

**Please note: This is a working draft of Directive 344.05. This is proposed language and the Bureau has not implemented any changes to the current policy at this time.*

344.05 Bias-Based Policing/Profiling Prohibited

2nd Universal Review: 1/2/19 – 1/31/19 (clean view)

Refer:

- ORS § 166.155, Intimidation in the Second Degree
- ORS § 166.165, Intimidation in the First Degree
- Oregon House Bill 2002, (2015).
- Oregon House Bill 2355
- Citywide Equity Goals and Strategies
- City of Portland Resolution No. 37277, Declare the City of Portland a Welcoming City, a Sanctuary City, and an Inclusive City For All
- DIR 310.00, Professional Conduct and Courtesy
- DIR 310.20, Discrimination, Harassment, and Retaliation Prohibited
- DIR 330.00, Internal Affairs, Complaint Intake, and Processing
- DIR 640.80, Mandatory Bias/Prejudice Crime Reporting
- DIR 810.10, Immigration Enforcement and Diplomatic Immunity
- DIR 1500.00, Training

Definitions:

- **Bias-Based Policing:** The differential treatment of any person or any group of persons and/or any discriminatory practices by the Bureau or its members that are motivated by prejudicial judgments of the individual on the basis of their membership in classes protected by law or Bureau policy.
- **Equity:** The process of creating policies and procedures to promote the fair and unbiased treatment of all individuals and to remove differences in treatment of Bureau members and community members based on membership in classes protected by law or Bureau policy.
- **Law Enforcement Contacts Policy and Data Review Committee:** A statewide, governor-appointed committee that is charged with the duties of assisting Oregon law enforcement agencies with stop data collection and analysis efforts, improving community relations, training efforts, and policy recommendations that pertain to ensuring equity in Oregon law enforcement.
- **Probable Cause:** A substantial objective basis for believing that, more likely than not, an offense has been committed and a person to be arrested has committed it.
- **Profiling:** Where a Bureau member targets an individual belonging to a class protected by law or Bureau policy when conducting stops or detentions unless the Bureau member is acting on suspect description or information related to an identified or suspected violation of a provision of law.
- **Reasonable Suspicion:** An objective test measured at the time and place the member acts and based on the totality of the circumstances, which requires a member to point to specific, articulable facts giving rise to a reasonable inference that a subject has engaged or is engaging in criminal activity.

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- Stop: Temporary restraint of a person's liberty by a sworn member who is lawfully present in any place.

Policy:

1. The Bureau is dedicated to offering courteous and professional service delivery and providing equal protection, a fundamental right under the Constitution, to all members of the community. The Bureau endeavors to create an organizational culture that promotes nondiscriminatory and inclusionary practices, and its members shall strive to enforce laws and policies in an impartial and equitable manner.
2. Bureau members are committed to respecting and preserving the constitutional rights of all individuals. Members are prohibited from taking or refraining to take any police action motivated by bias or prejudice and should, when appropriate, strive to engage community members in a positive manner. Furthermore, members shall not profile or discriminate against any individual who is a member of a legally protected class. Legally protected classes, as defined by federal or state statute, as well as case law, include an individual's race, color, national origin, citizenship, ethnicity, religion, sex, pregnancy, sexual orientation, gender identity, age, actual or perceived mental or physical disability, language (spoken or signed), marital or familial status, veteran status or any other protected status under law.
3. While other classes of persons are not legally protected in that there is no basis in case law or statute requiring that they be treated in a non-discriminatory manner, the Bureau is committed to policing in the most impartial manner possible. Therefore, the Bureau shall also prohibit the profiling or any disparate treatment of any individual based on their membership in the following classes: housing status, lawful source of income, economic status, immigration or refugee status, or political ideology or affiliation.
4. Public trust and confidence are the cornerstones of community policing. The Bureau recognizes that engaging in police acts that are rooted in bias is contrary to the values of the Bureau and erodes that trust and confidence, delegitimizes the Bureau, and ultimately undermines community policing efforts.
5. Members shall adhere to established legal, ethical, and best practice standards. The Bureau shall provide introductory and ongoing training to all sworn members that emphasizes developing an understanding of racial, ethnic, national, religious, cultural, and other differences and fosters the professional growth and continued development of members. Training of this nature is reinforced and incorporated throughout several disciplines and is intended to equip members with the necessary tools and techniques to police effectively, lawfully, and without bias, while also treating community members with dignity and respect.
6. The Bureau recognizes the reality of implicit bias, the scope of its potential influence on human behavior and, as it pertains to policing, how it can affect interactions and relationships between the Bureau and Portland's diverse communities. Therefore, the Bureau is committed to offering resources and instruction that help members identify and acknowledge

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their own subconscious perceptions or associated stereotypes about or attitudes towards people about which they may not be aware. In an effort to both minimize discriminatory practices and strengthen its relationship with the communities it serves, the Bureau will continue to work with members on an individual and collective basis to address how implicit biases may directly impact their work.

Procedure:

1. Bias-Based Policing and/or Profiling.
 - 1.1. Members shall police justly and impartially. Members shall not engage in bias-based policing or profiling.
 - 1.2. Members who engage in, condone, or fail to report bias-based policing or profiling shall be subject to discipline, up to and including termination.
 - 1.2.1. Pursuant to Directive 310.00, Professional Conduct and Courtesy, members have a duty to report misconduct, including bias-based policing and/or profiling practices.
 - 1.2.2. Any supervisor who is informed that a member has engaged in profiling or bias-based policing, receives a complaint alleging such, or otherwise becomes aware of such action and fails to act or report the member's behavior shall be subject to disciplinary action.
2. Permitted Use of Physical Traits and/or Individual Characteristics when Establishing Reasonable Suspicion or Probable Cause.
 - 2.1. When executing a stop, detention, search, seizure of property, an arrest or any other police action, the member's action shall be based on a standard of reasonable suspicion or probable cause. Members must be able to articulate and document specific facts and circumstances that establish reasonable suspicion or probable cause.
 - 2.2. Members are permitted to consider status characteristics that are protected by law or Bureau policy when acting on a suspect description or information related to an identified or suspected violation of a provision of law.
 - 2.2.1. Members shall only use the listed classification information in combination with other relevant and specific identifying traits or factors (e.g., description of clothing, height, etc.) when searching for a specific individual or group. In these circumstances, status characteristics that are protected by law or Bureau policy should not be the sole factor cited/identified.
 - 2.3. For a bias crime, as defined in ORS §166.155 and 165.165, a member may consider an individual's class status that is otherwise protected by law or Bureau policy to the extent they are formulating reasonable suspicion or probable cause to investigate or arrest.
 - 2.3.1. When investigating or charging under one of these statutes, members shall document the protected class status considered and the reason for doing so to establish reasonable suspicion or probable cause.
 - 2.4. When initiating consensual encounters that do not amount to legal detentions or when seeking consent to search, members shall not rely solely on status characteristics that are protected by law or Bureau policy.

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- 2.4.1. Members are permitted to engage in voluntary and non-coercive conversations with community members for the purpose of building relationships, seeking or providing assistance, or exchanging information.
 - 2.4.2. It is not the intent of this policy to impede legitimate community engagement based on a community's protected status.
3. Complaint Intake and Processing.
 - 3.1. Internal Affairs (IA) and the Independent Police Review (IPR) shall accept and process all complaints alleging profiling and bias-based policing, whether from a known, anonymous, or third-party complainant or from the Law Enforcement Contacts Policy and Data Review Committee, in accordance with Directive 330.00, Internal Affairs, Complaint Intake, and Processing.
 4. Communication with the Law Enforcement Contacts Policy and Data Review Committee.
 - 4.1. The IPR Director is the City of Portland's responsible point of contact with the Law Enforcement Contacts Policy and Data Review Committee.
 - 4.2. The IPR Director or designee will submit copies of all City-received profiling complaints to the Law Enforcement Contacts Policy and Data Review Committee and will intake any Committee-received profiling complaints from the Law Enforcement Contacts Policy and Data Review Committee.
 - 4.3. The IPR Director or designee will notify the Law Enforcement Contacts Policy and Data Review Committee of disposition of the complaint.
 - 4.3.1. The Law Enforcement Contacts Policy and Data Review Committee may collect and disseminate data regarding profiling and bias-based policing for statistical purposes, but is required to keep personally identifying information confidential.
 - 4.4. The IA Captain or designee shall ensure that the appropriate profiling complaint data is provided to the Law Enforcement Contacts Policy and Data Review Committee as described above.

Provide feedback [here](#).

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COMPLETE

Collector: Web Link 1 (Web Link)
Started: Thursday, September 06, 2018 1:51:09 PM
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Q1 Please provide feedback for this directive

344.05, Bias-Based Policing/Profiling Prohibited

Q2 Contact Information (optional)

Name

Email Address

#2

COMPLETE

Collector: Web Link 1 (Web Link)
Started: Saturday, September 15, 2018 4:33:47 PM
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Q1 Please provide feedback for this directive

COMMENTS ON PROFILING, ACCOUNTABILITY, AND OTHER DIRECTIVES SEPTEMBER 2018

To Chief Outlaw, Capt. Bell, Lieutenant Morgan, PPB Policy Analysts, Compliance Officer/Community Liaison Team, Community Oversight Advisory Board staff, US Dept. of Justice, Independent Police Review, Citizen Review Committee and the Portland Police Bureau:

Below are Portland Copwatch's comments on the Directives posted for review in September . We are very concerned that the PPB released SEVENTEEN Directives for review on the Saturday of Labor Day weekend, expecting meaningful feedback by September 16. Because we have made comments on all of these Directives in the past, this task was somewhat easier for us but still requires checking to see what changes were made in between comment periods. We continue to encourage the Bureau to post comments as they arrive so commenters might be able to build off others' ideas (de-identified is fine with us, though we are fine being identified). We point out that until recently, comments on Body Cameras were posted on the Bureau's website for everyone to read.

We make a few comments about the possible findings on misconduct allegations, below. We are glad that the Bureau moved away from trying to cut down the four possible findings to two, but continue to believe that the same findings should apply to deadly force cases. They should not just be "In Policy/Out of Policy," as there could be room for an "Insufficient Evidence" (aka "Not Sustained") finding in those cases. We did not see any reference to applying this concept to deadly force cases in the Bureau's published Directives memos, rather, Directive 336.00 still only includes the two findings previously being used.

In publishing the finalized 330 series in February, the Bureau claimed they clarified that the "Discipline Coordinator" is the same person as the "Review Board Coordinator." The Discipline Coordinator's role and position at the Professional Standards Division (PSD) is not made clear in Directive 335.00, though there is a brief mention in Section 2.1.1.1 that the person is in PSD. The term "Review Board Coordinator" is still used in Directive 336.00. So it seems no clarification actually happened.

Similarly, in previous comments we noted: "A general point of confusion is that many Directives refer to the Professional Standards Division and/or Captain, while others refer to the Internal Affairs Captain. Our understanding of the structure is that IA is part of PSD and there is a ranking member over all of PSD, not just IA. We hope the Bureau can clarify this point." The two terms are still used interchangeably among the Directives.

We also continue to believe that the review periods should be at least 30 days on both ends of the rewriting process so there is time for organizations who only meet monthly to weigh in. As we noted, this might include the BHU Advisory Committee, though they seem to have special dispensation to make comments and receive feedback above and beyond all other groups, as well as the Training Advisory Council, Citizen Review Committee, and if it ever begins meeting, the Portland Committee on Community Engaged Policing.

Although the Bureau has been putting out "redline" versions of the Directives when they are up for their second round of public comments, the final versions-- which frequently are significantly different from what was posted in round two-- do not indicate where changes were made, making comments on the policies extremely difficult when they come back up again as all of these have.

Directive 344.05 Feedback

The Bureau did make some changes-- some of which are substantive-- based on PCW's comments, as noted below, although in once case the change reversed a policy PCW supported.

We continue to believe the Bureau should add letters to section headings (Definitions, Policy, Procedure) so that there are not multiple sections with the same numbers, and to enumerate the Definitions. Our comments below refer to the Procedure Section unless otherwise noted.

344.05 BIAS-BASED POLICING/ PROFILING PROHIBITED (previous comments made September 2017)

A number of changes were made to this Directive following the Second Universal Review in September 2017, not the least of which was a very poor rewriting of the definition of profiling. The last version the community had for comment talked about profiling as "a form of bias-based policing wherein a law enforcement officer targets an individual for suspicion of violation of a provision of law based solely [on their race or other characteristics]." The current definition ignores that a Bureau member's stop is based on the person's visible protected class status characteristics. If the existing definition is to remain, it should include the following new phrases (as we have inserted *in between asterisks.*

Profiling: Where a Bureau member targets an individual belonging to a class protected by law or Bureau policy *based on the identifiable traits of that class* when conducting stops or detentions unless the Bureau member is acting on *such traits as one part of a broader* suspect description or information related to an identified or suspected violation of a provision of law.

To break down how that works:

"Black man, stopped him" with no reasonable suspicion is profiling.

"Suspect is a black man and so is this guy" is also profiling.

"Suspect is a middle aged black man in a red baseball hat and orange pants, so is this guy" that is not profiling.

We noted in September 2017 that the Bureau made strides toward improving the Directive by removing the word "solely" from the definition of "bias-based policing." We also reminded the Bureau that as a local entity, Portland can define "profiling" more narrowly than the state. We note that Section 2.2.1 says not to use protected traits as the "sole factor cited/identified" when looking for a suspect. We continue to suggest the Bureau use the language that was put into 810.10 on immigration enforcement, which prohibits action based "solely or primarily upon a person or group's actual or perceived national origin or immigration status." In other words, adding the words "or primary" after "sole" is an acceptable solution. Similarly we encourage that the word "solely" also be removed from (or further clarified in) Section 2.4 which guides consensual stops.

We made extensive comments about the previous section on the topic of such stops. This is what officers would call "mere conversation," though we know in Portland it might include asking for voluntary pat-downs. The language guiding "voluntary and non-coercive conversations with community members for the purpose of building relationships, providing assistance or exchanging information" (Section 2.4.1) does not prohibit officers from disparately stopping people based on their protected characteristics under the guise of "relationship building." Rather, Section 2.4.2 says that the policy is not meant to "impede legitimate community engagement based on a community's protected status." This language is upside-down from what needs to be in the Bias-Based Policing Directive. Like the language floated in 2017, this (a) doesn't prohibit officers from disproportionately stopping people to talk based on any of the protected characteristics (including race), (b) doesn't require officers to let the person know they are free to go, and (c) doesn't recognize that for many people, an armed uniformed officer asking to talk to them seems like a coercive action.

The language reflecting state law indicates the encounter has to be due to "suspected violation of a provision of law" (Section 2.2). The reality is, sometimes officers see a person and pull them over and later decide to explain the stop by relying on a traffic or equipment

Directive 344.05 Feedback

violation-- but sometimes no reason at all is given. Often the person is let go with no citation, warning or other paperwork. Thus the use of the term "any police action" as used in Policy Section 2 should apply to the definition of profiling, which only talks about "stops or detentions."

Furthermore, after our last set of comments identifying issues with groups protected from profiling, the Bureau re-wrote the list in Policy Sections 2 and 3. The term "gender identity" was appropriately added back in as protected by law, but housing status (which is part of state law) is still listed in the "other classes" under Section 3. The Bureau acted on PCW's recommendation separating "source of income" from "economic status" since, as we noted, "How someone makes money (whether it is returning recyclables or being the CEO of a corporation) is not the same as how much money they have or appear to have (rich vs. poor)." However, the Bureau added the word "lawful" before the words "source of income," which opens up a lot of problems, for example for sex workers and in the federal vs. state debate on the legality of marijuana. Officers should not discriminate against people for engaging in acts that are considered "unlawful," they should fairly and equitably enforce the law using discretion and compassion.

A previous requirement (in pre-2017 Policy Section 5) told officers they had to take "immediate action to stop or prevent [bias based policing]" that they observe. This is somewhat watered down in the current Procedure Section 1.2, which just says "Members who engage in, condone, or fail to report bias-based policing or profiling shall be subject to discipline, up to and including termination." We're all for the sentiment of that sentence-- we just want to see "condone" be expanded to include the previous requirement to take action to stop such behavior. We support the continuation of explicit language saying supervisors who fail to act based on reports of bias shall be subject to discipline as well (Section 1.2.2).

The Bureau has removed old Section 6.1, which made a blanket exemption to disclosing "personal information" including the name of a complainant and employee, citing ORS 192.502. Instead the only mention of such information is in Section 4.3.1, wherein the entity taking complaints on a state level is "required to keep personally identifying information confidential."

CONCLUSION

Once again we thank the Bureau for seeking for community input, and to the extent that some of our comments have been addressed, for taking our advice seriously. We repeat here our deep concern about publishing so many important policies at one time, during a holiday season. We continue our struggle to see a Bureau free from corruption, brutality and racism, which is the basis for our participating in this process. As noted before, while we don't always agree with the Bureau's reasons for rejecting certain recommendations, it is helpful to be receiving them.

Thank you for your time

--Portland Copwatch

Q2 Contact Information (optional)

Name

Portland Copwatch

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