to all commissioned officers of the Department of Public Safety.

**4.0 REFERENCES**

- A. United States Constitution**
- B. New Mexico Criminal & Traffic Law**
- C. CALEA Chapter 1 – Law Enforcement Role and Authority**

**5.0 DEFINITIONS**

- A. Exigent Circumstances** – Those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or public, the destruction of relevant evidence, or the escape of a suspect.
- B. DPS** – Department of Public Safety.
- C. Probable Cause** – Facts or circumstances that would lead a reasonable officer to believe a crime has been committed, is being committed or is about to be committed and that the person to be arrested committed the crime.
- D. Probable Cause to Search** – Facts or circumstances that would lead a reasonable officer to believe that the items to be searched are connected with criminal activity and that these items will be found in the place to be searched.
- E. Reasonable Suspicion** – Individualized suspicion that the individual in question may have committed a crime.
- F. Warrantless Search** – An exception to the requirement for a search warrant. Some exceptions include: consent (includes third party consent), exigent (or emergency) circumstances, abandoned property, open fields, plain view, inventory searches, protective sweeps, searches incident to arrest, and community caretaker.

**6.0 PROCEDURE**

The Fourth Amendment of the U.S. Constitution prevents “unreasonable” searches and seizures. Any search of a person or property requires a search warrant unless an

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exception to the requirement is present. Officers shall abide by state and federal law as well as this policy when conducting any type of search and seizure activity.

### **A. Search Warrants**

1. An officer/agent must have probable cause to obtain a search warrant from the appropriate court and must particularly describe the place to be searched and the person or things to be seized. It is recommended that officers/agents consult with the local district attorney's office for guidance when drafting an affidavit for search warrant, if possible.
2. When an officer/agent obtains a search warrant that is signed by a judge, the officer/ agent shall have ten (10) days in which to serve the warrant. If the search warrant is not served within ten (10) days, and probable cause still exists, a new affidavit in support of a search warrant will be submitted for judicial approval. The officer/agent shall notify a supervisor of the issued warrant as soon as practical.
3. Upon execution of the search warrant, the officer/agent shall:
  - a. Fill out the Return and Inventory.
  - b. When possible, have the subject named in the search warrant sign and date the inventory to acknowledge seizure of any items taken.
  - c. Provide the subject named in the search warrant with a copy of the affidavit for search, a copy of the inventory, and a copy of the search warrant, unless the warrant is sealed. When the subject named in the warrant is not at the location, the paperwork will be left in a conspicuous place.
  - d. Ensure that the original warrant and the inventory are returned to the court within the time frame directed by the court.
  - e. Complete an offense/incident report to include the following information:
    - i. Date the search warrant was received.
    - ii. Date of service.
    - iii. Location of service.
    - iv. Name of person on whom, or location where, the warrant was served.
    - v. Name of the judge and court who issued the warrant.
    - vi. Names of those persons present when the warrant was served.
    - vii. Items seized in the search.
    - viii. Any arrests and/or pending charges.

### **B. Exceptions to Search Warrants**

Anytime a warrantless search is conducted, officers/agents shall document the search on their daily log, Computer Aided Dispatch (CAD) or offense/incident report as appropriate, including the names and contact information for all witnesses and the facts or circumstances which led to the warrantless search.

1. Consent Search

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- a. An officer may conduct a search without a warrant if the person to be searched voluntarily consents to the search.
  - b. Consent searches are limited in scope by the request of the officer and the permission given by the person granting the consent to search.
  - c. The officer may not legally search beyond the scope of the consent which has been given. The consent to search lasts only as long as the person granting the consent does not change his/her mind or a person with right to equal access revokes the consent.
  - d. The person granting the consent may also limit the area to be searched, i.e., giving consent to search only one room or one area.
  - e. Because there is a legal presumption against a waiver of a constitutional right, the officer has the burden of proving that the consent to search was made voluntarily.
  - f. When possible, officers will utilize both audio and video tape to record the request for consent. Additionally, when possible the request for consent to search should be documented in writing by utilizing the appropriate Consent to Search form.
  - g. If there is a question as to the validity of the consent or the scope of the search, officers should contact a supervisor.
  - h. If a Consent to Search form was completed, it will be retained in a district file. If the consent was recorded, the tape(s) and/or digital files will be maintained in accordance with *OPR: 19 Use of Recording Equipment*. If criminal charges are filed and evidence seized as a result of the search, the tape(s) will be maintained in evidence until the final disposition of the criminal case.
  - i. Officers obtaining consent shall determine that the person has authorization to give consent. An overnight guest, for example, can not legally authorize a search of a house belonging to another.
2. Protective Sweeps
    - a. Officers, who have legally entered a residence or place to conduct a lawful arrest, may conduct a protective sweep or search of the interior of the premises when the officers have a reasonable suspicion that the area to be searched could harbor an individual posing a danger to officers or others.
    - b. Such a search is not a full search of the premises and may extend only to a cursory inspection of those spaces where a person may be found.
    - c. The protective sweep may last no longer than is necessary to dispel the suspicion of danger to the officers.
3. Stop and Frisk
    - a. Officers/Agents may conduct a pat-down of a person they have lawfully stopped when they have reason to believe that the person is armed and/or

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presently dangerous. The pat-down is for the purpose of detecting weapons and not contraband.

- b. Factors to consider include:
  - i. The subject's movements.
  - ii. The subject's reputation for being armed.
  - iii. Visual clues as to the presence of weapons.
  - iv. The type of criminal activity in question.
- c. The pat-down may include the person's clothing, baggage, and the immediate area surrounding the person from which they could obtain a weapon when there is reasonable suspicion that the area may contain a weapon.
- d. Items that feel as if they may be weapons may be removed to determine what they are.
- e. Officers/Agents must document and articulate the reasons for pat-down searches utilizing their daily log, CAD, criminal complaint, statement of probable cause, or offense/incident report anytime a pat-down is conducted. If the contact was recorded, the recordings must be retained in accordance with *OPR: 19 Use of Recording Equipment*.

#### 4. Fresh Pursuit

- a. When entering a dwelling in fresh pursuit of a suspect, an officer/agent must have probable cause to believe that a crime has been committed, that the person they are pursuing committed it, and that the person is in the dwelling they are entering.
- b. The scope of the search must be limited to areas where the suspect reasonably could be found.
- c. If it is believed that evidence may have been placed or hidden in the residence by the suspect and it is not found during a search incident to arrest, a search warrant must be obtained before there is a further search of the residence.

#### 5. Plain/Open View

- a. If an officer/agent is lawfully in an area or at a location, evidentiary items in plain view which are evidence of a crime or contraband may be seized. When dealing with structures or vehicles, once the plain/open view contraband or evidence is seized, no further searching can be continued without consent or a search warrant.
- b. The "three-prong test" which assists in ensuring the legality of this exception is:
  - i. The officer is legally present at the location.
  - ii. The items seized must be immediately recognizable as evidence or contraband.

- iii. The officer has a legal right of access to the items to be seized.
6. Search Incident to Arrest
    - a. A search of the person of an arrestee is permissible to prevent destruction of evidence and to prevent access to a weapon.
    - b. When dealing with motor vehicles, a search incident to an arrest is permissible in the immediate area to remove any weapons that might be used to harm officers or to aid in the arrestee's escape and to seize any evidence which might be destroyed.
  7. Exigent Circumstances
    - a. A warrantless search is permitted when both probable cause and exigent circumstances exist.
  8. Inventory Searches
    - a. An inventory search can be conducted if:
      - i. The object of the search is in the custody or control of law enforcement.
      - ii. The inventory is made pursuant to established police regulations or policies.
      - iii. The search is reasonable.
    - b. If an item is in police custody (example: a vehicle) and police want to search it for evidence, a search warrant must be obtained.
  9. Canine (Dog) Searches - The use of canine searches shall be in accordance with the guidelines set forth in Department policy *OPR: 20 Criminal Enforcement Unit*.

### **C. Other Types of Searches and Seizures**

1. Motor Vehicles
  - a. Probable cause and exigent circumstances are required to search a vehicle. If these do not exist, a search warrant is required. This will not preclude an owner or driver of a vehicle from giving consent to search the vehicle.
  - b. This also does not preclude a warrantless search under any of the exceptions noted previously in this policy.
2. Crime Scenes
  - a. It is always safer to obtain a search warrant than it is to proceed on the assumption that an unknown suspect has no reasonable expectation of privacy in the location which contains the crime scene. Refer to department policy *OPR: 40 Crime Scenes*, for further clarification.
  - b. There is no reasonable expectation of privacy in a public place so any crime scene located in public may be searched and processed as necessary.

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- c. If it is believed that the suspect has an expectation of privacy, then a warrant must be obtained. If in doubt, contact the local district attorney for direction. Refer to department policy *OPR: 40 Crime Scenes*, for further clarification.
- d. When a crime scene is located on private premises officers may only enter the premise without a search warrant or consent for the following circumstances:
  - i. Locate and secure suspects.
  - ii. Provide emergency assistance to injured persons.

Upon the conclusion of these actions all personnel will cease any type of search until a search warrant is issued, consent given or other exigent circumstances arise.

### 3. Strip Searches

- a. Level 1 Strip Searches are searches that may require the removal of outer layers of clothing such as jackets/coats, shoes/socks, belts and/or the untucking of a shirt. These searches may be done without a warrant for the following reasons:
  - i. Incident to arrest
  - ii. Reasonable suspicion the person has weapons, contraband, evidence or other dangerous items that may pose a safety risk to the officer or others.
- b. Level 2 strip searches are searches that require the removal of some or all articles of clothing. In the event a Level 2 strip search is conducted, it shall be conducted in a private location, preferably at a DPS facility or other facility where officers have control over the environment. It shall be conducted, when practical, by at least two Officers, but no more than three of the same gender as the person being searched or of the gender to which that person identifies with. The search shall only be conducted after approval by a supervisor and pursuant to a valid court order or upon written voluntary consent.
- c. The officer shall complete an offense/incident report documenting all the information relevant to any level 1 searches involving an arrest and for all level 2 strip searches.

### 4. Body Cavity Searches

- a. Level 1 body cavity search is a search that includes a visual **only** inspection of the mouth, ears, or nostrils with or without the aid of an artificial lighting device such as a flashlight. These searches may be done without a warrant for the following reasons:
  - i. Incident to arrest, such as checking the mouth for foreign objects during a DWI arrest.
  - ii. Reasonable suspicion the person has weapons, contraband, evidence or other dangerous items that may pose a safety risk to the officer or others.

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- b. Level 2 body cavity search are searches that require the visual or manual search of intimate parts, such as skinfolds, navel, penis (urethra and foreskin) or vagina, and rectum. When information is developed or visual inspection during a search leads an officer to believe an arrestee or suspect has weapons, contraband or evidence concealed within a body cavity, the following procedure will be followed:
  - i. The officer will consult with their supervisor to determine whether or not probable cause exists to seek a search warrant for a body cavity search.
  - ii. If probable cause does exist, the officer will obtain a search warrant or consent to search waiver consistent with departmental policy.
  - iii. Only a medical professional will conduct the search.
  - iv. Level 2 body cavity searches shall only be conducted at a medical facility, unless exigent circumstances exist. The search at the medical facility shall not be directly observed by the officer.
  - v. The officer will complete an offense/incident report and make all warrant returns consistent with current procedure. Officers/Agents shall document and articulate the reasons for the level 2 body cavity search.
5. All strip searches and body cavity searches may be done when involving a juvenile as indicated in the above procedures.

### D. Currency Forfeitures

1. The New Mexico Court of Appeals ruled in the case of *Albin v. Bakas*, 141 N.M. 742, 160 P. 2d 923 (Ct. App. 2007) that whenever New Mexico law enforcement officers seize cash under the authority of the Controlled Substances Act, they must comply with the requirements of the Forfeiture Act. Specifically:
  - a. As soon as possible, the seized currency must be deposited with the clerk of the district court in the county where the seizure occurred. (The court clerk will then deposit the cash into a court-supervised, interest-bearing account.) From that point the court will have jurisdiction over the money.
  - b. Within 30 days after making the seizure, the State (the District Attorney or Attorney General) is required either to file a forfeiture action in the District Court, or else arrange with the court for return of the money. If criminal charges have been filed for violation of the Controlled Substances Act, the forfeiture complaint would be filed as part of the criminal case.
2. These requirements do not apply if a non-state police officer such as a federal agent is present at the scene and makes the initial seizure, or if all persons connected with the currency execute a "Voluntary Disclaimer of Interest and Ownership in Abandoned Currency" prior to the officers taking possession of the cash. However, the Court of Appeals did not authorize New Mexico officers to make the initial seizure but then transfer the cash to a federal officer for forfeiture under federal procedures.

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3. Officers/Agents should contact the DPS Office of Legal Affairs to seek guidance in reference to any situations that arise in the field.

### **7.0 ATTACHMENTS**

- A. **Vehicle Consent to Search Form**
- B. **Consent to Search Premises**
- C. **Voluntary Disclaimer of Interest and Ownership (English)**
- D. **Voluntary Disclaimer of Interest and Ownership (Spanish)**
- E. **Biological Sample Waiver**
- F. **Consent to Search Cell Phone and Related Media**

### **8.0 APPROVAL**

APPROVED BY: S/ Scott Weaver DATE: April 30, 2018  
DPS Cabinet Secretary