

# TRAINING



# BULLETIN

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*"Department Training Bulletins shall be used to advise members of current police techniques and procedures and shall constitute official policy."*

## OBTAINING A SEARCH WARRANT

The purpose of this Training Bulletin is to set forth Department policy and procedures for obtaining a search warrant and to ensure that the information in a search warrant affidavit is factual, reliable, true to the best of the knowledge of the peace officer affiant, and supports the issuance of a search warrant.

### DEFINITIONS

#### Affiant

A peace officer who swears under oath that the facts contained in an affidavit requesting a warrant are true and correct to the best of his/her knowledge.

#### Affidavit

The affidavit is a legal document. The affidavit is signed in the presence of a judge or magistrate and is a sworn statement made under penalty of perjury setting forth information regarding the search warrant. The information in the affidavit must be based on the personal knowledge of the affiant or based on information and belief which the affiant to the best of his/her knowledge believes to be true. As provided by Penal Code Section 1527, *the affidavit must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.*

#### Presumptive Test

A limited and preliminary chemical test conducted on suspected narcotics that may indicate the possible presence of a specific compound (e.g., cocaine, THC, Ecstasy, Methamphetamine, etc.). A presumptive test is not merely determining the presence or absence of a substance through one's sensory perception (i.e., sight, smell, or touch).

#### Search Warrant

A written order signed by a judge, magistrate or other judicial authority, authorizing and directing a peace officer to search for a person or persons, a thing or things, or personal property and other evidence of a crime and bring it before the court (Penal Code §1528).



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## Obtaining a Search Warrant, Index Number I-F

### **POLICY**

It is the policy of the Oakland Police Department that every officer who prepares a search warrant affidavit shall ensure the contents of the affidavit are true and correct to the best of the officer's knowledge. The officer shall review the entire affidavit and verify all the information prior to presenting the affidavit to the judge or magistrate for signing. The officer shall not rely on assumptions regarding any facts asserted in the affidavit. The officer shall submit the affidavit to his/her supervisor and a commander for review prior to submission to a judge or magistrate. The officer shall be aware that any material errors, omissions, or misstatements of the factual basis for the warrant - whether intentional or not - may result in an illegal search and seizure, cause a violation of a person's constitutional rights, expose the officer to criminal prosecution and/or disciplinary action, and expose the officer and the Department to civil liability.

### **BACKGROUND**

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures. One mechanism for assuring that a search is reasonable is by obtaining a search warrant from the court. In considering whether to issue a search warrant, a judge or magistrate relies upon the search warrant affidavit prepared by the affiant. Thus, the search warrant is one of the more powerful and valuable tools available to law enforcement.

While the general process of applying for and obtaining a search warrant should be familiar to most officers, there are many technical and legal pitfalls that must be avoided. Failure to recognize these challenges may result in the invalidation of a search warrant, the suppression of evidence or dismissal of cases, and present serious liability implications for involved officers and the City. Therefore, officers must have a sound knowledge of the legal requirements associated with obtaining a search warrant in order to prevent the suppression of evidence, protect the Constitutional rights of persons, and maintain public confidence in the Department's ability to carry out the police function in an ethical and legal manner.

A search warrant is approved by a judge or a magistrate upon a finding that the affiant has properly articulated probable cause under oath to support the issuance of the warrant. The probable cause standard is a requirement of the Fourth Amendment and cannot be compromised, minimized, or substituted with a lesser level of proof.

An affiant who signs a search warrant affidavit swears and affirms the following:

1. The information contained in the affidavit is true and correct and that it is based on his or her personal knowledge;
2. The information contained in the affidavit and which was obtained from other sources is believed by the officer to be true and correct to the best of the officer's knowledge;
3. That no information that would detract from the probable cause has been purposely omitted; and
4. The affidavit is not purposely over-broad to include additional items and places without good cause.



It is the responsibility and duty of the officer affiant to ensure that the contents of the affidavit are true and correct to the best of his/her knowledge. Improper preparation of the affidavit is the most common focus of defense lawyers seeking to attack the validity of a search warrant. Any officer that swears to the facts contained in an affidavit without ensuring that the facts are true and correct based on personal knowledge or information believed by the officer to be true commits, at a minimum, a reckless disregard for the probable cause requirement of the Fourth Amendment.

### **AFFIDAVIT PREPARATION**

In order to obtain a search warrant, an officer must prepare a written affidavit<sup>1</sup> showing probable cause for the issuance of the search warrant. The affiant must state facts establishing probable cause for the seizure of the described items at the described location(s). Probable cause is shown by articulating that specific evidence, contraband or fruits of a crime may be found at a particular location. Specific facts establishing probable cause shall be set forth with clarity and specificity. Such facts shall be based on personal observation/knowledge of the officer; or information from a reliable source and which the officer believes to be true. Officers shall not rely solely upon personal opinion, assumptions, hearsay, or information from an unconfirmed third-party.

To satisfy the constitutional requirement of specificity, a search warrant affidavit must clearly state the following:

1. The offense in relation to which the search is being conducted;
2. The person, place, or thing to be searched;
3. The items to be searched for; and
4. The probable cause for believing that such items are to be found at that location.

If any of these elements is lacking, incomplete, erroneous, or otherwise insufficiently stated, the affidavit is insufficient, and any warrant issued based upon the affidavit may be found to be invalid.

An affidavit supporting an application for a search warrant shall be prepared on an appropriate form accepted by the court. Officers shall ensure that the following information is clearly and completely specified (Penal Code §1529):

1. Offense

The offense shall be described with reference to the criminal code section where possible.

2. Person to be Searched

The person to be searched must be described with specificity including a name if known, physical description and distinguishing marks, if any.

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<sup>1</sup> In critical and time sensitive investigations, search warrants may be obtained without first completing a written affidavit via an oral presentation (usually over a telephone) providing facts supporting probable cause. However, this method is reserved for extremely urgent cases and the affiant must still obtain approval from a supervisor and a commander prior to contacting the judge.



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### 3. Place or Thing to be Searched

The place or thing to be searched shall be described with specificity, and officers shall ensure that the warrant includes the specific reference(s). Where premises are to be searched, references must include:

- a. Street number and apartment number if appropriate;
- b. Physical description of the premises; and
- c. Name of owner or occupant, if known.

### 4. Scope of the Search

The affidavit shall specify the following:

- a. All areas to be searched. In cases where officers wish to conduct a complete search of a home and its surroundings, the affidavit must specify a premises search and adjacent areas, and must identify any outbuildings such as garages, tool sheds or barns;
- b. All motor vehicles known to be on the premises or adjacent areas and intended to be searched. A vehicle description must include the make, model, number of doors, color(s), license plate, and any distinguishing features (custom wheels, tinted windows, etc.);
- c. All searches (other than pat searches for weapons) of specific persons known to be on the premises and intended to be searched, by name if possible;
- d. All specific items to be searched, described in detail; and
- e. Officers anticipating search of computers and related high-technology equipment shall consult a designated expert regarding procedures for the proper seizure of hardware and software.

### 5. Time and Method of Search

A search warrant may be served at any time of the day or night as long as the affidavit provides good cause and permission is granted in the warrant. If nighttime service has not been approved by the issuing magistrate, the acceptable hours of service are limited to 0700-2200 hours.

## Drug Evidence Testing

Affidavits filed in support of search warrants seeking the recovery of narcotics often contain provisions regarding the testing of the drugs recovered. Therefore, it is important to understand the various ways in which drugs are tested by the Department and which information can then be used to support the issuance of a warrant.

1. A positive test result regarding suspected drug evidence is not a requirement to establish probable cause to believe the drug evidence is contraband or that more will found. **No test is required to obtain a search warrant.**



Examples:

- Suspected marijuana is discovered in a residence after a fire or burglary occurred. No drug test is needed to establish probable cause to believe more will be found.
  - Suspect is detained after leaving a suspected drug house that is under surveillance. A kilogram of suspected cocaine is recovered from the suspect's vehicle. No drug test is needed to establish probable cause to believe more will be found in the house.
2. An officer affiant's statement in the affidavit can be sufficient to establish the necessary probable cause to obtain a search warrant without a test. The affiant officer shall describe:
    - a. How the evidence is obtained: purchased by an informant or undercover officer asking for a "dime bag" or a "twenty piece";
    - b. How the evidence is packaged: knotted clear plastic wrap, toy balloon, clear plastic zip lock baggie;
    - c. What the evidence looks like: chunky off-white material, leafy green organic plant; and
    - d. Other descriptors that indicate to a reasonable person a fair probability that the evidence is an illegal substance, such as the affiant's experience and training which led the officer to believe the items to be seized are evidence, contraband, or fruits of a crime.
  3. It does not matter if the substance is later determined to be "bunk" or something other than an illegal substance. What matters is whether the affiant officer properly and reasonably believed and articulated in the affidavit a belief that the substance was an illegal drug.

### **Presumptive Tests**

Presumptive chemical tests shall not be conducted except by qualified criminalists assigned to the Criminalistics Division. Police officers shall not conduct presumptive chemical tests.

### **Criminalistics Division Procedures- Drug Evidence Testing**

Drug evidence submitted to the Criminalistics Division is not automatically tested. Criminalistics Division personnel will test drug evidence for Department personnel only upon written request from the Narcotics Charging Unit.

A written request from field officers to test drugs is not necessary when drug evidence is recovered by a field unit and:

1. A suspect is in custody; or
2. A suspect is identified and not in custody (complaint warrant may be requested).

The Narcotics Charging Unit is responsible for making all drug test requests for persons arrested with suspected narcotics or to charge an out-of-custody named suspect with a drug offense. Field units do not request drug tests under these circumstances.



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In all other circumstances, the requesting officer shall complete and submit the Drug Analysis Examination Request (TF-3341) form (available on-line) to the Narcotics Charging Unit via Department email addressed to **DL – OPD – Drug Test**.

Prepare the Drug Analysis Examination Request form to request testing of drug evidence under the following circumstances:

1. When preparing an affidavit for a search warrant when an affiant wishes to use drug test results to establish or support probable cause; or
2. When a follow-up investigator has drug evidence and requires testing for charging.

**NOTE:** Drug test results are not routinely required by the court to obtain a search warrant.

The Narcotics Charging Unit shall submit all requests made to the Criminalistics Division on the Drug Inventory and Analysis Request Log (TF-3341-1) (available on-line).

Training Bulletin IV-N *Submission of Evidence to the Laboratory, Requests for Laboratory Examination Services and Reports* provides additional instructions regarding requests for drug tests. The Criminalistics Division will normally be able to conduct the test and provide results within 24-48 hours (not including weekends and holidays).

The Narcotics Charging Unit and Criminalistics Division assign tracking numbers (“D” number) to all suspected drug evidence received. This number does not indicate that the drugs have been tested. Drug evidence will have a tracking number but may not have been tested.

Officers requesting test results – documented in the Chemical Analysis Report (TF-708) prepared by the Criminalistics Division – may contact the Drug Analysis Unit directly at 238-3901. Although test results may be obtained via the phone or email, a search warrant affidavit stating that the Criminalistics Division tested the drug evidence must include information regarding the test results obtained from the Chemical Analysis Report from the Criminalistics Division.

### Use of Informants

Informants shall be handled, and their management reviewed and approved in accordance with the provisions of DGO O-4 *Informants*. When informants are used—particularly confidential informants—the reliability of the informant and information provided shall be specified. Whenever possible, officers shall corroborate informant information.

### Review of Affidavit and Search Warrant

The affiant and his/her supervisor and a commander shall review the affidavit, or oral presentation<sup>2</sup>, and confirm all of the following:

1. If suspected drug evidence was involved and the drug evidence was tested by the Criminalistics Division, the affiant confirms the results of the test with a criminalist by obtaining the written Chemical Analysis Report prepared by the OPD Criminalistics Division. A statement documenting receipt of the Chemical Analysis Report shall be included in the affidavit. In addition, the following information shall also be included in the affidavit:

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<sup>2</sup> The review is required anytime a search warrant is to be requested, including when affiant is seeking an oral or telephonic warrant.



- a. Name of Criminalist providing test result information;
  - b. Date and time the Chemical Analysis Report was obtained; and
  - c. Drug test results.
2. Probable cause, which supports the issuance of the search warrant, is properly articulated;
3. Statements regarding affiant's experience and training;
4. Statements asserting the affiant's expertise in any area of specialty; and
5. The reviewing supervisor and commander shall review the affidavit for errors, omissions, and inconsistencies (names, suspect's descriptions, addresses, drug type, vehicle descriptions, etc.).

### **Supervisor and Commander Responsibilities**

Supervisors and commanders shall review the affidavit (or review the oral statements) in support of a search warrant prepared by his/her subordinate prior to submission to a magistrate and identify language that appears routine or standard to ensure all information contained in the search warrant affidavit can be verified by the affiant. Supervisors and commanders shall review the affidavit to prevent any intentional or unintentional errors, omissions, or misstatements of the factual basis for the warrant. Reviewing supervisors and commanders shall also review the search warrant and relevant Chemical Analysis Report confirming the test results of the suspected evidence referenced in the affidavit.

Reviewing supervisors and commanders shall document his or her review and approval of search warrant affidavits and search warrants on the Search Warrant Approval (TF-3343) form. The affiant's supervisor and a commander shall complete the form prior to the affiant presenting the affidavit and search warrant to a magistrate. In the event a Deputy District Attorney reviews the affidavit and search warrant, the affiant shall write in the name of the reviewing Deputy District Attorney. Supervisors and commanders do not sign the affidavit or search warrant.

Search warrant affidavits and search warrants shall not be presented to any magistrate without the prior approval of both a supervisor and a commander.

### **Search Warrant Service**

The affiant shall ensure the following:

1. A copy of the signed search warrant<sup>3</sup> is left at the location of the search (there is no requirement to leave the affidavit that was written in support of the search warrant);
2. A receipt for evidence seized is provided to the proper person (Pen. Code, §1535);

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<sup>3</sup> Information may be redacted to protect the integrity of the investigation and avoid furnishing information that may undermine or compromise the investigation.



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3. Areas/property searched shall be photographed or video taped before and after searches to document the condition of the area/property searched and specifically to document the lack of or any damage or destruction of property. In the event areas/property searched are not photographed or video taped before and after searches a supervisor shall be advised and such advisement documented in the Crime Report; and
4. Evidence is properly handled, collected, and deposited with the Property and Evidence Unit in accordance with the provisions of DGO H-3.

### **Return of the Warrant / Evidence Inventory**

Officers shall observe statutory and administrative requirements regarding returning to the issuing court the original search warrant and an inventory of evidence seized pursuant to the search warrant (Penal Code §1534).

A warrant must be executed and returned to the issuing court within 10 calendar days of its issuance. If the 10<sup>th</sup> day is a court holiday or weekend, the next court day is permitted. The 10 days start after the day the warrant is signed. After the expiration of the 10 days, the warrant, unless executed, is void.

### **Submission of Records**

Any search warrant service shall be documented in the appropriate report regardless of whether evidence is recovered (i.e., Crime Report, Supplemental Report). The affiant shall include a copy of the affidavit, Search Warrant Approval form and a copy of the signed search warrant in the case packet.

Additional copies of the affidavit, search warrant, return of the search warrant (inventory), Chemical Analysis Report (if applicable) and Search Warrant Approval form shall be forwarded to the CID Commander who shall ensure the documents are scanned and stored in an electronic folder for auditing purposes and retained for a period of at least five (5) years.

### **Sealing Affidavits**

All documents relating to a search warrant become open to the public as judicial records following execution and return of the warrant, or after the 10 day period expires. However, certain limited circumstances provide for sealing of a search warrant (Penal Code §1534).

Sealing a warrant may be necessary to protect the identity of a confidential informant or to protect the integrity of an on-going investigation. If any portion of the affidavit is to be sealed, that fact may be disclosed on the face of the warrant and the request to seal shall be included in the affidavit.

### **Confer with the District Attorney's Office**

Officers seeking warrants in unusual situations or where the seriousness, nature or legal complexity of the case dictates shall consider reviewing the case with the District Attorney's Office prior to seeking a search warrant.





## **Monthly Inspections/Reviews and Reports**

### Inspections/Reviews

Division Commanders shall:

1. Conduct monthly inspections/reviews of search warrant affidavits, search warrants, returns of search warrants (inventory), Chemical Analysis Reports, and Search Warrant Approval forms completed by personnel under their command;
2. Copy the above mentioned documents in order to perform the monthly inspections/reviews and retain the source documents for at least 60 days;
3. Ensure the above mentioned documents are compliant with this Training Bulletin; and
4. Document the results of the inspections/reviews in the Monthly Management Report submitted to the Bureau Deputy Chiefs.

### Annual Audits

Internal: The Office of Inspector General shall conduct an annual compliance audit of search warrant affidavits, search warrants, inventory forms, Chemical Analysis Reports, related crime and arrest reports and Search Warrant Approval forms.

External: The Office of Inspector General shall request an independent government agency to conduct an annual compliance audit of the following documents:

1. Search Warrant Affidavits;
2. Chemical Analysis Reports used to support affidavits;
3. Search Warrants;
4. Return of search warrant forms (inventory);
5. Search Warrant Approval forms; and
6. Related Crime Reports and Arrest Reports.

## **Search Warrant Training**

1. All sworn members shall complete an online "Search Warrant Fundamentals" course through the POST Learning Portal website.
2. The Training Section shall develop and present additional courses as needed to meet the training needs of the Department.

## **Common Myths About Search Warrants and Drug Testing**

- **MYTH:** A positive chemical test result is required to obtain a search warrant for drugs.

No test is required. A statement establishing probable cause to believe drug evidence was obtained and additional drugs will be in the place to be searched at the time of the search is sufficient.

- **MYTH:** A 72-hour time limit to obtain a search warrant begins when the suspected drugs are purchased.



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There is no predetermined time limit. There is no 72 hour time limit rule. The only “limit” is if the probable cause for the search warrant evaporates due to changing conditions, or a significant amount of time passes, and this is known to the affiant. For example, the suspect moves to another state and no longer sells drugs from the residence and there is no probable cause to believe anyone else is selling drugs from the residence and the affiant is aware. In this case, the probable cause for the search warrant is gone and has “evaporated” and the warrant is no longer valid.

- **MYTH:** All suspected drug evidence submitted to the Oakland Police Department Crime Lab is tested.

This is not true. Drug evidence is only tested upon request. Drug analysis requests from Department personnel must be submitted in writing to the Narcotics Charging officer. Simply submitting a drug envelope to the lab does not constitute a written request to test the suspected drug evidence.

- **MYTH:** Suspected drug evidence “cases” assigned a Drug Number (“D” Number) were tested and the test result is positive.

Drug Numbers do not indicate test results or that a test was performed. Drug Numbers are tracking numbers only. The number is assigned to all drug evidence when the lab receives it. The number does not have any significance other than to identify and track the suspected drug evidence.

- **MYTH:** Officers can perform a “visual presumptive test” in the field.

There is no such thing as a “visual presumptive test.” A presumptive test is a chemical test where a sample of the suspected drug evidence is introduced to a chemical designed to indicate the possible presence of a specific chemical compound or group of compounds. Merely observing the size, color, odor and texture of suspected drug evidence *is not a test*. However, these observations are important and may establish the necessary level of suspicion to believe the suspected drug evidence is real.



### Checklist for Affidavits and Search Warrants

- ☐ Make sure the affiant's name appears on the face of the affidavit and warrant. If there is more than one affiant, the name of each must appear unless the identity of an affiant is to be sealed.
- ☐ Check the appropriate statutory grounds for issuance on the warrant and affidavit forms (Penal Code Section 1524).
- ☐ Describe the location, vehicle and person to be searched with sufficient particularity. If separate search warrant and affidavit forms are used, the descriptions must be identical in both the search warrant and affidavit.
- ☐ Describe the items to be seized with sufficient particularity. A general description such as "all papers" or "stolen property" is insufficient. List only those items which there is probable cause to believe will be found. Do not list items that are merely hoped will be present.
- ☐ Prepare the statement of probable cause.
  - ✓ Set forth the identity, experience and expertise of the affiant. The affiant's expert opinion may be necessary to explain certain observations made by the affiant. The affiant's opinion may not have much weight unless the affiant's expertise and experience is first established.
  - ✓ Set forth the personal observations of the affiant.
  - ✓ Set forth information received from informants. Establish reliability and express information in a factual manner reflecting personal knowledge of the informant, if possible.
  - ✓ Include corroboration as needed to support probable cause.
  - ✓ Make certain it is clear that the information set forth is current. Avoid staleness. Update old information or explain why it is still accurate.
  - ✓ Make certain all attachments and exhibits are complete, legible and clearly labeled.
  - ✓ Be certain that the affidavit connects up to the suspect with the location to be searched, the suspect with the items sought, and the crime with the items sought. Failure to connect up or to show a nexus is a common error.
- ☐ Set forth the reasoning and conclusions of the affiant as based upon the information set forth in the affidavit. The affiant must conclude that the items sought are at or on the premises, vehicles and persons to be searched.
- ☐ Proofread particularly for transposed or incorrect numbers.
- ☐ Make sure all parties sign in the correct spaces.
- ☐ Do not rely on affidavit/warrant templates or boilerplate language.
- ☐ If a confidential informant is used ensure compliance with DGO O-4 *Informants*.
- ☐ Confirm that the Chemical Analysis Report results match the results reported in the affidavit.