

Recommendation xx: MPD should collect data on how many times officers request consent to search individuals and places, and on the demographics of those who are subject to such requests and searches. Whenever officers are in range of an operable recording system, they should audio record the entire consent encounter. MPD should amend its SOPs to require, prior to any consent searches, that officers explain to individuals that they have a right to refuse consent. MPD should change its current SOP to require presentation and signature of a consent to search form when audio recording of the encounter is not possible prior to executing a voluntary search. [OIR 107]

Discussion: This recommendation originated from OIR 107, which stated that “MPD should change its current SOP to require presentation and signature of the consent to search forms prior to executing a voluntary search.”

The Fourth Amendment to the U.S. Constitution protects people against unreasonable searches. Absent a warrant or probable cause, police can only conduct a search if the person to be searched consents. President Obama’s Task Force on 21st Century Policing recommends “Law enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause. Furthermore, officers should ideally obtain written acknowledgement that they have sought consent to a search in these circumstances.”

MPD has policies that address consent searches, but none require officers to inform people of their right to refuse to consent to a search. Nor do the SOPs require officers to complete “consent to search forms” as evidence that the search was consensual.

Many people do not understand they can refuse to consent to a search. The law does not require police officers to inform people of their rights before asking for consent to search, and most people are predisposed to comply with any request a person in authority (such as a police officer) makes of them. As OIR noted, routine use of consent to search forms would align MPD policy with the Task Force recommendations and best practices.

MPD opposed this OIR recommendation, arguing that it has an SOP on consent searches that is adequate (in that it requires officers to have an articulable reason for requesting consent to search and requires the officer to document the reason in a report) and contending that consent forms are cumbersome.

The Ad Hoc Committee recognizes the importance of ensuring that Madison residents fully understand their right to refuse to consent to a search. Therefore, it adopts an amended version of this recommendation. The reasons for each part of the amended recommendation are:

1. MPD should collect data on how many times officers request consent to search individuals and places, and on the demographics of those who are subject to such requests and searches.

President Obama’s Task Force on 21st Century Policing recognized the importance of internal collection and promulgation of demographic data regarding police activity. As a core recommendation, the Task Force recommended that law enforcement agencies should “regularly post on their website information about stops, summonses, arrests, reported crime and other law enforcement data aggregated by demographics.”

Data collection serves several important functions. It can be used to build trust with the community by providing transparency and insight into police operations; it allows for both internal and external analysis that can be used to identify problems and improve performance; and it allows for identification of any racial disparity trends.

2. Whenever officers are in range of an operable recording system, they should audio record the entire consent encounter.

The best evidence that a search was consensual is a recording of the entire encounter. This will allow the encounter to be examined in context to determine if the consent to search was truly voluntary. Moreover, this would often provide an easier means of documenting consent than obtaining signature of a form. MPD does not oppose this recommendation but notes that not all squad cars have recording capabilities.

3. MPD should amend its SOPs to require, prior to any consent searches, that officers explain to individuals that they have a right to refuse consent.

This recommendation is consistent with the position of President Obama’s Task Force on 21st Century Policing that people should be informed of their right to refuse to consent to a search. The first step to gaining trust and building relationships is to be honest with people and inform them of their rights.

4. MPD should change its current SOP to require presentation and signature of the consent to search form when audio recording of the encounter is not possible prior to executing a voluntary search.

The Ad Hoc Committee recognizes that officers may not always be in range of, or have access to, a recording system. In those circumstances, requiring the use of the consent to search form provides some evidence, albeit not definitive, of the voluntariness of the consent. Again, this recommendation is consistent with the position of President Obama’s Task Force on 21st Century Policing.

Recommendation xx: MPD should consider whether there is sufficient accountability in its disciplinary process regarding violation of integrity and force. [OIR 128]

Discussion: It is critically important that the public have confidence that MPD will hold its employees accountable for violations of integrity and force. MPD uses a disciplinary matrix that categorizes offenses and the range of standard sanctions. The matrix is designed to promote consistency and fairness in disciplinary actions. OIR found evidence of a potential pattern of

leniency in discipline, including breaches of integrity handled as lesser violations, sanctions weaker than those specified in the disciplinary matrix, and minimal use of suspension days. MPD's philosophy that the goal should be to reform officer behavior and have officers accept responsibility, rather than to punish, is laudible. But OIR expressed some concern about whether consequences for violations are significant enough to offer appropriate accountability and send a firm message. MPD notes it is committed to a robust system of internal accountability. This recommendation demands nothing more than that MPD itself re-assess whether its disciplinary process is demanding sufficient accountability. The recommendation is significant, nonetheless, especially in light of the role envisioned for the Independent Monitor proposed in the Committee's Recommendation #1. Central to ensuring there is sufficient accountability in the disciplinary process is an independent monitor who would review internal investigations and provide an assessment of potential violations of policy, outcome, and level of discipline independent of MPD.

Recommendation xx: MPD should expand its restorative justice disciplinary program to authorize and address courtesy violations or other low-level violations involving police/civilian contacts. [OIR 129]

Discussion: Restorative justice is a framework applied in situations of wrongdoing as an alternative to retributive punishment. It emphasizes repairing harm—recognizing the needs of the person(s) harmed, the needs of the community in order to heal and restore, and the needs of the person who caused the harm. Restorative justice is an essential component of an effective disciplinary system. OIR states that:

It appears from the language of MPD's policy, however, that the use of restorative justice is limited to performance issues. Other police agencies have used these remedial principles in a broader array of situations. For example, officers who have found to have been discourteous or who have violated a Department's social media policy could be asked to write a letter of apology to the complainant. This type of remediation more directly addresses the transgression and has the added benefit of atonement to complainants in the true spirit of restorative justice.

MPD contends that it uses restorative justice as part of its disciplinary process to address a broad array of issues, not just performance issues. The Ad Hoc Committee encourages use of restorative justice for courtesy violations and other low-level violations involving police/civilian contact. This is likely to provide better remediation of officer behavior and greater satisfaction to victims of violations, and could facilitate building trust between MPD and the community.

Recommendation xx: While retaining the ultimate determination on select the Chief, the PFC

should consider ways to involve the Madison community in the process for selecting the Chief through community panels and interviews. [OIR 140]

Discussion: President Obama's Task Force on 21st Century Policing recommends that law enforcement agencies establish civilian oversight mechanisms within their communities. Increasing community involvement is an important way to increase trust and reduce alienation and misunderstanding between the community and law enforcement.

There are several methods communities can use to promote community involvement, and one of those ways is to involve community members in the selection of the Chief of Police. Other recommendations in this report address other methods, such as the establishment of an independent monitor and a civilian review board, and community input into formulation of Departmental policy. Community input into such decisions is one of the defining characteristics of true community policing. For example, as Lincoln, NE Public Safety Director Tom Casady notes:

Ultimately, citizens should be involved in major decisions that a police department makes. For example, election of a police chief, major promotions, important policy questions and oversight of the police. That's what we practice here in Lincoln and I think that's what distinguishes us from other cities that claim to be practicing community policing.

The Madison Police and Fire Commission (PFC) is a five-person board whose members are appointed by the Mayor. Pursuant to state law, the PFC is responsible for selecting a Chief of Police when a vacancy occurs. The PFC controls the application process, which traditionally has involved interviews between the PFC members and candidates. Currently, there is little community input or effort to engage the community in the selection process. While the PFC is appointed to represent the community, the perspectives of PFC members may not fully represent the perspectives and knowledge of community members. Members of communities most impacted by policing are likely to be underrepresented in PFC appointments. Moreover, Chiefs exercise a great deal of power and autonomy, and the law requires a finding of cause to remove a Chief from office. The practical effect of the law is that a Chief can serve as long as s/he wants even if the community decides a Chief is not serving its best interests. Thus, an absence of community input during the selection process is problematic.

In selecting a new Chief, OIR suggests that the PFC should find a range of ways to solicit input from the broader Madison community. For example, the interview process can provide one opportunity for meaningful public input and engagement. As OIR notes: "*A number of jurisdictions have recently included a public component to the Chief selection process in which community panels are provided the opportunity to ask questions and engage with the final set of candidates.*"

MPD takes no position on this recommendation. The PFC does not oppose this recommendation. The Ad Hoc Committee strongly endorses this OIR recommendation.