

June 5, 2002

Ms. Ruth Carter
Corporation Counsel
City of Detroit
660 Woodward Avenue, Suite 1650
Detroit, MI 48226-3491

Re: Investigation of the Detroit Police Department

Dear Ms. Carter:

As you know, the Civil Rights Division and the United States Attorney's Office for the Eastern District of Michigan are jointly conducting an investigation of the Detroit Police Department (DPD), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. We greatly appreciate the cooperation of the City of Detroit and the DPD thus far in this investigation.

Our investigation covers three areas: Use of force policies and practices of the DPD; DPD holding cell conditions, policies and practices; and DPD arrest and detention policies and practices. We identified our preliminary concerns regarding the use of force policies and practices of the DPD in our letter of March 6, 2002. We identified our concerns regarding DPD holding cells in a letter regarding emergent conditions on April 25, 2001, and provided more extensive comments and technical assistance recommendations regarding DPD holding cell conditions, policies and practices in our April 4, 2002 letter.

In this letter, we identify several areas of concern regarding DPD arrest and detention policies and practices, along with our recommendations for addressing these concerns. Important aspects of our fact-gathering process have yet to be completed, most notably completing our review of relevant DPD documents. Therefore, this letter is not meant to be exhaustive, but rather focuses on significant concerns identified in our review of the DPD's policies and procedures, a preliminary review of the documents that the DPD has produced and interviews with over 100 DPD employees. Please note that we may identify additional issues, and that the concerns discussed below do not relate to the use of force and holding cell components of our investigation.

I. Background

In March of 2000, former United States Attorney Saul Green met with former DPD Chief Benny Napoleon, other DPD command-level staff and supervisors from federal law enforcement agencies to discuss DPD arrest policies and procedures. The meeting was called because the United States Attorney's office had received reports of unconstitutional arrest and detention practices within the DPD homicide section. In response, the DPD agreed to end these arrest and detention practices and to institute a training program to ensure future compliance with constitutional mandates.

Our review to date raises concerns that the DPD may be (1) making warrantless arrests without probable cause; (2) arresting and detaining witnesses and family members of suspects without proper judicial authority; and (3) inappropriately delaying probable cause hearings before a judge or magistrate. Our interviews of DPD personnel indicate that, with the exception of Wayne County Prosecutors having spoken at a homicide roll call, the DPD has not instituted any policy changes or formal training program to address these concerns. We recognize that the new leadership in the DPD intends to address these issues.

As our investigation initially focused on the homicide section, the numbers presented in this letter reflect arrests and detentions in that section. Although arrest and detention concerns were identified throughout the DPD, the homicide section is one of the special commands where the arrest and witness detention concerns were most prevalent. The special commands include homicide as well as the other sections of the major crimes division and the narcotics bureau. The special commands are located in the First Precinct in the Headquarters Building. Individuals detained by the special commands were lodged, or housed, in the First Precinct until the cells were closed in September 2001. Special command detainees are now lodged in any precinct with available space. The closure of the cells in the First Precinct does not change our analysis as 1) the individual investigator in charge of a particular case and that investigator's supervisor continue to be responsible for the detainee irrespective of location, and 2) the DPD has not changed its problematic arrest and detention policies and practices.

II. Arrest Policies and Practices

DPD arrest policies and procedures contain imprecise, ambiguous and contradictory language. The policies as written, coupled with a lack of supervision, allow for the unconstitutional arrest of witnesses and suspects.

A. Arrest of witnesses

We recommend that the DPD amend and clarify its policies to comply with the law governing arrest. An arrest occurs when an officer's words or actions would convey to a reasonable person that he or she is not free to leave. ⁽¹⁾ *California v. Hodari D.*, 499 U.S. 621, 628 (1991). Therefore, an officer's subjective intent is not a factor in the evaluation. This inquiry is based on all of the circumstances surrounding the encounter. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Thus, an individual may be under arrest whether uncuffed on the street, guarded by officers in a special command or locked in a precinct holding cell, so long as a reasonable person would conclude that he or she is not free to leave.

According to DPD policy an arrest is defined "as a taking of an individual into custody for further investigation, booking or prosecution." ⁽²⁾ Under DPD policy, "an arrest is not valid unless the arresting officer actually has the intent to make an arrest according to the definition of 'arrest'." ⁽³⁾ DPD policy further states that witnesses should be detained at the scene of a crime investigation and/or transported to the Headquarters Building for interviewing. ⁽⁴⁾ These policies implicitly authorize DPD employees to detain witnesses involuntarily for questioning. Some DPD employees, who acknowledge that witnesses are detained involuntarily for questioning, stated that even though a witness is not free to refuse transport to or leave from the command, they do not consider the witness to be under arrest.

We recommend that the DPD revise and clarify its investigative policies and eliminate any authorization or instruction to detain witnesses, absent a valid material witness order. ⁽⁵⁾ We further recommend that the DPD utilize appropriate law enforcement procedures that include techniques for both on-scene and station house interviews of witnesses. The procedures must safeguard voluntary participation by witnesses.

The new policies and procedures should be circulated to all precincts and commands. The DPD Manual should be updated to reflect the changes. The DPD should provide training on the new policies and procedures to all levels of command. All training should be documented to clearly identify who was trained, the date they were trained, and how the training was conducted. Finally, audits should be conducted to ensure compliance with the new procedures.

B. Arrest of suspects

The DPD does not adequately define arrest or probable cause, although DPD policy correctly states that probable cause is required for an arrest.⁽⁶⁾ As previously mentioned, the DPD defines an arrest as "a taking of an individual into custody for further investigation, booking, or prosecution."⁽⁷⁾ This policy implicitly permits the arrest of an individual with less than probable cause as a means to facilitate an investigation. Indeed, some former DPD employees informed us that it was acceptable practice to arrest suspects without probable cause and then continue to investigate the case to develop probable cause prior to arraignment. Gathering additional evidence after an arrest in order to establish probable cause for that arrest is unconstitutional. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

Furthermore, DPD policy states that "a very substantial possibility that the person to be arrested has committed a crime" is sufficient for probable cause.⁽⁸⁾ This is problematic because it does not set an objective standard. Probable cause requires the officer have information "sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, (1979) (citations omitted). DPD policy also implicitly sets a lower standard by referring to the possibility that a crime was committed, rather than a probability.

Within any given police department there will be examples of individuals who are arrested and then discharged from police custody without being charged with a crime. However, the large number of individuals arrested and later discharged by the DPD indicates that arrests may have been made without probable cause. The 1998 FBI Uniform Crime Report revealed that in 1998 the DPD arrested three times as many individuals for homicides as the number of homicides in the City of Detroit. In that same year, the DPD solved only 47% of its homicide cases. This trend continued in 1999 and 2000.⁽⁹⁾

While more than one person may be involved in a homicide, which could increase the number of arrests per homicide, our preliminary document review indicates that this does not explain this discrepancy. For example, in one month in 2001, 76 individuals were arrested and initially charged with homicide.⁽¹⁰⁾ Of the 76, only 30% were formally charged with homicide. Of the 53 individuals not formally charged with homicide, 23% were held for over 48 hours, one for 91 hours, or almost four days.

DPD employees informed us that a suspect may be discharged from police custody if probable cause is not attained within a reasonable period of time after the arrest.⁽¹¹⁾ If and when probable cause is attained, the suspect may be re-arrested. As discussed above, arresting individuals without probable cause and then investigating to obtain probable cause is not constitutional. Other DPD employees revealed that some suspects are not actually released from the precinct for lack of probable cause, but instead are removed from the holding cell and taken into another area of the precinct while the investigator completes new arrest documentation indicating a new arrest date and time and returns the individual to the holding cell, with no apparent additional basis for an arrest.

Two DPD policies that require supervisory review of probable cause are not being applied to the special commands in the Headquarters Building. The first requires the Officer-in-Charge (OIC) of the precinct station desk to review the circumstances of each arrest.⁽¹²⁾ The second requires each precinct commanding officer to review the details of the case for every individual lodged and later discharged.⁽¹³⁾ Although DPD employees informed us that the supervisors in the special commands were expected to know who was arrested, on what case, and for what reason, this review process was not routinized or documented in the special commands.

We recommend that the DPD amend and clarify its definition of probable cause. The DPD should revise and clarify its arrest policies to eliminate any reference to an arrest as an investigative tool.

We recommend that the DPD ensure that the policies requiring supervisory review of probable cause are applied to the special commands. The consistent application of existing DPD policies will require a supervisory and precinct review of probable cause when a detainee is lodged by an investigator in a special command. Furthermore, the case file should clearly indicate every individual arrested in the course of an investigation by name, address, probable cause statement, date of arrest, date of discharge, arresting officer and supervisor approving the detention.

The new policies and procedures should be circulated to all precincts and commands. The DPD should provide training on the new policies and procedures to all levels of command. All training should be documented to clearly identify who was trained, the date they were trained, and how the training was conducted. Finally, audits should be conducted to ensure compliance with the new procedures.

III. Detention Policies and Practices

When a detainee is arrested, the DPD requires that the detainee be formally processed before being placed in a precinct holding cell. As part of the processing procedure, DPD policy requires that an arrest ticket be completed. An arrest ticket records an individual's personal information as well as the charge on which he/she is lodged, or detained in a holding cell. If the individual is a police witness, the investigator is required to identify that information on the arrest ticket and to attach the court order authorizing the witness' detention to the arrest ticket.

The DPD does not ensure that detainees are moved out of its custody in a systematic and timely manner. The lack of a systematic process permits the unconstitutional detention of individuals in DPD custody. The DPD precinct cells were designed and are intended to operate as temporary holding facilities. Regardless of a detainee's destination,⁽¹⁴⁾ the DPD needs to implement a system that will process all detainees and ensure their timely movement out of DPD custody.

A. Individuals lodged as police witnesses

A witness who is subpoenaed to testify in a criminal case is a material witness. Pursuant to the U.S. Constitution and Michigan Law, only a court has the authority to decide whether an individual is a material witness and whether that material witness should be committed to a jail pending his/her testimony.⁽¹⁵⁾ DPD policies regarding material witnesses are inconsistent. Although the DPD does not identify material witnesses as such, the DPD describes four categories of police witnesses, all of whom are detained to ensure their testimony in a criminal case⁽¹⁶⁾ and all of whom require a court order prior to their detention in a precinct cell.⁽¹⁷⁾ This policy also states that the DPD does not have the authority to detain a police witness without a court order for more than 12 hours.⁽¹⁸⁾ The policy implies that an eleven hour detention without a court order is acceptable. Yet another DPD policy specifically requires DPD detention officers to check the admission cards of all police witnesses on a daily basis and to contact the OIC regarding the lack of a court order or expected date of release.⁽¹⁹⁾ These inconsistencies in DPD policies implicitly allow for the illegal detention of individuals classified as police witnesses.

DPD employees have informed us that individuals merely suspected of being a witness or merely suspected of knowing the whereabouts of a suspect are arrested, lodged and held as police witnesses in precinct cells without a court order or access to judicial review. However, even if the DPD enforced its policy requiring a court order to arrest or detain police witnesses, individuals would remain improperly

detained in DPD custody because not all witnesses are classified as witnesses when they are arrested. Indeed, DPD employees informed us that some witnesses are listed as being charged with the crime with which they are believed to have information.

Some witnesses are appropriately classified as police witnesses and lodged pursuant to a court order. We spoke to several such police witnesses who were sentenced prisoners removed from a state correctional facility. The police witnesses we spoke to had been in the holding cells for several months even though DPD facilities are designed and operated for temporary placement only.

We recommend that the DPD revise its policies regarding police witnesses to eliminate conflicting elements and to comply with the U.S. Constitution and Michigan Law. The DPD should not allow any individual classified as a police witness to be lodged without a court order. If an investigator does not have a court order, the OIC of the precinct desk should refuse to lodge the witness. Similarly, if a witness without a court order is detained at a special command, the investigator's supervisor should ensure that the individual is immediately released.

The DPD should arrange for any police witness held for an extended period of time to be lodged in a facility designed for extended stays.

B. Individuals charged with a crime

Judicial review of a warrantless arrest is required as soon as is reasonably feasible. ⁽²⁰⁾ DPD policy requires DPD employees to obtain judicial review of a warrantless arrest "within the time period required by law" or "within a reasonable period of time." ⁽²¹⁾ Despite this written policy, several DPD employees informed us that they have 48 hours from the time of arrest to seek judicial review as a matter of course. Some DPD employees stated that they used the 48 hour period to investigate for probable cause and/or to seek a statement from the detainee. Some DPD employees stated that they were allowed 72 hours if an individual was charged with a felony. During our February 2002 tour, we were informed by a DPD employee that a woman recently had been detained at the 12th precinct for five days before presentment for judicial review.

DPD employees have informed us that after an arrest, the arresting officer completes the necessary paper work including a warrant request. The submission of a warrant request to the precinct's court liaison begins the arraignment process. Each day, the court liaison files the requests with the prosecutor's office, who in turn schedules the detainee for arraignment. In a case involving a special command, the arresting officer does not submit the warrant request because the case is turned over to an investigator in a special command. The assigned investigator determines when to submit the warrant request and may delay this process to interview the detainee or conduct other additional investigation. DPD employees cite investigator unavailability as the primary cause for delay in the arraignment process.

DPD Special Order 95-47 attempts to create a system to ensure a timely arraignment by requiring notification and responsibility at multiple levels of command. The Special Order states that it is the responsibility of the investigator in charge of the case or the investigator's supervisor to ensure that a detainee is arraigned within the "time period required by law." If a detainee is not arraigned within 24 hours, the policy requires that "the command holding the detainee" notify the deputy chief or an executive duty officer. Upon executive review, if permission to hold the detainee beyond 24 hours is granted, the arrest ticket is to be marked accordingly and an inter-office memo is to be sent to the affected deputy chief. The Special Order requires deputy chiefs to prepare a monthly report to the chief "detailing the circumstance of detainees held over 24 hours." Our preliminary document review reveals no notations indicating executive review of arrest tickets of individuals detained over 24 hours.

Interviews with DPD employees confirm that the policy is not practiced.

Prior to the closing of the holding cells in the First Precinct, DPD detention officers at that facility were required to record all detainees held for 36 hours or more. ⁽²²⁾ However, the policy only authorized the OIC to contact the investigator in charge of the case or the investigator's supervisor, notify him or her that the detainee had been in custody for 36 hours or more and record the notification. The OIC was not authorized to send the detainee to court or release the detainee if an investigator was in charge of the case, although the OIC did have this authority if a non-investigator was the officer in charge of the case. The policy also required a written authorization for prisoners held over 48 hours by the commanding officer of the unit responsible for the prisoner. Our preliminary document review reveals no notations indicating executive review of individuals detained over 48 hours. Interviews with DPD employees further confirm that it is not uncommon for DPD detainees to be held over 48 hours. Similarly, our preliminary document review revealed that in one month in 2001, of the 83 individuals either detained on a charge of homicide or as a police witness without a writ, 29% were detained for more than 48 hours.

We recommend that the DPD examine its policies and repeal or amend policies that are fully or partially in conflict with the U.S. Constitution and Michigan Law. The DPD should circulate the revised policies, provide training to all affected levels of command, and document the training of DPD employees as described in Section 2(B) above. Audits should be conducted to ensure compliance with the new procedures.

We recommend that the DPD develop a routine and systematic process to ensure that a detainee will be presented for judicial review as required by the U.S. Constitution and Michigan Law. The process should be triggered when an individual is lodged in a precinct and proceed independent of an investigator's oversight. An investigator's unavailability should not affect the detainee's arraignment process. ⁽²³⁾

If a detainee's arraignment does not occur as part of this systematic process, DPD policy should designate the individual responsible for contacting the investigator's supervisor regarding this delay. Upon notification, the supervisor should be required to submit a written review of the detention, specifying the probable cause for the arrest, the reasons for the delay in arraignment and the steps identified to ensure imminent arraignment. If the supervisor's investigation reveals that the detainee's arraignment was delayed without good cause, the supervisor should authorize the detainee's release. This entire process should be documented and contained in the case file.

C. Holds

An arrest ticket is prepared for every detainee lodged in a precinct cell. The arrest ticket records an individual's personal information as well as a criminal charge. There is a separate arrest ticket for each charge. An arrest ticket marked with a "hold" indicates that a detainee should not be released if the charge on the particular arrest ticket is resolved, as the detainee has additional pending charges.

Pursuant to DPD policy, ⁽²⁴⁾ individuals detained by special commands are not permitted to clear outstanding warrants or holds until arraignment or discharge by the special command. Our preliminary document review reveals that in one month in 2000, several individuals with outstanding traffic warrants were held by a special command for several days before being released by the special command. The DPD should not prevent a detainee from clearing a traffic warrant while using the existence of the traffic warrant to justify an individual's continued detention.

We recommend that the DPD amend its warrant policy. All detainees with warrants should be presented to the court where the warrant was lodged in a routine and timely manner. The interest or charge of a special command should not affect the time frame in which the warrant is vacated. A legitimate material witness order will serve to hold a detainee for a special command after the traffic warrant is vacated.

D. Restrictions

The DPD does not have a policy that identifies appropriate circumstances for restricting an individual's telephone or visiting privileges. An investigator is able to deny telephone and visitation privileges to a witness or a suspect in a precinct holding cell without a documented explanation or review of the decision. The investigator need only relay the name of the individual and the type of restrictions to a detention officer who recorded the restrictions in a log book.⁽²⁵⁾ Some DPD employees informed us that a detainee with telephone restrictions would not be permitted to telephone an attorney.

We recommend that the DPD develop policies that do not unreasonably restrict a detainee's access to telephone calls or visitors. Although the DPD may identify special circumstances that require reasonable restrictions, the policy should: 1) identify the circumstances that permit a restriction; 2) require a written record; and 3) be subject to review. Copies should be kept at the precinct of detention and in the case file. The policy also should clearly articulate that it does not prevent a detainee from communication with an attorney.

E. Record Keeping

DPD arrest and detention record-keeping practices are insufficient. Without accurate record-keeping, the DPD cannot review the status of detainees held in DPD custody to determine the basis or length of detention. Poor record-keeping also makes oversight of the arrest and detention process difficult.

DPD policy requires that each detention be recorded on three separate documents, the arrest ticket, the log book/desk blotter and the computerized data base.⁽²⁶⁾ Prior to its closing, the First Precinct was required to maintain a fourth record for each detainee, a prisoner admission card.

In one month in 2001, we found that of the 94 persons arrested and charged with a homicide⁽²⁷⁾ or as a police witness in connection with a homicide: 26% had no arrest tickets; 35% had no prisoner admission cards; 8% were never entered in the database; and 48% did not appear in the log book. Arrest tickets frequently did not have all of the required information completed, such as the "Initial Charge" or "Final Charge" or the date and time a particular detainee was discharged or turned over to another agency. As a result, there is no log or data base that accurately reflects each individual arrested by the DPD.

We recommend that the DPD develop a system which ensures the complete and uniform documentation of each person held in DPD custody. The system should allow the DPD to evaluate the detainee population in terms of length of detention, timely presentment to a judicial officer and ratio of arrests to judicial findings of probable cause. We also recommend that the DPD develop an audit process which regularly evaluates detainee documentation for accuracy and completion.

Thank you again for the continued cooperation of the Law Department and the DPD. We look forward to working with you and the DPD.

Sincerely,

Steven H. Rosenbaum
Chief
Special Litigation Section

Jeffrey G. Collins
United States Attorney
Eastern District of Michigan

cc: The Honorable Kwame M. Kilpatrick
Chief Jerry A. Oliver, Sr.

1. A brief investigatory stop based upon reasonably articulable suspicion is not an arrest. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).
2. Detroit Police Department General Procedures(GP), Volume III, Chapter 9, Section 7.
3. GP, Volume III, Chapter 1, Section 8.2. DPD policy does seem to recognize that there is an objective standard for an arrest in a limited context. Specifically, DPD policy states that a court may find that a Terry stop has become an arrest if an individual has been detained for an undue length of time (the policy recommends no more than 20 minutes) or if an individual is transported to another location. GP Volume III, Chapter 1, Section 4.7. However, this provision only addresses when a Terry stop becomes an arrest, not the more generalized question of when an arrest has occurred.
4. GP, Volume III, Chapter 9, Sections 1, 3.2, 5.1(f) and 8.
5. The detention of material witnesses will be discussed in Section III(A) below.
6. GP, Volume III, Chapter 1, Section 16.1.
7. GP, Volume III, Chapter 1, Section 7.
8. GP, Volume III, Chapter 1, Section 16.2.
9. 1998 FBI Uniform Crime Report indicates that the DPD reported 1,310 homicide arrests but only 430 homicide cases. Similarly, the Michigan State Police Uniform Crime Report indicates that in 1999, the DPD reported 1,152 homicide arrests for 415 homicides and in 2000, the DPD reported 1,217 homicide arrests for 396 homicides.
10. The initial charge is the charge for which the DPD officer indicates the individual is being detained. A final, or formal charge, is the charge sought by the DPD on a warrant presented to a judicial officer.
11. One DPD employee claimed that the additional arrest tickets caused by the temporary release and re-arrest of homicide suspects explains the unusually high number of homicide arrests reflected in the FBI Uniform Crime Report. This does not account for the large discrepancy and raises concerns that arrests are being made without probable cause, as discussed above.
12. GP, Volume III, Chapter 2, Section 1.

13. GP, Volume III, Chapter 2, Section 106.
14. Detainees may be arraigned, released, sent to a specific court to have a warrant vacated or lodged at another facility.
15. MCL § 767.35.
16. "1. Hostile Witness: A hostile is a non-involved eye witness to a crime but refuses to testify when subpoenaed.
2. Protective Custody Witness: This classification of witness is a person who comes forth to testify but requests protective police custody because of life-threatening circumstances.
3. Co-defendant Witness: A co-defendant witness is a person charged with a crime awaiting trial or sentence on one case and declares himself a witness to another case.
4. Declared Witness: A declared witness is a person charged with a crime awaiting trial or sentence on one case and declares himself a witness to another case." Detroit Police Department Standard Operating Procedure (SOP) S-100.
17. "A prisoner classified as a police witness will not be detained in our custody unless said witness is committed by authority of an Affidavit For Order Detaining Prisoner/Material Witness document signed by a 36th District or Recorder's Court judge." SOP S-100(I)(B)(4).
18. Id at (II)(E)(1).
19. SOP C-300.
20. County of Riverside v. McLaughlin, supra.
21. DPD Legal Advisor Update 01-01 issued March 22, 2001 and DPD Legal Advisor Update 92-02 issued May 15, 1992. Although the Legal Advisor Updates state that it is unreasonable to delay judicial review for the purpose of gathering additional evidence to justify the arrest, the DPD did not change its definition of arrest or clarify its arrest policies. See discussion in Section II(B) above.
22. SOP C-301.
23. Delaying arraignment for investigative purposes violates the Supreme Court's ruling in Riverside, supra.
24. GP, Volume III, Chapter 2, Section 19.4/19.5.
25. The log book was the practice in the now-closed First Precinct cells; we are unclear as to the practice in the precincts.
26. The data base generates a unique central booking number for each charge lodged against a detainee.
27. The number of individuals charged with homicide is the sum of individuals charged with murder, homicide and manslaughter.