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Sunnyvale Department of Public Safety

DATE: September 18, 2009
TO: All Personnel
FROM: Mark Stivers, Deputy Chief, Police Services
SUBJECT: **Unloaded Open Carry (UOC) Movement**

Recently we have had two incidents where members of this movement have been reported to be carrying guns in public. Justifiably we all get nervous when a gun is introduced into the mix of any call. Safety for ourselves and the public is always our highest priority. However the law is very clear when addressing the specific circumstances for which someone may carry an unloaded gun in plain view in public. To be very clear this is a constitutional right, a lawful act, and we as law enforcement professional must adjust our response accordingly.

To be very frank I do not like the fact people can carry an unloaded gun in a holster in plain view in public. However the law says they can and we uphold the law. In fact the Constitution says they can and we all swore an oath to uphold and defend the constitution and that is the bottom line. We WILL adjust our response accordingly. The goal will be to balance our safety and the safety of others while still doing our job within the law so as to not violate anyone's rights and expose ourselves to criminal or civil litigation.

Please read this LONG memo very carefully. We will be addressing this issue in the upcoming A/O cycle.

The Unloaded Open Carry (UOC) movement began in 2004 and involves citizens exercising their right to carry unloaded firearms in plain view. In most cases you may find citizens carrying the firearms in a belt holster and the citizen may be in possession of ammunition. A group of citizens that frequent the website opencarry.org have previously been in our city and we have contacted them. I recommend you become familiar with the laws regarding this issue as I expect this will not be the only time we experience citizens openly carrying firearms.

Operational considerations:

You must keep in mind that these people may want to provoke an incident with you so they could potentially take civil action against the City for violating their rights. Recently, there was an open carry event in Sunnyvale. Sunnyvale DPS encountered the citizens

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and found them to be polite and respectful. However, they also found that many members had video recorders, audio recorders, and cameras. In addition, they had an attorney present. There were seven members present at the event, which was held at a Starbucks, but only two members were carrying firearms. The UOC enthusiasts most likely **will not** produce identification, if requested. It is their stance that they are complying with all laws and are not compelled to identify themselves.

In short, Per the District Attorney's Office, there is no authority that we are aware of that requires them to identify themselves so **do not** enforce the 148 PC section solely under this circumstance.

YOU CAN EXPECT:

- Citizens carrying holstered firearms
- Citizens in attendance will not identify themselves but you may *request* identification
- UOC enthusiasts will know the law regarding carrying firearms
- You will not be able to persuade the citizens to leave or put their firearms away
- You will be recorded on video and / or audio
- These citizens perceive themselves as law abiding people exercising their rights

The following guidelines should be followed:

We can INSPECT the weapon. They must comply. If not, arrest for 12031 (e). If the serial number is in plain view you may conduct a records check. You can arrest if 537(e) or 12090 if applicable. You cannot *search* for the serial number.

We can arrest if within 1000 feet of school if it is reasonable that the subject knows or should have known they are within 1000 feet. See 626.9 PC below. If it does not meet those criteria, then admonish regarding the 1000 feet. This situation is now a reasonable lawful detention to further identify the person as there may be a crime that has occurred. Use your discretion and take appropriate investigative steps.

Absent any other reasonable suspicions or articulable facts, we cannot arrest for failure to provide I.D.

Dispatchers

Dispatch will process the calls using current procedures. However upon receiving a phone call regarding people openly carrying firearms, they will obtain as much information as possible about the demeanor, behavior, and activities of the people carrying the firearms to help everyone determine if this is an "open carry" situation. Dispatch will confirm that there is no brandishing, assault, or other unlawful activity in progress. They will confirm whether or not the firearms are concealed and the location of the firearms. Typical information such as information regarding the Reporting Person, descriptions, does the caller have any safety concerns, etc. will be gathered and relayed to the Officers.

The intent is to not change our current practices/procedures of how we gather information or what information to gather, rather try to drill in further to determine if this is an open carry" type call or a "man with a gun" type call. Obviously this information is critical to determine the appropriate tactics. A supervisor shall be assigned to all open carry or man with a gun calls.

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Supervisors

Ensure your officers are familiar with state laws regarding the carrying of firearms. Please share training material, which includes videos you may find at youtube.com. Other related documents have also been posted on the J Drive in the folder Open Carry.

I want to stress that we want this to be a brief, unobtrusive interaction as we do not have the right to detain anyone beyond inspecting firearms. Officers should be carrying a digital audio recorder and MVAR to record the event.

Supervisors may deviate from these recommendations if there are circumstances present which require a differing response.

Officers

Officers are expected to appropriately assess each situation and respond in a safe manner that respects the citizens' rights.

These types of contacts are difficult in the sense that you will be using different contact tactics that you may otherwise use in a situation involving a person with a gun that has other extenuating circumstances. We are required to respect the rights of others and impartially enforce the law. Demonstrate the utmost professionalism in your conduct.

Assess the situation and monitor the subjects prior to making contact. Use 'contact and cover while interacting with the citizens. Clear verbal commands regarding the weapon inspection should be given with the Officer retrieving the weapon from the holster.

If possible I would like a supervisor present when contact is made with the individuals or group.

Related Penal Code sections and Other Information

- PC §12025(f) states, "Firearms carried openly in belt holsters are not concealed within the meaning of this section." In other words, in order for a citizen to be in possession of a **concealed** firearm on his / her person [PC § 12025(a)(2)] the firearm must be concealed.
- PC § 12031(g) states, "A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell consisting of a case that holds a charge of powder and a bullet or shot, in or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder."

In *People v. Clark* (1996), the court held even though ammunition was in close proximity to a firearm the firearm was not considered "loaded" since it was not yet

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placed in a firing position. As a result, **citizens may lawfully carry ammunition on their person when they are carrying an unloaded firearm in a belt holster and the firearm is not concealed.**

- PC § 12031(e) states, "In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section."
- PC § 626.9 makes it unlawful to possess a firearm within 1,000 feet of any public or private school. There are exceptions to this rule when transporting a firearm. (FEL/MISD) Please note: The only 2 Starbucks Coffee that are within 1000 feet of a school are Mary/Washington and ECR/Poplar. It is suggested that a quick conversation to determine if the person knows there is a school nearby would be needed to establish the elements of 629.9 PC
- PC § 537e (a) Any person who knowingly buys, sells, receives, disposes of, conceals, or has in his or her possession any personal property from which the manufacturer's serial number, identification number, electronic serial number, or any other distinguishing number, or identification mark, has been removed, defaced, covered, altered, or destroyed, is guilty of a public offense. (MISD)
- PC § 12090 Tampering with marks on firearms. It is illegal to possess a firearm in which the serial number has been altered, covered, or obliterated. (FEL)

In reviewing the multiple court cases that discuss the Open Carry issue, it appears that the actions of police extend to:

- 1) A check of the firearm to determine if it is loaded pursuant to PC 12031 (e).
- 2) The serial number of the firearm can only be run if you happen to see it during the PC 12031 (e) check. But you cannot search for the serial number, **People v DeLong** (1970) 11 Cal.App.3d 786.
- 3) Once the firearm is determined to be unloaded, there is no further law enforcement action called for.
 - a. While **Hibel v Sixth Judicial District** allows for a demand for I.D., this case was in Nevada which has a "Stop and I.D." statute. California has no requirement for I.D., so the question of identifying someone is not clear. **The Santa Clara District Attorney position is not to detain or arrest for failure to provide I.D.**
 - b. U.S. Supreme Court held that law enforcement cannot stop and frisk a citizen based solely on an anonymous tip describing only innocent behavior and which also does not sufficiently predict the future actions of a subject. **Florida v J.L.** 529 U.S. 266 (2000).
 - c. U.S. Supreme Court **Arizona v Hicks** 480 U.S. 321 (1987), held that the 4th Amendment requires the police to have probable cause to search items in plain view.