

BERKELEY POLICE DEPARTMENT

DATE ISSUED: April 16, 2008

GENERAL ORDER A-53

SUBJECT: ARREST AND INVESTIGATION PROCEDURE - DRIVING UNDER THE INFLUENCE

PURPOSE

- 1 - The purpose of this Order is to establish policy and procedures for the investigation of, and management of custody issues pertaining to, "Driving Under The Influence" of an intoxicant (DUI) offenses.

POLICY

- 2 - Officers shall investigate reports of, or incidents involving, the operation of a motor vehicle by a person under the influence of an intoxicant (i.e., alcoholic beverage, drug(s), or combination of both), and effect an arrest for a violation of a DUI-related Vehicle Code offense(s) when:
 - (a) The arresting officer witnessed the offense.
 - (b) The subject driver was involved in a traffic collision and the arresting officer has reasonable cause to believe that the person had been driving under the influence of an intoxicant, as authorized in VC §40300.5.
 - (c) The investigating officer takes custody of a subject driver subsequent to a private party arrest, as authorized by Penal Code §837.
- 3 - Prosecution should be requested in each case where the drug or alcohol content of a driver's blood indicates impairment, as defined in VC §§23152 and 23153.
- 4 - In incidents unrelated to a traffic collision where an investigating officer must rely on witness testimony to place a person, who was detained in a public place, in and driving a vehicle while under the influence of an intoxicant, the officer should arrest the subject driver for a violation of PC §647(f) (public intoxication) and submit a request for a criminal complaint to the District Attorney's Office for the DUI offense.

PROCEDURES

Venue/Where An Arrest May Be Made

- 5 - VC §§23152 and 23153 prohibit the operation of a vehicle while under the influence of an intoxicant without restriction to a particular venue. Therefore, an arrest may be made for a DUI offense on public or private property.

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Field Sobriety Tests (FST)

- 6 - Unless otherwise required or appropriate, officers should employ FST procedures described in Training and Information Bulletin #95 (Driving Under the Influence (DUI) Detection), to include the following three standardized tests: Horizontal Gaze Nystagmus, Walk and Turn, and One Leg Stand.
- (a) Officers should use additional tests, as may be necessary, in the event the driver is unable to perform one or more standardized tests, or to further evaluate the person's sobriety.

Preliminary Alcohol Screening (PAS)

- 7 - The Preliminary Alcohol Screening (PAS) device is a field sobriety test that may be used by an officer investigating a suspected intoxication offense.
- 8 - A PAS test will be conducted only by personnel trained by a certified PAS device operator in the device's operation.
- 9 - Prior to administering a PAS test, the PAS operator shall admonish drivers (21 years or older) pursuant to VC §23612(i); drivers under 21 years of age require no such admonition.
- (a) A driver under 21 years of age is deemed to have given his/her consent to a PAS test or other chemical test for the purpose of determining the presence of alcohol in his/her blood if lawfully detained for DUI (VC §23136.)
- (b) If a driver under 21 years of age refuses to submit to a PAS test, the officer shall admonish him/her pursuant to VC §13353.1 (reference Department of Motor Vehicle (DMV) form DS 367M (Under Age 21 Officer's Statement).)
- 10 - The PAS test will be administered following established procedures:
- (a) The device operator shall conduct the preliminary screening test by following the precautionary checklist associated with the PAS unit.
- (b) The device operator shall maintain continuous observation of the driver for at least fifteen (15) minutes before beginning the PAS test, during which time the subject must not have ingested alcoholic beverages or other fluids, eaten, smoked, or regurgitated.
- (c) A PAS test will involve two (2) separate breath samples obtained at least two (2) minutes apart, and will be deemed successful if the results exhibited are within a .02% variance.

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- (1) In cases where this tolerance is exceeded, additional tests of the driver's breath shall be conducted until the results of two analyses fall within the 0.02% BAC variance.
 - (d) Upon completion of the testing, the officer shall ensure that the "Set" button is depressed, and the machine is returned to its proper storage container.
- 11 - The device operator who employs a PAS device shall complete the sign-out sheet when obtaining the unit from, and at the time of its return to, the designated PAS device storage location.
 - (a) When the device is returned to storage, the device operator shall log the total number of tests conducted during the period of use.
 - (b) When the device is returned to storage, the device operator shall replenish the mouthpiece supply in the PAS unit storage case.
- 12 - PAS program liaisons shall be responsible for conducting accuracy checks on Department PAS devices every ten (10) days or 150 tests, whichever occurs first, and for accomplishing required device calibration.
 - (a) If analysis results are within a .010% variance of the actual value of the alcohol solution used for the accuracy check, no calibration of the PAS device is required.
- 13 - Should a PAS device malfunction or become damaged, the device operator shall report the problem via Defective Condition form to the Patrol Division Fleet Manager, who shall notify a Department PAS program liaison.
 - (a) If the device operator is a PAS program liaison, a Defective Condition form is not required.
 - (b) No other person should attempt to repair or check the accuracy of the PAS device.
- 14 - A designated PAS program liaison shall be responsible for maintaining PAS device records, including, but not limited to, the number of tests performed in a specified period, time checks, and accuracy checks.

Blood Alcohol Content (BAC) Admonition

- 15 - Pursuant to VC §23612, it is mandatory that:
 - (a) A person arrested for a DUI offense submit to a chemical test to determine the alcohol and/or drug content of his/her blood.

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- (b) The arresting officer shall properly admonish the arrested person regarding "Implied Consent" and BAC testing options relevant to the suspected DUI condition.
- 16 - When a person arrested for a DUI offense refuses to participate in a chemical test required by VC §23612, officers shall read verbatim the Chemical Test Admonition text presented on either DMV form DS 367 (Age 21 and Older Officer's Statement) or DS 367M.
- 17 - Officers shall adhere to the following admonition procedures when investigating particular DUI offenses:
- (a) Alcohol Intoxication:
 - (1) A person arrested for driving under the influence of an alcoholic beverage shall be advised he/she has the choice whether the test shall be of his or her blood or breath.
 - (i) If either the blood or breath test is unavailable, or the arrested driver is, or states he/she is, incapable of completing either test, he/she shall be advised of the requirement to submit to the remaining test.
 - (ii) If neither the blood or breath test is available, or the arrested driver is incapable of completing both tests, he/she shall be advised of the requirement to submit to a urine test.
 - (2) Notwithstanding the tests referenced in the Chemical Test Admonition, if the arrested driver requests a urine test, the officer shall facilitate the person's completion of a urine test as an alternative to the blood or breath tests.
 - (3) If the arrested driver refuses to take either the breath or blood test, and does not request a urine test, the arresting officer may proceed with an involuntary blood test, unless the driver is legally exempt, as described in paragraph 28 of this Order.
 - (i) A search warrant is not required to obtain an involuntary blood sample to facilitate a DUI investigation.
 - (b) Drug Intoxication:
 - (1) A person arrested for driving under the influence of drugs (no alcohol) shall be advised he/she has the choice whether the test shall be of his or her breath, blood or urine.

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- (i) If the arrested driver chooses the breath test, the arresting officer shall read the Drug Admonition text presented on DMV form DS 367 or DS 367M.
 - (ii) The arresting officer must, to the arrested driver and in the criminal investigation report, articulate the "clear indication" that a blood or urine test will reveal evidence of his/her being under the influence of drugs.
 - (iii) If either the blood or urine test is unavailable, or the arrested driver is, or states he/she is, incapable of completing either test, he/she shall be advised of the requirement to submit to the remaining test.
- (2) If the arrested driver refuses to participate in either the blood or urine test, the arresting officer may proceed with an involuntary urine test as described in paragraph 42 of this Order.
- (c) Alcohol and Drug Intoxication:
- (1) A subject driver arrested for driving under the influence of a combination of alcohol and drugs shall be advised he/she has the choice whether the test shall be of his or her breath, blood or urine.
 - (i) If the subject driver requests a breath test, he/she shall be advised of the requirement to submit to a blood or urine test to determine the drug content of his/her blood.
 - (ii) At the conclusion of the breath test, if not already accomplished, the arresting officer shall read verbatim the Drug Admonition text presented on DMV form DS 367 or DS 367M.
 - (iii) The arresting officer must, to the subject driver and in the criminal investigation report, articulate the "clear indication" that a blood or urine test will reveal evidence of his/her being under the influence of drugs.
 - (iv) If either the blood or urine test is unavailable, or the subject driver is, or states he/she is, incapable of completing either test, he/she shall be advised of the requirement to submit to the remaining test.
 - (2) If the subject driver refuses to participate in either the breath or blood test, the arresting officer may proceed with an involuntary blood test, unless the driver is legally exempt, as described in paragraph 28 of this Order.

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- 18 - The officer who issued the Chemical Test Admonition and received the subject driver's response regarding his/her participation in required BAC testing shall document this information on DMV form DS 367 or DS 367M, in addition to noting it in the criminal investigation report narrative.
- 19 - Pursuant to VC §23612(a)(5), BAC test(s) may be conducted on the following at the direction of the arresting officer:
 - (a) A person who is unconscious or otherwise in a condition rendering him/her incapable of refusal.
 - (1) BAC testing may proceed without issuance of, or receipt of the subject driver's response regarding, the Chemical Test Admonition.
 - (b) A person who is dead.

Blood Testing (Voluntary)

- 20 - Unless otherwise necessary or directed, the arresting officer shall transport a person arrested for a DUI offense who is subject to blood testing to the Berkeley City Jail.
- 21 - Extraction of blood samples for evidentiary analysis shall be performed in a medically approved manner by trained and certified personnel (e.g., physician, registered nurse, certified phlebotomist, etc.)
- 22 - The arresting officer shall notify the Communication Center regarding the blood test request, and provide the following information as soon as practical:
 - (a) Identify the criminal offense(s) that warrants a chemical test.
 - (b) Report whether the arrested driver is cooperative or is refusing to participate in the blood test.
 - (c) Identify the location where the blood test is to occur.
 - (d) Provide an estimated time of arrival at the testing location.
- 23 - Unless otherwise advised or directed, the Public Safety Dispatcher who receives the arresting officer's notification of a blood test request shall contact the on-call phlebotomy vendor, convey the above information, and log the call into the associated CAD event.
 - (a) The officer having custody of the arrested driver shall notify the Communication Center when the on-call phlebotomist arrives at the testing location, if other than the Public Safety Building.

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- (b) In the event the on-call phlebotomist does not arrive at the testing location within 45 minutes of initial notification, the officer having custody of the arrested driver shall advise the Communication Center, who shall accomplish and log in the CAD event a follow-up request for service.
- 24 - Prior to and during the blood test, the officer witnessing the blood draw procedure shall be responsible for the following:
 - (a) The officer will obtain a "Declaration of Person Qualified to Perform Venipuncture" from the on-call phlebotomist prior to beginning the blood test.
 - (b) The officer will receive two samples of the arrested driver's blood to determine the alcohol and/or drug content.
 - (c) The officer shall ensure all necessary evidence documents are complete prior to the departure from the testing location.
- 25 - The arresting officer shall store the blood sample evidence in the temporary storage refrigerator, in accordance with General Order P-65.
- 26 - The Property Room supervisor, or his/her designee, shall be responsible for contacting the contract courier service to request a pick-up of evidence specimens requiring laboratory analysis.
- 27 - Upon receipt of laboratory analysis results from the contract laboratory vendor, the Records Bureau supervisor, or his/her designee, shall ensure test results are incorporated into the case archive and copies are provided to the Department's Court Liaison officers, as well as to the arresting officer.
 - (a) Court Liaison officers shall be responsible for delivering copies of laboratory analysis results to the District Attorney's Office.
- 28 - As set forth in subsections (b) and (c) of VC §23612, the following are exempt from blood testing otherwise required by this statute:
 - (a) Persons afflicted with hemophilia (a blood disorder that inhibits or prevents blood-clotting.)
 - (b) Persons afflicted with a heart condition and who are using an anticoagulant under the direction of a licensed physician and surgeon.

Blood Testing (Involuntary)

- 29 - The following employees shall be involved in the administration of an involuntary blood test procedure:
 - (a) A sworn supervisor.

* Entire text is revised.

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- (b) The arresting officer.
 - (c) An assisting employee.
 - (1) The incident supervisor shall involve as many assisting employees as may be required to ensure the restraint of an arrested driver and to accomplish an involuntary blood test.
- 30 - Prior to conducting an involuntary blood test procedure, the arresting officer shall seek the consent of the arrested driver.
- (a) Should the arrested driver refuse the arresting officer's request for consent to a voluntary blood test procedure, the incident supervisor shall explain to the subject their refusal will result in his/her physical restraint, and that reasonable force may be employed to promote the safety of all involved parties during the impending blood test procedure.
- 31 - Upon authorization of the incident supervisor, employees may employ physical force to restrain a driver arrested for either a misdemeanor or felony DUI offense who refuses to participate in a voluntary blood test.
- (a) The incident supervisor shall evaluate the subject's level of resistance in light of the nature of the offense (e.g., misdemeanor or felony DUI, aggravating/mitigating factors, etc.) when considering authorization and continuation of an involuntary blood test procedure.
 - (1) Where significant physical effort will be required to overcome a subject's active, aggressive resistance, the incident supervisor should only consider authorization of an involuntary blood test procedure for investigation of a felony DUI offense.
- 32 - The incident supervisor shall monitor the restraint process to ensure only the amount of force that is required to overcome subject resistance is employed.
- (b) Should a subject's violent resistance increase the potential for injury to an involved party, and intensify to an untenable level the amount of physical force required to accomplish his/her restraint, the supervisor shall terminate the involuntary blood test procedure.
- 33 - If video recording equipment is available, and its use is practical, the incident supervisor shall ensure the entire involuntary blood test procedure is recorded.
- (a) The incident supervisor shall ensure the medium employed to record the testing procedure (e.g., cassette, digital video disk, etc.) is booked as evidence in accordance with General Order P-65.

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- 34 - When available and practical, restraint equipment should be employed if its use would enhance the safety of persons involved in an involuntary blood test procedure.
- (a) "Restraint equipment", as used in this Order, may include, but is not limited to, a padded phlebotomy chair, a hospital gurney equipped with soft-restraints, and "The Wrap" restraint device.
 - (b) The use of restraint equipment shall not preclude the physical restraint of an arrested driver's person by an employee(s) if such action is necessary to mitigate the potential for injury.
- 35 - Should employees employ physical force to overcome an arrested driver's violent resistance to an involuntary blood test procedure, the incident supervisor shall adhere to "Use of Force" reporting protocols described in General Order U-2.
- (a) The arresting officer shall document in the criminal investigation report the conduct of an arrested driver during an involuntary blood test.
- 36 - In the event an arrested driver is injured, or complains of injury, as a result of police action, the incident supervisor shall ensure the medical service protocols described in General Order A-17 are followed.

Urine Testing (Voluntary)

- 37 - The Jail Operations Sergeant, or his/her designee, shall ensure a sufficient supply of materials necessary for the administration of a urine test are maintained in the Jail.
- 38 - Urine testing shall be witnessed by an employee of the same gender as the person providing the sample.
- 39 - When testing an arrested person for either alcohol intoxication, or a combination of alcohol and drugs, the arresting officer shall obtain two urine specimens, each labeled with the subject's name and the date and time the sample was provided.
- (a) The first specimen shall be collected in a specimen cup (without preservative) immediately after arrival into the Jail.
 - (b) The second specimen shall be collected in a specimen cup (containing preservative) not less than twenty (20) minutes after the first specimen.
- 40 - When testing an arrested person for drug intoxication only, the arresting officer shall obtain one urine specimen.
- (a) The specimen shall be collected in a specimen cup (without preservative) labeled as described in paragraph 39 of this Order.

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- 41 - The arresting officer shall ensure all specimen containers are sealed, placed into a properly completed laboratory envelope, and placed into the temporary storage refrigerator, in accordance with General Order P-65.

Urine Testing (Involuntary)

- 42 - In the event an arrested person, who is lawfully exempt from blood testing, refuses to participate in the urine test, be it the only BAC testing process available, the arresting officer may only obtain a urine sample if its seizure is authorized by search warrant.
- (a) An officer shall seek a search warrant to obtain a compelled urine sample only in the investigation of a felony DUI offense and with the prior approval of a supervisor.
- (b) In that a compelled urine sample must be obtained through catheterization, said procedure shall be conducted at an appropriate medical facility by trained medical personnel.
- 43 - With due regard to the protocols of the medical facility wherein the involuntary urine test is to be conducted, employees shall follow the involuntary testing procedures described in paragraphs 29 - 36 of this Order.

Breath Testing

- 44 - When the arrested driver has selected the breath test, the arresting officer shall issue the driver the "Trombetta Advisement" and facilitate the driver's choice to provide for preservation a sample of his/her blood or urine.
- 45 - The arresting officer shall without delay transport the driver who has elected to participate in a breath test to a detention facility equipped with a County-certified Dräger Alcotest breath analysis system.
- 46 - The arresting officer shall ensure the arrested driver does not eat, drink or smoke, and be attentive to burping and/or regurgitation by the arrestee, from the time of arrest to the completion of the Dräger Alcotest breath test.
- (a) The arresting officer shall inform the Dräger Alcotest operator if the arrestee has burped and/or regurgitated during the aforementioned custodial period.
- 47 - The arresting officer shall be present for and witness the administration of the Dräger Alcotest breath test.
- 48 - Dräger Alcotest breath tests shall be administered only by Department employees certified as Dräger Alcotest Operators by the Alameda County Sheriff's Office Crime Laboratory.

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- 49 - Department employees who are certified Dräger Alcotest Operators shall adhere to testing procedures established for the particular Dräger Alcotest employed for a breath test (e.g., Dräger Alcotest checklist procedures.)
- 50 - The Dräger Alcotest Operator shall instruct the arrested person in the conduct of an Dräger Alcotest breath test, and monitor his/her performance to ensure the best opportunity for a successful testing process.
- (a) A testing process will be deemed successful if the results exhibited on the analysis report are within a .02% variance.
 - (b) In cases where this tolerance is exceeded, additional tests of the arrested person's breath shall be conducted until the results of two analyses fall within the .02% BAC variance.
- 51 - The Dräger Alcotest Operator shall complete the test record, present the original to the arresting officer, and place one copy in the designated Crime Lab box.
- (a) The arresting officer shall book the original test record into the Property Room and include a copy with the criminal investigation report.
- 52 - In case of Dräger Alcotest instrument malfunction during a test, no attempt shall be made to repair or adjust the unit.
- (a) The Dräger Alcotest Operator who witnessed the malfunction shall report the problem to his/her supervisor, who will ensure the problem is reported to the Jail Operations Sergeant.
 - (b) The Jail Operations Sergeant, or his/her designee, shall be responsible for requesting repair of, or maintenance for, an Dräger Alcotest unit from: 1) Alameda County Crime Lab (510-667-7700, M – F/0800 – 1700); or, 2) Alameda County Sheriff's Office, Eden Township Station Patrol Bureau Watch Commander (510-667-3603.)
- 53 - In the event the Dräger Alcotest unit malfunctions, the arrested person requesting a breath test will be transported to the nearest facility with a functioning Dräger Alcotest unit.
- (a) The Jail Operations Sergeant, or his/her designee, will ensure a current list of local agencies with Dräger Alcotest equipment is maintained in the Jail.

DUI ON A BICYCLE

- 54 - Pursuant to VC § 21200.5, an officer may arrest any person who is suspected of operating a bicycle on a highway while under the influence of an alcoholic beverage or drug, or a combination of both.

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- 55 - An arresting officer may request an arrested person's participation in, and shall facilitate a person's request for, an available chemical test to determine his/her BAC level.
- (a) "Implied Consent" statutes (VC §§13353 and 13353.2) do not apply to bicyclists, and, as such, arresting officers shall neither require an arrested person to submit to BAC chemical testing, nor admonish them pursuant to VC §23612.
 - (b) Neither completion and submission of DMV form DS 367 or DS367M (Officer's Statement), nor issuance of an associated chemical test admonition, is required in incidents involving the DUI-related investigation and arrest of a bicyclist.

REPORTS AND FORMS

- 56 - The arresting officer shall document their investigation of a DUI offense on designated Berkeley Police Department and DMV-issued reporting forms.
- 57 - With regard to general report preparation policy set forth in General Order R-31, officers will present facts relevant to their investigation in the DUI-specific narrative format described in Training and Information Bulletin #95.
- 58 - The arresting officer shall include all relevant offenses in the criminal investigation report and on the Consolidated Arrest Report, and refrain from issuing a separate Notice to Appear citation for related minor offenses (i.e., the Vehicle Code infraction(s) that supported the initial detention.)
- 59 - When completing DMV form DS 367 or DS 367M (Officer's Statement), the arresting officer shall complete the Administrative Per Se section and issue the designated copy of the form to the arrested driver in the following situations:
- (a) The arrested driver completes a breath test indicating a .08% BAC or more.
 - (b) The arrested driver completes a blood or urine test and the arresting officer believes the results will indicate a .08% BAC or more.
 - (1) Except in cases of commercial vehicle operation (refer to paragraph 59(d)), arresting officers are not required to complete DMV form DS 367 if he/she does not believe the driver has a BAC of .08% or more.
 - (c) The arrested driver refuses to submit to, or fails to complete, a chemical test of the alcohol and/or drug content of his/her blood.

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- (d) When the arrested driver is operating a commercial vehicle, regarding the conditions described in paragraphs 59(a) and 59(b), the levels are .04% BAC or more.
 - (e) If the arresting officer finds the arrested driver has not been issued a driver's license, DMV form DS 367 shall be completed and Administrative Per Se copy issued.
- 60 - The arresting officer shall attach the designated copy of DMV form DS 367 or DS 367M with their investigation report and forward the remainder of the form to the Traffic Bureau.
- (a) Within five (5) business days of the associated DUI arrest, the Traffic Bureau Lieutenant, or his/her designee, shall ensure the completed and signed original of DMV form DS 367 or DS 367M is mailed to: Department of Motor Vehicles, Office of Driver Safety, 303 Hegenberger Road, Suite 400, Oakland, CA 94621-1452.
- 61 - The arresting officer shall adhere to the following criteria regarding seizure and confiscation of a California Driver's License (CDL):
- (a) The officer shall confiscate the driver's CDL if a breath test is completed and both results yield .08% BAC or greater.
 - (b) The officer shall confiscate the driver's CDL if a blood or urine test is completed, and the officer has reasonable cause to believe the results will yield .08% BAC or greater.
 - (c) The officer shall not confiscate the driver's CDL if drug use, or a combination of drugs and alcohol (<.08% BAC) is suspected.
 - (1) In cases of suspected DUI involving drugs, or a combination of drugs and alcohol (<.08% BAC), the officer should complete a DMV form DS 427 (Request For Regular Re-Examination of Driver) to document the reason for the stop and indicate the driver was arrested for a DUI offense.
 - (2) The arresting officer who completes DMV form DS 427 shall be responsible for mailing it and toxicology results to the DMV Office of Driver Safety identified in paragraph 60(a) of this Order.
 - (d) The officer shall not confiscate an arrested driver's out-of-state operator license, as California's Administrative Per Se law applies to CDLs only, but shall complete and route DMV form DS 367 or DS 367M as directed in paragraphs 59 and 60 of this Order.

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- 62 - The arresting officer shall request via Communications Center personnel an abstract of the arrested driver's conviction record from DMV's Division of Driver's Licenses, and shall attach the abstract to his/her criminal investigation report.

CUSTODIAL PROCEDURES

- 63 - When a driver is arrested for a DUI offense and is to be retained in custody, employees shall follow the booking and custodial procedures described in General Order J-1.
- 64 - Employees shall adhere to procedures set forth in General Order C-10 with regard to an arrested driver's release from custody on a Notice to Appear citation.
- 65 - Arresting officers who, while investigating a DUI offense, take a suspected driver into custody for public intoxication (PC §647(f), reference paragraph 4 of this Order) shall follow custodial protocols described in General Order I-15.

ASSISTING OTHER AGENCIES

- 66 - Employees of this department shall, upon request, provide necessary assistance to any law enforcement agency investigating a DUI offense, including, but not limited to, facilitation of BAC testing.

References: California v. Trombetta, 467 U.S. 479 (1984)
California Attorney General's Office Opinion #88-1102 (10/26/1989),
Lawful Use of Preliminary Breath Testing Devices in DUI
Enforcement
California Vehicle Code, §§13353, 13353.2, 13354, 23140, 23152, 23153,
23612, 23614 and 40300.5
California Penal Code §§191.5, 647(f) and 837
General Orders A-17, A-50, C-2, C-10, I-15, J-1, R-31, U-2 and V-4
Training and Information Bulletins 95 and 247
Mutual Agreements, Understandings and Policies – Pacts #3, 4, 43 and
49