

then stops and tickets that motorist. If that officer chose to only stop Black drivers, then he would be guilty of racial profiling.

If, on the other hand, that officer only stopped every second car that ran the stop sign, without regard to race, that officer would not be guilty of racial profiling. Even so, if 50% of the motorists so stopped were Black, those stops still ended up being racially disproportionate.

Take this example one step further. Imagine two police departments are deciding where to place their police officers to watch stop signs, just like the officer in the above example. They both tell their officers to stop each and every person that runs the stop sign. But in one department, command staff evenly distribute officers throughout the city. The stopped drivers, when tallied by race, then had a racial distribution similar to the city as a whole.

The other department, on the other hand, assigns all its traffic officers to a majority Black neighborhood in which there have been many complaints about stop sign running. Those officers then stop every car they see running a stop sign, just as in the first city. The stopped drivers at the end of the day are largely Black, just like the surrounding neighborhood. Thus, the individual police officers writing tickets in the second police department are not guilty of racial profiling, but the police department's decision to assign all traffic officers to a Black neighborhood had a disproportionate effect on Black residents. And residents in that neighborhood would have good reason to feel treated unfairly.

California law bans individual officers from using race as the reason for a stop. But it does not address how law enforcement patterns on a broad scale, like where to assign officers, can still result in disproportionate and unacceptable effects on BIPOC communities. In other words, California bans individual officers from racial profiling, but it has not yet solved the long-term and historical over-policing of BIPOC communities.

OPD RACIAL PROFILING POLICY IS ALREADY A NATIONAL BEST PRACTICE

Oakland Police Department General Order M-19, implemented in 2004, also prohibits racial profiling. That order prohibits “[t]he use of race, ethnicity, or national origin in determining [1] reasonable suspicion, probable cause or [2] the focus or scope of any police action that directly or indirectly imposes on the freedoms or free movement of any person...” Like state law, this policy has an exception for using race where race is part of a specific description of a suspect. For example, when an arrest warrant is issued for a person, that warrant usually describes the wanted person's height, weight, hair color, eye color, gender, and race.

Note that neither California law nor OPD policy address implicit bias. These two authorities ban the explicit consideration of race when making a stop, but do not

address the effect of implicit bias, the unconscious bias that might seep into a person's decision making without their conscious understanding that they possess that bias. From a disciplinary perspective this is an important point. Employment law principles only allow an employee, like a police officer, to be disciplined if they had notice of a rule at work, and then consciously chose to break it. Generally speaking, unconscious behavior, like implicit bias, is not something for which arbitrators or courts allow employers to discipline employees. Thus, implicit bias is simply not captured in these two authorities. Nor can it be given current employment law principles.

Oakland's policy also goes a step further than state law and most other police departments: it places on officers an obligation to explain their actions to the community. Specifically, officers must explain the reason for the stop, which would hopefully help to allay the stopped person's concern that they may have been racially profiled. Officers are also required to be courteous, apologize for the inconvenience if appropriate, and take a complaint if the stopped person asserts that they have been racially profiled. These requirements are designed to reassure members of the public that the officer had objectively reasonable explanations for their actions independent of race.

In addition, Oakland's policy requires tracking of the reasons for each stop, and the demographics of the persons stopped. Oakland was ahead of most other police agencies in California when it adopted this tracking program over 15 years ago. From this data, we can see the numbers of persons stopped in Oakland, which is discussed further below.

In sum, Oakland policy is similar to state law, and to the racial profiling prohibitions found in other cities. This policy matches current best practice, and at the time of its implementation, pioneered those best practices.

CPRA INVESTIGATIONS IMPLEMENT THESE STATE AND LOCAL POLICIES

CPRA investigates whether an officer complied with OPD policies and California state law. Because OPD policy prohibits the use of race or other protected characteristics in establishing reasonable cause for a detention or search or the scope of any police action, just as state law does, CPRA looks to see whether officers used race in a manner contrary to that policy. CPRA does not have the authority to judge police officer conduct by any other measure than current law and policy.

Under this body of law and policy, it is exceedingly difficult to show that an officer improperly considered race or other protected characteristics on any given occasion. Often, an officer can and does articulate other legitimate reasons for the contact. Officers are required to memorialize those reasons in police reports, should a report be required. Officers also consistently deny using race as a factor in taking action. Those officers' claims are credible when they can show legitimate reasons for the contact other

than race. In those cases, absent any evidence that the officer was dishonest in the reasons provided for the stop, existing OPD policy simply does not allow CPRA or OPD to sustain those misconduct allegations.

CPRA can sustain racial profiling cases when the officer makes statements showing explicit bias. Use of racial slurs, for example, are sustainable as a form of discourtesy, but also are strong evidence of racial bias on the part of the officer using the slur. These cases are rare, but are among those CPRA and other agencies do sustain. Likewise, if the officer's explanation for their enforcement action (whether it is a stop, arrest, or search) is not credible based on the objective facts of the case, this too is a potential sign of racial bias.

At first blush, the fact that few racial profiling cases are sustained might appear an impediment to reforming police departments. That said, racial profiling bans do force officers to have a lawful, specific reason independent of race for each action they take. And with the advent of body worn cameras, we sometimes can see proof of these reasons (or their absence) after the fact. Long-term law enforcement personnel can attest that racial profiling rules like Oakland's and California's really do make a difference in this regard in changing the culture of police officers. Here in Oakland, this ban has been in place for 17 years, long enough to change the culture of policing locally. Thus, OPD's racial profiling policy has been, and continues to be, an important tool in combating explicit racism, even if it does not resolve all of the racially disproportionate results we see in law enforcement.

Even so, rates of traffic stops, detentions, and arrests continue to show a disproportionate effect on BIPOC communities, especially Blacks. Continuing to work on reducing this disparate impact is critically important, even though attempting to prove individual claims that officers have intentionally discriminated rarely results in sustained findings.

For example, in 2020, CPRA closed 96 allegations of harassment/discrimination in 45 cases. CPRA did not sustain any of those allegations. Given the extremely narrow language in OPD's policy and in state law, this result is to be expected. And it is consistent with the experience of other Bay Area cities:

- In San Jose, the Office of the Independent Police Auditor reported in 2019 that none of the 57 allegations of bias-based policing were sustained and that only three such allegations were sustained in the prior ten years. Only one of those was an allegation of racial profiling.
- The San Francisco Department of Police Accountability (SFDPA) reported in its 2019 annual report that it made its first-ever sustained finding of bias-based policing in 2017 after nearly 35 years of investigating such cases. Because I worked on that case as an SFDPA attorney, the people of Oakland can be confident that their CPRA Executive Director is one of the few people in the state to ever sustain a biased policing claim.

- The BART Independent Police Auditor likewise reported that there were no sustained findings of bias-based policing in its most recent annual report.
- Statewide statistics for 2019 show that there were 13 sustained allegations of racial profiling out of 700 allegations the state tracked, and one sustained out of 35 allegations of profiling based on nationality.

Nonetheless, in many cases in which racial profiling is alleged, CPRA does sustain other violations. For example, in 2020 CPRA sustained claims of use of force, discourtesy, failure to take a complaint, and unlawful search and seizure, all of which are commonly alleged in the same cases as racial profiling allegations. In the future, CPRA is looking for ways to work with the Inspector General to determine whether there are any patterns to those kinds of cases.

OAKLAND POLICIES CAN BE, AND HAVE BEEN, EXPANDED TO TARGET IMPLICIT BIAS

Oakland has already taken important steps to reduce disparities in police interactions with community members. In 2019, this Commission implemented a new policy that prohibits officers from immediately inquiring about the probation or parole status of a person who has been stopped and, absent a connection to criminal activity or a concern about officer safety, prohibits officers from searching such a person. This is the first such policy in the nation, so far as we know.

One justification for this change was that an officer's decision to ask for consent to search used to be entirely discretionary. Absent any guidelines for making the request, other than a prohibition on explicitly using race to make the decision, this decision point seemed one vulnerable to unconscious, implicit bias. OPD expects to have data later this year showing what effect this policy change had, if any, on the numbers of BIPOC people searched.

This new probation and parole policy therefore reduces both explicit and also implicit bias. Before this policy, probation and parole searches were entirely discretionary. With no guidance as to when to search – or not to search – officers were left to their own devices to make that call. If an officer did have subconscious, implicit biases they were unaware of, entirely discretionary decisions like whether to ask about probation or parole status is exactly where we would expect such implicit biases to create disparities. In this regard, the probation and parole search policy goes one step beyond the racial profiling policy, in that it seeks to protect against both explicit and also implicit bias. The racial profiling policy, by itself, only guards against explicit bias.

Giving officers more explicit guidance, rather than leaving important decisions solely to discretion, appears likely to be a tool for reducing disparities caused by implicit bias. For example, Oakland has switched to intelligence led policing, i.e., focusing patrol officers on known patterns of crime in specific beats rather than simply patrolling at the officer's discretion to hopefully find criminal activity. Since that time, stops of Blacks have

dropped tremendously in Oakland, both in overall numbers and proportion to all other races, but remain disproportionate. OPD has also conducted far fewer stops overall because of this switch in policy. In this regard, Oakland is ahead of the curve.

Through policies like these, aimed at limiting the role of officer discretion and subjective decision making, we appear to have a strategy to reduce implicit bias from influencing officers' actions. Specifically, by reducing the circumstances in which officers may contact people – stopping or detaining them, conducting searches, asking questions, etc. – and setting objective criteria for such decisions, we close those disparities. To the extent that BIPOC community members are most impacted by police contacts in the first place, these measures to better guide subjective decision making on the part of officers should have a disproportionately beneficial impact on those same communities.

Police interactions with bystanders are another area in which officers are given great discretion in Oakland, and thus those actions are potentially subject to implicit bias. OPD has no specific policy as to how to deal with those watching police actions. OPD appears to provide no formal guidance as to how close to the enforcement action such bystanders can remain, whether they have the right to record the interaction, or how officers should interact with them. Officers currently exercise great discretion in this regard, which can, at a minimum, create the appearance of bias. Other jurisdictions provide more specific guidance, such as the appropriate distances to maintain between bystanders and enforcement actions like arrests. Creating such guidance in Oakland may help reduce the role of bias in officers' decisions about how to handle bystanders, as well as increase public confidence that the treatment of bystanders is consistent regardless of the race of the bystander.

While the fight to eliminate the historically disparate effects of policing in Oakland still requires more work, we should take note that Oakland has been, and continues to be, ahead of most other communities. The innovative strategies we have implemented here have had at least some positive effect, and are now considered best practices that others look to adopt.

For now, then, the best measure of whether Oakland is successfully addressing racial disparities in policing is not sustained rates on complaints of racial profiling, given the narrow language of that law and policy. Rather, a better measure is how well Oakland continues to examine where we can identify disparate outcomes, and change policy to address those outcomes.

Staff Recommendation

Staff recommends that the Police Commission share with the new Inspector General, once hired, the Police Commission's priorities with respect to policy creation in general, and racial profiling in particular. Identifying tasks in which officers are asked to use their

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own discretion, such as the treatment of bystanders, and providing more detailed guidance as to those tasks, appears likely to be an effective strategy in reducing the effects of implicit bias on BIPOC communities in Oakland.

Respectfully submitted,



JOHN ALDEN
Executive Director, CPRA

Attachments (1):

1. OPD DGO M-19



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Index as:

Bias-Based Policing
Prohibitions Regarding Racial Profiling
and Other Bias-Based Policing
Racial Profiling

**PROHIBITIONS REGARDING RACIAL PROFILING AND
OTHER BIAS-BASED POLICING**

I. PURPOSE

- A. The purpose of this policy is to reaffirm the Oakland Police Department's commitment to providing service and enforcing laws in a fair and equitable manner, and to establish a relationship with the community based on trust and respect. Whenever our practices are, or are perceived to be, biased, unfair, or disrespectful, we lose public trust and support and diminish our effectiveness.
- B. The Department recognizes that there has been a growing national perception that law enforcement action is too often based on racial stereotypes ("racial profiling") or other bias-based policing – whether it is against African Americans, Latinos, Asians, Middle Easterners, South Asians, or any other race, ethnicity, national origin, gender, age, religion, sexual orientation, or disability. In Oakland, there is concern within our communities that some members may engage in this behavior. Whether individual members agree or not, we, as an organization, must recognize that this concern exists and be responsive to it.
- C. California Penal Code Section 13519.4(e) prohibits racial profiling by law enforcement officers. This Department policy explicitly prohibits racial profiling and other bias-based policing. It also states the limited circumstances in which members can consider race, ethnicity, national origin, gender, age, religion, sexual orientation, or disability in making law enforcement decisions and actions.

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II. DEFINITION OF RACIAL PROFILING

The use of race, ethnicity, or national origin in determining reasonable suspicion, probable cause or the focus or scope of any police action that directly or indirectly imposes on the freedoms or free movement of any person, unless the use of race, ethnicity, or national origin is used as part of a specific suspect description.

III. POLICY

- A. Investigative detentions, traffic stops, arrests, searches and property seizures by officers shall be based on a standard of reasonable suspicion or probable cause in accordance with the Fourth Amendment of the U.S. Constitution.
- B. Members shall articulate specific facts and circumstances that support reasonable suspicion or probable cause for investigative detentions, pedestrian, bicycle, or vehicle stops, arrests, non-consensual searches and property seizures.
- C. Members shall not consider actual or perceived race, ethnicity, national origin, gender, age, religion, sexual orientation, or disability in establishing either reasonable suspicion or probable cause or when carrying out law enforcement activities EXCEPT when credible and reliable information links specific suspect descriptions to specific unlawful or suspicious activity.

Members seeking one or more specific persons who have been identified or described in part by any of the above listed characteristics may rely on these characteristics in part and only in combination with other appropriate factors.

IV. CONSENT SEARCHES

- A. A consent search refers to searches conducted not based on probable cause, incident to arrest or pursuant to a search warrant, but based on permission granted from the person being searched.
- B. Consent searches are permissible law enforcement tools; however, their use shall not be:

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1. Arbitrary. In other words, the request to conduct a consent search must be reasonable and members should be able to articulate the suspicion that formed the basis for the request.
 2. Based on actual or perceived race, ethnicity, national origin, gender, age, religion, sexual orientation, or disability.
- C. Members shall complete a Field Contact Report (836-314) for each consent search conducted articulating the reason for the search.
- D. Pursuant to Report Writing Manual Insert R-2, members shall complete a Stop-Data Collection Form (Scantron) for each consent search conducted.
- E. Members shall advise individuals of their right to refuse a consent search.

V. CONDUCTING STOPS

In conducting pedestrian, bicycle, or vehicle stops, members shall:

- A. be courteous, respectful, polite and professional.
- B. explain the reason for the stop while asking for identification, unless impractical.
- C. identify yourself.
- D. ensure the length of the detention is no longer than necessary to take appropriate action for the known or suspected offense, and explain the reason for any delays.
- E. answer questions the person may have regarding the stop and explain the disposition of the stop.
- F. apologize for the inconvenience when appropriate.
- G. if asked, provide the procedures for filing a complaint about police services or conduct outlined in DGO M-3 COMPLAINTS AGAINST DEPARTMENTAL PERSONNEL OR PROCEDURES.

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VI. EXAMPLES OF RACIAL PROFILING

A. Examples of racial profiling include but are not limited to the following:

1. Example #1

While on patrol an officer observes a black male driving a new, expensive Mercedes Benz in a low-income neighborhood. The vehicle is not listed on the “hot sheet” nor is it entered in the Stolen Vehicle System (SVS). The officer decides to stop the vehicle to further investigate because he feels the car may be stolen because it appears too expensive for the driver and the neighborhood.

Detaining the driver of a vehicle based on the determination that a person of that race, ethnicity or national origin is unlikely to own or possess a specific model of vehicle is prohibited.

In this particular example, the officer had neither reasonable suspicion nor probable cause to detain the vehicle. Absent additional information or observations that would lead a “reasonable” officer to believe the vehicle was stolen, such as a smashed window or signs that the vehicle was hot-wired, the officer’s stop constitutes racial profiling.

2. Example #2

An officer is assigned to a predominately “white” residential neighborhood. While on patrol, the officer observes a Hispanic male driving a truck late at night. The officer knows most of the residents in the area and does not recognize the Hispanic driver. Recently there have been burglaries in that area. Based on the fact that there have been burglaries in the area, and the driver is Hispanic and the residents in the area are white, the officer stops the vehicle to further investigate.

Detaining the driver of a vehicle based on the determination a person of that race, ethnicity or national origin does not belong in a particular part of town constitutes racial profiling and is prohibited.

In this particular example, the officer’s knowledge of the residents and the driver’s race, even though the race differs from most of the residents in that area, does not provide reasonable suspicion. The

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fact that there have been burglaries in the area may raise an officer's suspicion to vehicles driving late at night; however, even when this information is considered with the other factors discussed, it is an insufficient basis for a detention.

VII. STOP-DATA COLLECTION

Pursuant to Department Report Writing Manual Insert R-2, members shall:

- A. complete a Stop-Data Collection Form for every vehicle, walking, and bicycle stop conducted during their shift. Members shall also complete a Stop-Data Collection Form for every consent search conducted.
- B. print his/her name and serial number at the bottom of every Stop-Data Collection Form completed.
- C. submit completed Stop-Data Collection forms to their assigned supervisor or, in the absence of the assigned supervisor, an available field sergeant or Watch Commander for review and approval.
- D. deposit all completed (and approved) forms in the report writing receptacle at the end of their shift.

VIII. MEMBER RESPONSIBILITIES

Members shall:

- A. not engage in, ignore, or condone racial profiling or other bias-based policing.
- B. be responsible for knowing and complying with this policy.
- C. report incidents of racial profiling as defined in this policy.
- D. be subject to disciplinary action if deemed not in compliance with this order.

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IX. COMPLAINTS

Complaints of racial profiling and other bias-based policing against members shall be:

- A. considered complaints of discrimination (Class 1 violation as defined in DGO M-3) and, as such, immediately forwarded to the Internal Affairs Department.
- B. immediately referred to the member's supervisor, or if the officer's supervisor is not available, to the Watch Commander.

X. TRAINING

- A. Pursuant to California Penal Code Section 13519.4, each member shall:
 - 1. attend POST racial profiling training; and
 - 2. complete an approved refresher course every five (5) years, or sooner if deemed necessary, in order to keep current with changing racial and cultural trends.
- B. The Racial Profiling Program Manager shall ensure line-up training on racial profiling and this policy is provided to sworn personnel at least once annually. This training may also be provided to non-sworn personnel.

XI. SUPERVISORY RESPONSIBILITIES

Supervisors shall:

- A. not engage in, ignore, or condone racial profiling or other bias-based policing.
- B. be responsible for knowing and complying with this policy.
- C. ensure that subordinates under their command know and understand the content and application of this policy.
- D. periodically monitor subordinates under their supervision to ensure compliance with this policy.
- E. review all forms submitted by members to ensure the forms are completed in accordance with this order and Report Writing Manual Insert R-2.

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- F. print his/her name and serial number in the appropriate boxes signifying the form has been reviewed and approved, and return the form to the appropriate member.
- G. conduct periodic audits to ensure compliance with this order.

Supervisors and commanders who fail to comply with this order shall be subject to disciplinary action.

If it is determined that members assigned to a supervisor and/or commander failed to comply with this order and the supervisor and/or commander knew of said violation, or should have reasonably known, the supervisors and/or commander shall be subject to disciplinary action.

XII. BUREAU OF FIELD OPERATIONS

The Bureau of Field Operations (BFO) is responsible for data collection processing. Accordingly, BFO shall:

- A. ensure Stop-Data Collection Forms are available in the Patrol Line-up Room.
- B. enter the Stop-Data Collection Forms into the SCANTRON system within five working days of receipt.
- C. retain completed and scanned forms for period of not less than three years unless otherwise instructed by the Chief of Police.
- D. conduct periodic audits to ensure members comply with the provisions of this order and RWM Insert R-2.

XIII. OFFICE OF INSPECTOR GENERAL (OIG)

Pursuant to the provisions of DGO N-12, Departmental Audits and Inspections, the OIG shall conduct annual reviews and audits of the Department's data collection efforts to ensure compliance with the Settlement Agreement. The OIG shall report all findings to the Chief of Police and the Program Manager.

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XIV. RACIAL PROFILING PROGRAM MANAGER

A. The Racial Profiling Program Manager is responsible for the following:

1. Racial profiling grant management;
2. Coordination of stop-data collection and analysis;
3. Completion of all reports pertaining to racial profiling; and
4. Coordination with the OIG to ensure compliance with the Settlement Agreement.

B. The Racial Profiling Program Manager shall:

1. produce a written report to the Chief of Police at least twice per year that includes an analysis of the data collected, and appropriate policy recommendations.
2. periodically meet with the Oakland Racial Profiling Task Force, which is comprised of representatives of the following organizations:
 - a. Oakland Police Officers' Association (OPOA);
 - b. Citizens' Police Review Board (CPRB);
 - c. American Civil Liberties Union (ACLU);
 - d. National Association for the Advancement of Colored People (NAACP); and
 - e. People United for a Better Oakland (PUEBLO).

By order of

Richard L. Word
Chief of Police

Date Signed: 26 Oct 04