

GUIDANCE MEMORANDUM



Ending Discriminatory Profiling in Maryland



AUGUST 2015

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ATTORNEY GENERAL OF MARYLAND

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INTRODUCTION

Discriminatory profiling by police is inconsistent with Maryland's enduring commitment to equality under the law. That promise is enshrined in our state and federal constitutions, in our antidiscrimination laws, and in the regulations and internal directives of law enforcement agencies across the State. This Guidance Memorandum fortifies Maryland's commitment to equality by promoting uniform statewide standards on the proper use of race, ethnicity, national origin, gender, gender identity, sexual orientation, disability and religion in the vital work of police. This Guidance aims to ensure that our pledge of equal protection is ingrained, in principle and in practice, in the everyday conduct of police, and is embodied by the everyday experience of all people in Maryland.

BACKGROUND

Each day, a wide array of law enforcement officers from city, county, and municipal police to state troopers and federal agents perform the important work of public safety. They operate in dense cities and small towns, on winding roads and congested highways, from Western Maryland to the Eastern Shore. While individual agencies must have flexibility to address challenges specific to their jurisdictions, on a subject as consequential as police profiling, a clear statewide standard for all law enforcement personnel is essential.

Over the past several years, many law enforcement agencies, including the Maryland State Police, have explicitly disavowed racial profiling, recognizing that the practice was unlawful and that it undermined public safety by alienating the communities they seek to serve. In December 2014, appreciating that profiling can extend beyond race and ethnicity, the United States Department of Justice issued new guidance on when federal law enforcement may use certain characteristics of a person — race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion — as a basis to act. Because those guidelines only apply to federal agents, the Attorney General of the United States called upon local leaders to adopt similar policies with respect to law enforcement activities at the state level. This Guidance Memorandum of the Attorney General of Maryland is an answer to that call.

Today more than ever, uniform standards are needed to avoid a patchwork understanding of when profiling is appropriate. Consistency is critical so both law enforcement and the communities they serve have a clear, common understanding of the rules. And no matter whether it is a federal drug agent, a state trooper, or a city detective, these rules should be the same across our State.

Rules and policies predicated on the discredited claim that certain groups commit crimes at higher rates, and therefore warrant greater police scrutiny, have been widely rejected. Experience has taught us that improper profiling by police exacts a terrible cost, discouraging cooperation by law-abiding citizens, generating bogus leads that turn attention away from bona fide criminal conduct, and eroding community trust. This makes police work more difficult and more dangerous. The nation is rightly shaken each time we hear of a lethal encounter between a civilian and a police officer. These tragic events have recently come to define the relationship between communities and police. That should not be. In this respect, the Guidance Memorandum is also meant to help repair fraying relationships by aiming to restore mutual respect to everyday police encounters.

The entire law enforcement community should not be vilified because of those who engage in discriminatory profiling, a practice that all hope has become increasingly rare. For too long, however, certain distinguishing human traits have been carelessly asserted to be crudely linked to crime. Where police carry out their work based on those assumptions, a person with one of those traits carries a burden every day that a person without that trait does not. This is deeply unfair: it segregates people by class instead of respecting them as individuals, and it compromises the dignity and individuality of every person placed into those subordinated groups. Invidious profiling has proven to be a profoundly flawed, ineffective, and unjust method of policing. The time has come for these principles to be transformed into uniform practice.

Accordingly, this Guidance Memorandum adopts the precepts set forth in the Justice Department's federal guidelines and extends it to all state and local law enforcement activities.¹ Provided below are governing state standards, along with corresponding illustrations, for two main sets of circumstances: one for routine police activity where there is no investigation already underway, and another for situations where the police have information and are investigating a certain crime, a particular criminal organization, or a specific crime scheme.

The Attorney General's Guidance is meant to be straightforward and pragmatic, easy to understand, and simple to follow. In order to integrate these guidelines into everyday police practice,

¹ Guidance issued by the Attorney General of Maryland is meant to enhance the internal policies and everyday practices of state and local law enforcement agencies. Like the federal guidance issued in December 2014, it is not intended to, and does not, create any right, trust, or responsibility, substantive or procedural, enforceable at law or equity by a party against any person or against the State, its departments, agencies, entities, officers, employees, or agents, nor does it create any right of review in an administrative, judicial, or any other legal proceeding.

the Attorney General of Maryland will convene training sessions in the coming months and calls upon local law enforcement agencies to incorporate these statewide guidelines into their general orders and to ensure that violations are taken seriously. The Attorney General’s Office of Civil Rights will also begin to issue an annual report sharing with the public what progress has been achieved. The report will propose strategies for strengthening and, where necessary, rebuilding relations between law enforcement and the communities they serve and protect.

GOVERNING STANDARDS

Two distinct standards — applicable to two different sets of circumstances: routine law enforcement operations and law enforcement activities related to ongoing investigations — govern whether certain defining personal characteristics may be considered by police in the course of law enforcement activities and investigations. The first standard should guide law enforcement with respect to routine police activity (e.g., traffic stops) where no specific investigation is underway, while the second standard covers activities pertaining to pending investigations.

I. Standard for Routine Law Enforcement Activity

When conducting routine police activity unconnected to an investigation of a specific crime, organization, or scheme, law enforcement may not consider race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion to any degree.

Every day, law enforcement officers in Maryland engage in important routine police work. They walk their beats and engage with the community, sometimes briefly detaining a person who has raised a reasonable, articulable suspicion. They stop speeding and reckless drivers and patrol for broken taillights and expired tags. Although this valuable work contributes to the body of police intelligence and sometimes leads to evidence of more serious crimes, these kinds of police activities generally are not connected to an investigation of a specific offense, gang or organization, or crime spree. Officers performing this work typically do not have information about the individuals they are pulling over or talking with apart from their observations. In these situations, a person’s race, ethnicity, national origin, gender, gender identity, sexual orientation, disability and religion should play no part in a police officer’s actions.²

² The Supreme Court has already forbidden law enforcement from relying solely upon race in the context of traffic stops. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”). Similarly, Maryland statutes require law enforcement agencies to adopt a policy against race-based traffic stops that prohibits the use of race or ethnicity as the sole justification to initiate a traffic stop. Md. Ann. Code, Transp. Art. § 25-113. This Guidance expands

For one of these defining personal characteristics to bear on an officer's decision to make a traffic stop or to detain an individual for investigation is flatly improper and should not occur. The law enforcement officer should consider whether he or she would take the same action if the person were of a different race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion. This does not preclude police from engaging in active enforcement in areas where greater enforcement is warranted. Nor should it discourage law enforcement from detaining individuals engaged in suspicious conduct or stopping drivers violating the law. Indeed, smart policing of locations that have experienced high rates of violence, drug trafficking, and other crimes has been a potent strategy in safeguarding specific neighborhoods. But decisions by police about whom to talk with, which vehicles to stop, and what areas to police should be made without regard to a person's race, ethnicity, national origin, gender, gender identity, sexual orientation, disability and religion.

Example: An officer conducting traffic stops along a busy interstate believes that people of a certain ethnicity are more likely to be involved in the transportation of illegal narcotics. Based on that assumption, she focuses on drivers of that ethnicity, and when she witnesses a traffic violation, stops the vehicle. Even though the motorist is violating the traffic code, the officer's use of ethnicity in determining which motorists to stop is improper because a defining personal characteristic is one factor in the officer's actions.

Also, law enforcement may develop suspect profiles that do not incorporate race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion, so long as a proxy for one of these traits is not being used as a pretext.

Example: Officers develop a "drug courier profile" that focuses on the amount and type of luggage a traveler is carrying, how the traveler paid for his or her ticket, and when the traveler arrives at the airport. The officers then question people at BWI airport based upon this profile. This kind of routine police investigation is permissible because, while it targets certain individuals to the exclusion of others, it does not rely upon a defining personal trait, nor do the profiling characteristics operate as a proxy for an illegitimate consideration. See *Grant v. State*, 55 Md. App. 1, 7 (1983).

Example: Local law enforcement selectively approach individuals for consensual interviews and investigate their immigration status solely based upon how well they appear to speak English. Because English proficiency may operate as a proxy for race, ethnicity, or national origin, using this kind of superficial suspect profile is improper. See *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 459 n.2 (4th Cir. 2013).

that prohibition to other classifications and to law enforcement activities beyond traffic stops. Also, it establishes that in routine police activity, these defining personal characteristics should not be considered by law enforcement *to any degree* when taking an enforcement action.

Thus, in routine police encounters where law enforcement are acting upon no additional information separate from their observations, the race, ethnicity, national origin, gender, gender identity, sexual orientation, disability and religion of the person in question should in no way influence the conduct of police. Maryland's commitment to equal protection under the law guarantees no less.

A different standard applies where a certain crime, a particular criminal organization, or a specific crime scheme is under investigation.

II. Standard for Investigative Law Enforcement Activity

When investigating a specific criminal offense, criminal organization, or crime scheme, law enforcement may only consider race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion if police are in possession of credible information that makes the defining personal characteristic directly relevant to the investigation of a specific offense, organization, or scheme.

In addition to routine patrols and monitoring motorists, police are responsible for solving past crimes, dismantling criminal syndicates, and thwarting criminal schemes. Performing that work effectively requires police to pursue leads and build investigations based on reliable intelligence. In that context, certain individual characteristics may be relevant and properly used by law enforcement. Where, for example, an eyewitness to a shooting provides a description of the perpetrator that includes a particular characteristic, police can certainly narrow the search for the suspect to individuals possessing that trait. Similarly, if a reliable informant advises police that a narcotics organization or the "crew" responsible for a string of bank robberies is comprised of individuals who share some characteristic, law enforcement are permitted to take account of that information in conducting their investigation. Ending discriminatory profiling does not require law enforcement to ignore or reject bona fide leads and credible intelligence. It does require police to rely only upon information that is trustworthy and is relevant to the investigation of a specific offense, organization, or crime scheme.

As a threshold matter, police should be confident that the information implicating a potentially discriminatory personal characteristic is trustworthy. Many legal standards that govern police action (e.g., reasonable articulable suspicion to justify an investigatory stop or probable cause for a search warrant) already incorporate this requirement. Thus, law enforcement officers are not entitled to limit the scope of their investigation to individuals of a certain race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion, when the information that would justify concentrating on a specific subgroup is unreliable and unspecific. To be sure, courts have held that information from an eyewitness or the victim of a crime, where that person is not anonymous, can be

reliable. *See Cross v. State*, 165 Md. App. 164, 187 (2005) (distinguishing an anonymous tipster from someone who makes a face-to-face report of a crime). Intelligence from a confidential informant, whose identity is known to police and who has proven reliable in the past, can also be credited. *See, e.g. Smith v. State*, 161 Md. App. 461, 477 (2005). Anonymous tips by comparison should be highly specific and should be used judiciously.

Example: A confidential informant with a history of providing truthful information tells police that an individual of a certain nationality will be delivering narcotics to a particular place at a particular time. Law enforcement officers can properly consider nationality when investigating the suspected narcotics delivery.

The information upon which the police wish to act — even where that information satisfies the threshold requirement of being trustworthy — should also relate directly to the investigation of a certain crime, a particular criminal organization, or a specific crime scheme.

1. Investigation of a specific criminal offense.

When a victim or witness provides a description of a suspect that includes the suspect's race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion, that information can be considered by law enforcement in the subsequent investigation, even if it is the only information available. However, an individual descriptor should never be the sole basis for law enforcement action. Broad targeting of specific groups of individuals may raise constitutional concerns, and always raises serious fairness concerns.

Moreover, while law enforcement may consider identifying characteristics even where that is the only information available, that information alone is not sufficient to justify a Fourth Amendment intrusion, such as an investigatory detention. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) (officers' belief that defendants were of Mexican descent insufficient to justify border stop). Law enforcement may rely on identifying characteristics when developing the reasonable suspicion necessary to detain a suspect, but those characteristics must exist in conjunction with other information. When considering whether there is sufficient information to justify a detention, in addition to personal identifiers, the following factors should be considered:

- (1) the particularity of the description of the offender or the vehicle in which he fled;
- (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
- (3) the number of persons about in that area;
- (4) the known or probable direction of the offender's flight;
- (5) observed activity by the particular person stopped; and
- (6) knowledge or suspicion that the person or

vehicle stopped has been involved in other criminality of the type presently under investigation.

4 Wayne R. LaFare, *Search & Seizure* §9.5(g) at 550-51 (4th ed. 2004) (cited with approval by *Stokes v. State*, 362 Md. 407, 420 (2001); *Cartnail v. State*, 359 Md. 272, 289 (2000); *Williams v. State*, 212 Md. App. 396, 406, *cert. denied*, 435 Md. 270 (2013); *Sykes v. State*, 166 Md. App. 206, 217 (2005)). While this list of factors is not exhaustive, the totality of the circumstances must work together to “eliminate a substantial portion of innocent travelers” from suspicion. *Cartnail*, 359 Md. at 291. The following examples are illustrative:

Example: A woman flags down a police officer and reports that she was robbed by a tall man in his 20s of a particular race. Based on this report, for the next 24 hours, law enforcement officers detain and question every man of that race within a two-mile radius. This would be improper because of the expansive breadth of the detentions and because race, to the exclusion of other identifying characteristics supplied by the victim, has become a principal basis of who to detain.

Example: Police receive calls in the early morning hours for two robberies near one another in a residential neighborhood. One victim described the perpetrators as being of a particular race. While investigating the other call, police observe a vehicle drive very slowly down the secluded residential street, then speed away. The officers could see that the occupants were of the race identified by the victim. When officers stopped the car to investigate, the men tried to flee. The use of race in this case was permissible because it was accompanied by other factors such as the isolated area, and the behavior of the vehicle and its occupants. *See generally Williams*, 212 Md. App. at 405-16.

2. Investigation of a specific criminal organization.

The same limitations with regard to the consideration of race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion apply to investigations of a criminal organization. Police should consider the criteria articulated in Section II.1., also assessing whether the information is relevant in time and location to a specific criminal organization. And the source of the information must be trustworthy. The following examples are illustrative:

Example: A woman flags down a police officer and tells him that a group of men of a particular race are members of a neighborhood gang. The officer detains and questions every male of that race in the area. Because the information was not related to specific criminal activity, and because nothing in the general information provided by the person establishes that she is credible, this use of race was improper.

Example: A special task force is convened after a rash of gang violence erupts in a small urban neighborhood. After speaking with a number of reliable confidential informants and former gang members, the task force learns that the gang involved only permits members of a particular ethnicity, and that those members have signature

tattoos and wear articles of clothing of a specific color. Officers are permitted to consider ethnicity, along with the other defining traits of the gang, as part of their investigation.

3. Investigation of a specific criminal scheme.

Similarly, when officers are investigating a criminal scheme, considering the race, ethnicity, national origin, gender, gender identity, sexual orientation, disability or religion of the suspects may be appropriate, but only where that information is relevant and reliable, and directly relates to the criminal activity. As with information about a criminal incident, the information must be temporally and geographically related to the scheme being investigated. The following examples are illustrative:

Example: Police receive information that an auto theft ring is being run in one urban community at a specific location by a group of people of a particular ethnicity. Police in a neighboring county decide to conduct vehicle stops on all people of that ethnicity. This would be improper because the information, even if reliable, is not geographically relevant.

Example: A reliable confidential informant tells police that a group of men belonging to a particular religious sect are stockpiling weapons at a residence adjacent to a specific place of worship. The police include that information in an application for a search warrant of that residence as part of that investigation. This use of religion is proper because it is based upon reliable and relevant information.

CONCLUSION

We demand a great deal of our law enforcement community. We expect officers to perform perpetually at their very best, even as they confront citizens often at their very worst. Those are exacting requirements. And yet, every day, law enforcement officers across the State of Maryland deliver exactly what we ask of them. Unfortunately, many today do not appreciate the brave and important work of police. Frustration and misgivings have weakened the unspoken trust that once existed between law enforcement and the communities they serve. Correcting this will not happen overnight, but the end of discriminatory profiling — a practice that has long molded the views of groups who have been singled out — is essential to restoring that trust. The Office of the Attorney General issues this guidance with the hope that it assists in restoring the faith of all citizens, in every neighborhood and of every background, who form the rich mosaic of Maryland.

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