CPC RESPONSE TO CDP's JANUARY SEARCH AND SEIZURE REVISIONS

February 21, 2019

Dear Magistrate White,

Enclosed please find the CPC's Search and Seizure Groups response to the City's January Drafts of the (5) General Police Orders related to Search and Seizure.

At the core of the (5) proposed Search and Seizure Polices are Constitutional issues that should not be taken lightly. The 4th Amendment is the backbone of the Consent Decree and violations have resulted in numerous complaint actions, costly litigation and harmful findings against the City. The CPC's Search and Seizure Work Group is unique in quality of knowledge and years of legal experience with 4th Amendment issues. The group may constitute one of the greatest resources ever assembled to examine local police policy. The recommendations made were done thoughtfully, with consideration of current case law from all sides, and reviewed for practicality of application in the field. We stand firm on the following **22** recommendations from each of the 5 policies;

Search and Seizure Policy

Total Outstanding Issues 14

*** Universal policy issues which are broader in scope are tallied in the *Search and Seizure Policy* Portion**

Page/ Issue	Our Recommendation	City's Response
p. 2 Definitions Search	Search: A search is either a physical intrusion into a constitutionally protected area (a "person, house, paper, or effect") for the purpose of gathering information or any conduct that violates a manifested and reasonable expectation of privacy. A search can be conducted by officers, by civilians acting as law enforcement agents, by the use of technology that allows officers to obtain information about the interior of a constitutionally protected area, by the use of technology to gather information that, by virtue of its nature or degree, is reasonably expected to be private, or by the use of technology to conduct long-term surveillance of an individual.	Deleted. No definition in policy
Argument: Every legal dictionary contains a definition of this term when used in the context of the 4th Amendment. If there is a problem with the proposed definition we suggest selecting a commonly used one from other policy or dictionary.		
Page/ Issue	**Our Recommendation**	**City's Response**
p. 2 Definitions Juveniles	Juvenile: A subject under the age of 18 years old. Substitute Juvenile with associated definition instead of "youth" * This is a recommendation that should be applied to all subsequent Search & Seizure Policy	City deleted definition and used the word "youth" without defining it in some instances in

	and **universally** across all CDP policy in an effort to recognize the 21st Century policing goals of reducing harm and building trust.	this policy and subsequent policies.

Argument: Search and Seizure practices have the potential to affect Juveniles with greater magnitude than adults. International Association of Chiefs of Police (IACP) and other leaders in reform have stated Juveniles must be recognized and defined as a matter of policy. Our recommendations for policing policy toward Juveniles are primarily derived from these works on Leadership in Juvenile Justice, and Modern Police Youth Engagement in 2014 and 2018. Juvenile is defined in other CDP court approved Policy such as CIT.
We acknowledge the divisions other work in this area such as the *Engagement with Youth* Appendix in CPOP and the recent program with Shubert Center for Childhood Studies and we encourage the division to be universal in its policy approach and first contact is covered under these policies.

Page/ Issue	Our Recommendation	City's Response
p. 2 Definitions **Gender Identity & Equality** **Use of "They"**	1. Replace all references to **"Gender"** with the term **"Gender identity"** defined as: a subject's innermost concept of self as male, female, or a blend of both or neither. One's gender identity can be the same or different from their sex assigned at birth." 2. **"Gender expression**: the external appearance of a subject's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine." 3. "**Gender nonconforming (GNC)**: a person whose appearance or manner does not conform to traditional societal gender expectations" 4. **"Intersex**: a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female." **5. "Transgender**: a person whose gender identity is different from the person's assigned sex at birth." 6. Replace "**he** or **she**" in policy and the Seizure definition with "**they**" * This is a recommendation that should be applied to all subsequent Search & Seizure Policy (particular emphasis on *Body Cavity and Strip Search Policy*) and **universally** across all CDP	The city has limited its references to traditional male or female binary genders.

	policy in an effort to recognize the 21st Century policing goals of reducing harm and building trust.	

Argument: Our suggestion brings CDP policy in line with the values of Cuyahoga County Residents as reflected in recent Cuyahoga Cty. Council, Ordinance No. O2018-0009, *Anti-discrimination and Equal Treatment for all Residents*. In addition the recommendations are in line with the language of the Prision Rape Elimination Act (PREA) guidelines adopted by the DOJ in 2012 and law enforcement best practices trending nationwide.

Page/ Issue	Our Recommendation	City's Response
Throughout **Military Terminology**	Eliminate use of military terminology such as "tour of duty" * This is a recommendation that should be applied to all subsequent Search & Seizure Policy and **universally** across all CDP policy in an effort to recognize the 21st Century policing goals of reducing harm and building trust.	Organization is Paramilitary and would be burdensome to change

Argument: Military terminology and culture is counter productive to many citizens wants/ needs for cultural change as expressed to the CPC. Specifically referenced in the DOJ report 2014 as a negative example (forward operating base) it also works against the goals of the Consent Decree and is in conflict with the vision of the recent Community and Problem Oriented Policing Plan which states the division *alignment of structure..with community needs/ wants*. Paramilitary organization is not a legal requirement and we believe a commitment from the division to phase out military terminology over a period of time would be a step in the direction of a healthier relationship with the citizens the division serves.

Page/ Issue	Our Recommendation	City's Response
p. 2 Definitions **Trauma Informed Policing**	Include definition of Trauma-informed: An approach that realizes the widespread impact of trauma, and recognizes the signs and symptoms of trauma in community members, and responds to situations in a manner that actively resists re-traumatization. This can include: slowing down the speed of the interaction, reducing stimuli such as lights and loud sounds, explaining the reason for the interaction, avoiding use of threats, and repeating instructions in a calm manner until they are understood.	Deleted – referred to training, CIT policy and de-escalation policy.

Argument: The Cleveland Division of Police have recognized trauma which can occur in officers through their career and have created policy GPO 1.1.38 Traumatic Incident Protocol and GPO 1.1.32 Wellness Program. Recognition of trauma in citizens is equally as important in policy. There is no definition of Trauma informed policing included in the court approved CIT materials or de-escalation materials. De-escalation 1. D lists factors that may contribute to behavior but only references crisis and mental health. Further, trauma and crisis are different concepts. Our recommended definition and corresponding approaches are based on Substance Abuse & Mental Health Administration literature.

Page/ Issue	Our Recommendation	City's Response
p.3, I C & p. 7 VI 2 a. **Equality in Search Methodology**	Add provision (5) as follows: During any search of a transgender, intersex, or gender nonconforming person, including pat-downs or frisks, have the search conducted by either of three options: (1) a medical provider, (2)	Inclusive in provision C 1 and again repeated in generalized way in Strip searches

	a female officer, or (3) an officer of the gender identity with which the person is most comfortable. Prohibit officers from using strip searches to determine subjects gender (repeated in Strip Search Policy as previously recommended). * This is a recommendation that should be applied to all subsequent Search & Seizure Policy (particular emphasis on *Body Cavity and Strip Search Policy*) and **universally** across all CDP policy in an effort to recognize the 21st Century policing goals of reducing harm and building trust.	
Argument: Consistent with PREA guidance as described in previous point. Broadening of what it means to be "professional" and "respectful" as used in C 1 and Strip Search policy is necessary to ensure equality.		

Page/ Issue	Our Recommendation	City's Response
p.3, I D **Reasonable Suspicion**	1. Use or rely on information known or reasonably suspected to be materially false, incorrect, or unreliable in establishing reasonable suspicion for a search or seizure.	Removed "reasonably suspected to be materially false"
Argument: As we increase the training of officers we should also be increasing their ability to apply the law correctly in the street by solidifying it in policy. In other places Search and Seizure policy cites training and experience to establish reasonable suspicion. The practice of disregarding training and experience to reasonably rule out information suspected to be materially false and asking judicial forgiveness later is one that should also be addressed in policy. This recommendation is made consistent with law established in Terry V. Ohio 1968 392 U.S. 1 (1968), Sibron v. New York 392 U.S. 40 (1968) and many cases over the decades since.		

Page/ Issue	Our Recommendation	City's Response
P. 3 II B **Plain View**	Once the discovery is made, officers **may have** the probable cause to seek a search warrant for a more thorough search.	City added the following to statement: Once the discovery is made, officers have the probable cause to seek a search warrant for a more thorough search.
Argument: replace "have" with "may have"		

Page/ Issue	Our Recommendation	City's Response
p. 4 III D **Coercing Exploiting Consent**	D. Officers shall not physically or mentally coerce or exploit an individual in order to gain consent for a search. Examples of coercion include but is not limited to: 1. Threatening to charge person with a crime such as obstruction or disorderly conduct.	City reverted to original policy language: Officers shall not physically or mentally coerce,

	2. Threatening a referral to Department of Children and Family Services. 3. Threatening to obtain a warrant as means of obtaining consent. 4. Threatening to use a K-9. 5. Using an officer's physical proximity or the number of officers as a means of intimation. 6. Threatening to inconvenience or prolong the process.	threaten or exploit an individual in order to gain consent for a search. Generally opposed to using "lists" in policy that can appear in training .

Argument: A general policy prohibiting "coercion" or "threats" is important, but it can be very difficult for an individual officer to know what types of statements are impermissible threats. The proposed list of threats are specific examples, and are drawn from experience as types of threats that are common and should be directly addressed and prohibited. These are also examples that citizens have repeated to the CPC time and again as having observed or experienced resulting in continued harm to relationships.
Included in other policy points are lists that empower police; in this instance list limiting power is both necessary and reasonable. See lists used in Investigatory Stops policy Part I.B.1 (factors that distinguish between a voluntary contact and a Terry stop) and Part III.C (factors possibly giving rise to reasonable suspicion).

Page/ Issue	Our Recommendation	City's Response
p. 5 V B **Lawful Pat Down**	If during a lawful pat down an officer detects an object that is contraband or other criminal evidence, then the object may be seized (Referred to as the "plain feel" doctrine). Non-threatening items may only be removed during the frisk if there is probable cause to believe the item is contraband or evidence of a crime. Threatening items such as weapons may always be removed during frisks.	The City added "might reasonably be" contraband or criminal evidence. Avoided further reference/ Clarity to manipulation and P.C.

Argument: We feel that it is important to clarify the standard articulated in the policy related to the propriety of seizing items during a patdown pursuant to the "plain feel" doctrine. The current language of the policy provides two different standards of when an item can be seized – "an object that is or *might reasonably* be an item that is contraband" and "*probable cause to believe* the item is contraband." The phrase "might reasonably be" does not properly state the standard for seizing an object upon plain feel and thus should be removed from the policy. Moreover, the current policy statement fails to make clear that the officer may not manipulate the object in any way to determine its contents. The following standard is taken directly from the United States Supreme Court's decision in *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

New Suggestion:

V.B.3. During a lawful pat down, an officer may remove threatening items such as weapons. The officer may also seize a non-threatening item if its incriminating character is immediately apparent; which means that the officer has probable cause to believe the object is contraband or evidence of crime (Referred to as the "plain feel" doctrine). Probable cause must arise from the patdown itself without any further manipulation or movement of the object even through the clothing of the subject.

Page/ Issue	Our Recommendation	City's Response
P. 6, V F **Open Carry**	F. A person exercising his/ her right to openly carry a firearm, standing alone or in connection with a call to police that only reports the open carry itself (no other suspicious behavior), does not justify a stop and frisk. * Also recommended as a letter (I) In *Investigatory Stops*, p.3, II	Deleted by City

Argument: The Sixth Circuit, which covers Ohio, recently held that the open carry of a firearm, combined with a 911 call that reported the open carry in question, does not give rise to reasonable suspicion to stop or frisk. Though officers are free to approach and initiate a consensual encounter, they may not stop or frisk unless some additional factors are present. Northrup v. City of Toledo Police Dept., 785 F.3d 1128 (6th Cir. 2015).

Without explicit written guidance on this matter, officers may interpret the law differently and individuals open carrying may be profiled on illegitimate factors such as race. Without clearly written policies the City could face litigation for improper stops. It is not sufficient to only provide this guidance via the training. Our recommendations are as follows:

- Search and Seizure policy, p. 6, V D
  F. A person exercising their right to openly carry a firearm, standing alone or in connection with a call to police that only reports the open carry itself (no other suspicious behavior), does not justify a stop and frisk.

- Investigatory stops policy, p. 3 II, Basis for an Investigatory Stop Add letter I: Direct observation or a call of an individual openly carrying a firearm does not alone, without some additional suspicion, give reasonable suspicion for an investigatory stop.

Page/ Issue	Our Recommendation	City's Response
P. 6 V G **Juvenile Encounters** **De-escalation**	Suggested adding section G which reads: Officers should be aware of the behavioral responses people, especially juveniles, may employ that can impact the tenor and evolution of an investigatory stop in unintended ways. Responses may include: 1. Physical resistance, including fleeing; 2. Verbal challenges; 3. Outright disregard for police directives; and 4. Resignation to perceived mistreatment. Officers must resist the tendency to escalate the encounter by reacting to this less mature behavior and focus instead on the basis for the stop.	Deleted

Argument: CDP operations have potential to affect Juveniles with greater magnitude than adults. De-escalation is a critical component related to the Consent Decree. Although a separate policy exists it does not specifically address juveniles in its content. Also, re-emphasizing de-escalation as a cultural commitment requires repetitive reinforcement in all policy. IACP and other leaders in reform have stated Juveniles encounters must be recognized and defined as a matter of policy. Our recommendations for policing policy toward Juveniles are primarily derived from these works on Leadership in Juvenile Justice, and Modern Police Youth Engagement in 2014 and 2018.

Page/ Issue	Our Recommendation	City's Response
P. 6, VI A 1 a. **Religious Garment**	a. If the removal of a religiously significant garment is required, it shall be done respectfully and, if known and possible, in accordance with the person's religious beliefs, and such objects shall be returned upon search.	No return of object
Argument: the work group suggests adding that "objects shall be returned upon search unless it has evidentiary value"		

Page/ Issue	Our Recommendation	City's Response
X **Training**	Adequate in quality should mean use of subject matter experts in law (J.D.) instructors. This is in line with OPOTA standards for legal instruction. * This is a recommendation that should be applied to all subsequent Search & Seizure Policy	Revert to original generic language which removes JD requirement
Argument: OPOTA advocates and recommends this level as the standard. We have ample volunteers from CWRU Law School, CSU Law School, and other sources willing to contribute time to this effort to the Divisions Academy. The CPC would be happy to solicit a list of qualified individuals for the Division to supplement any deficiency in trainers who meet this standard. The list can be reviewed by the TRC as described in the previous court approved instructor standards.		

Investigatory Stops Policy

Total Outstanding Issues 3

Page/ Issue	Our Recommendation	City's Response
p. 1 Definitions **Consensual Encounter**	A casual encounter between the police and an individual with the intent of engaging in non-investigative conversation in which the officer explains that the individual may decline any conversation, questions and/or is free to leave.	Deleted condition where officer must explain the individual's right to decline conversation and freedom to leave.
Argument: Informing an individual that they are free to decline the encounter is a critical step for ensuring that consensual police-citizen encounters are truly consensual. There is broad recognition that ordinary citizens, when approached by law enforcement officers, believe they are under an obligation to cooperate with the police and answer police questions. This is true even in many encounters that are viewed, under the Fourth Amendment, as consensual. The CDP itself has proposed a similar rule in a comparable context. Under the Search and Seizure Policy, officers who are seeking consent to search are instructed to "inform the person of his or her right to refuse and to revoke consent at any time." This is a very positive step toward fostering respectful police-community interacts and ensuring that individuals who interact with the police understand their rights. We applaud this policy. The proposed language here is analogous. Just like with consent to search, ordinary persons interacting with the police often feel that they are not free to leave or decline the encounter. A simple verbal statement to that effect can help individuals understand their rights and ensure that police-citizen encounters are voluntary.		

Page/ Issue	Our Recommendation	City's Response
p.4, III C Demeanor Training/ Experience	Recommended deleting section and questions	Added: Law Enforcement Training and Experience: Is the person's appearance or demeanor consistent with specific criminal activity? Are the person's actions or demeanor consistent with the environment and/or others in the area?

Argument: Subsection III.C. lays out "factors" upon which an officer can rely to formulate reasonable suspicion for an investigative detention. We readily acknowledge that an officer can rely on his or her training or experience as part of developing reasonable suspicion. Our concern with the current language of this factor is that is that it could be read to suggest racial profiling and/or to encourage to targeting of particular individuals, based upon race, national origin, etc., who seem "out of place." While we have no doubt that was not the intent of the drafting of this section, we believe it is important to modify it to avoid any potential conflict with the City's overarching policy of not using "an individual's gender, race, ethnicity, national origin, or perceived sexual orientation as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause." The minor modification suggested below is also consistent with the well-established proposition that "the Constitution prohibits selective enforcement of the law based on considerations such as race." Whren v. United States, 517 U.S. 806, 813 (1996); see also Floyd v. City of New York, 813 F. Supp. 2d 417, 455 (S.D.N.Y. 2011) (denying the City's summary judgment claim on whether it had adequate training and supervised its officers "on racial profiling and the law of reasonable suspicion"). To leave no doubt on that critical point and to reflect that an officer's training and experience actually impacts the assessment of all the enumerated factors, we encourage the City to modify its existing draft to reflect the following (additions are in red and deletions are crossed out):

C. When formulating reasonable suspicion, officers may rely on activity they perceive through their own senses, training, and experience, and through information obtained from other credible persons, or through a combination of both factors, including but not limited to the following:

2. The Person's Actions: What suspicious activity has been observed? Is the person attempting to flee, making inexplicable movements, displaying signs of nervousness or involved in an activity commonly known to the officer as criminal in nature? Is the person engaged in conduct consistent with specific criminal activity?

~~7. Law Enforcement Training and Experience: Is the person's appearance or demeanor consistent with specific criminal activity? Are the person's actions or demeanor consistent with the environment and/or others in the area?~~

Our suggested revision does three important things: 1) Emphasizes the importance of training and experience and its influence on evaluating all of the enumerated factors; 2) Removes any generic reference to "appearance" (as opposed to fitting the specific description of a crime suspect) or consistency with the "environment" or "area" to avoid any suggestion of improper profiling; and 3) Places an additional focus on the person's actions and whether his or her conduct (as opposed to appearance) is "consistent with specific criminal activity." We believe that this small, yet important change provides clarity consistent with the intent of the policy.

Page/ Issue	Our Recommendation	City's Response
p.6, V A Chosen Name	A. Ohio Revised Code 2921.29 (Failure to Disclose Personal Information) states that no person who is in a public place shall refuse to disclose the person's **legal** name, address, or date of birth when requested by a law enforcement officer who reasonably suspects the following:	Removal of "legal" before name

Argument: It is understood that a person may commonly use or go by a chosen name that differs from their legal name. Examples include persons with nicknames, persons recently married, transgender or gender nonconforming persons, and persons from outside the United States. Violation of ORC § 2921.29 is a crime, a misdemeanor of the fourth degree. It is our view that an individual's reply to law enforcement's demand of identification with their chosen name should not constitute a criminal act, when such name is the name by which they commonly go, and when law enforcement gives no indication as to which name (legal vs. chosen) they desired. Therefore, Equality Ohio suggests the term "legal name" to replace "name" in this section.

Probable Cause/ Warrantless Arrests

Total Outstanding Issues: 1

Page/ Issue	Our Recommendation	City's Response
p. 5, VII C Supervisory Review	Additions in **bold**: 4. For every search or arrest involving the recovery of contraband evidence, whether the circumstances by which the evidence was recovered and/or probable cause for arrest was established are plausible and complete, **unless they ordered the recovery, in which case another officer must conduct the review.**	City reverted to original policy language.

Argument: A supervisor who has ordered an improper search or seizure must not have the authority to review that search or seizure. This recommendation mirrors the Division's Use of Force General GPO ("next non involved supervisor"), in which an officer who has witnessed a suspected unreasonable use of force must report it to the next *non-involved* supervisor in their chain of command. All policies should guarantee integrity of review by prohibiting a supervisor from reviewing their own orders/actions. We recommend the following revision:

- Probable Cause policy, p. 5, VII C [Supervisors shall review reports and forms for deficiencies, including but not limited to:]
  4. For every search or arrest involving the recovery of contraband evidence, whether the circumstances by which the evidence was recovered and/or probable cause for arrest was established are plausible and complete, <u>unless they ordered the recovery, in which case another officer must conduct the review.</u>

Miranda Warning and Waiver

Total Outstanding 3

Page/ Issue	Our Recommendation	City's Response
p. 2, II B Recording of Miranda	Additions in **bold**: B. The questioning officer shall ask the individual to verbally affirm that he or she understands the Miranda Warning (rather than by a nod of the head, or other physical gesture). **The Miranda Warning and subsequent affirmation should be recorded in its entirety via Wearable Camera System (WCS) or alternative method per Ohio Law.**	City reverted to original policy language.

Argument: R.C. 2933.81 describes that electronic recording of Miranda during custodial interrogation ensures integrity of voluntary statements. We strongly recommend that Miranda and subsequent interrogations are recorded when WSC is present or through alternate methods when available.

Page/ Issue	Our Recommendation	City's Response
p. 4 IV C Juvenile Comprehension of Miranda	Our recommended policy: 1. "Having these rights in mind, and having stated that you understand these rights, do you wish to talk to me (or us) now?" 2. Prior to seeking a waiver with a juvenile, officers should assess whether the juvenile possesses the capacity to understand the Miranda warnings and to also appreciate the consequences of a waiver. To determine this, officers should ask youth to spell out the consequences of a waiver. 3. Officers shall only question an individual if the individual has answered in the affirmative to the above question. D. The validity of a juvenile's Miranda waiver may be inferred from the totality-of-the-circumstances surrounding the alleged waiver, including:	The city modified the language and removed the requirement to assess a juvenile's capacity to understand the warnings.

Argument: Our recommendations for policing policy toward Juveniles are primarily derived from these works from IACP on Leadership in Juvenile Justice, and Modern Police Youth Engagement in 2014 and 2018. P. 10 of the 2014 work specifically addresses the problems with juveniles not understanding consequences of waivers.

Page/ Issue	Our Recommendation	City's Response
p. 5, VII Juvenile's Consult with Counsel	We added: D. Requestioning of a juvenile who has invoked Miranda may not occur without first allowing juvenile to consult with counsel.	The City removed this section.

Argument: Our recommendations for policing policy toward Juveniles are primarily derived from these works from IACP on Leadership in Juvenile Justice, and Modern Police Youth Engagement in 2014 and 2018. p.14 of the 2014 work re: "applying common sense lessons about children" the interrogation guide notes "Officers must apply their knowledge of youthful vulnerabilities..." We argue that permitting re-questioning of a child without first allowing the child to consult with a lawyer is purposefully ignoring the "vulnerabilities" of childhood.

Strip Searches and Body Cavity Searches

Total Outstanding 1

Page/ Issue	Our Recommendation	City's Response
p. 2, II D Parental notification of body cavity searches	We added: D. Parents/ guardians must be notified if a body cavity search is conducted on a juvenile.	The City removed this section.
Argument: Assuming that the officers or detectives ordered the body cavity search not conducting the search does not absolve of the duty to notify the guardians.		

We reiterate that there are some issues such as gender equality, para-military terminology and recognition of the issues related to juveniles that are universal and should be examined by the Division in a much larger scope, across all policy.

We appreciate the City's efforts to include the communities concerns and the advice of this work group into the most recent drafts. We look forward to our February 25th meeting with the City's policy team, DOJ representatives and members of the monitoring team to continue the conversation to ensure these policies are in harmony with the purpose of the Consent Decree.

Respectfully,

Gordon Friedman, Chairman

CPC Search and Seizure Work Group