**AUTHORITY OF LAW ENFORCEMENT TO REMOVE FIREARMS AT THE SCENE OF DOMESTIC VIOLENCE INCIDENTS AND TO ENFORCE ORDERS TO SURRENDER WEAPONS ISSUED WITH EITHER DOMESTIC VIOLENCE PROTECTION ORDERS OR EXTREME RISK PROTECTION ORDERS**

A. DOMESTIC VIOLENCE PROTECTION ORDERS & ORDERS TO SURRENDER WEAPONS[[1]](#footnote-1)

A domestic violence victim can petition for a civil protection order without involving the police or initiating a criminal investigation. When entering either a temporary or permanent protection order, where there is a clear and convincing showing that a party has used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him ineligible to possess a firearm a court shall order that party to surrender any firearm or other dangerous weapon. RCW 9.41.800(1)(a). If this showing is made by the lesser standard of a preponderance of evidence, a court may order surrender. RCW 9.41.800(2)(a).

When a protection order is issued after a hearing for which in the respondent received notice and had the opportunity to participate, and the respondent represents a credible threat to the physical safety of the intimate partner or child, the court **shall** also issue an order requiring the respondent to surrender firearms, other dangerous weapons, and concealed pistol license. RCW 9.41.800(3).

A court may order temporary surrender *without notice* to the respondent if it finds that irreparable injury could result without such an order. RCW 9.41.800(4).[[2]](#footnote-2)

The order requires the respondent to surrender to the serving law enforcement agency all firearms or other dangerous weapons in his/her possession immediate control. The law also permits the surrender of weapons to the respondent’s counsel, or to any person designated by the court. RCW 9.41.800(7). A respondent served with an Order to Surrender Weapons must file with the clerk of the court a proof of surrender and receipt form or a declaration of non-surrender form within five judicial days of the entry of the order. RCW 9.41.804. Any violation is a misdemeanor. RCW 9.41.810.

In the criminal context, after arrest and booking of an offender on a criminal domestic violence matter, upon a finding of probable cause that a crime has been committed, a judge will issue a domestic violence no contact order and will impose an order to surrender firearms and other dangerous weapons. If and when formal charges are formally filed, an additional domestic violence no contact order will be imposed, and another order to surrender firearms and other dangerous weapons.

B. DOMESTIC VIOLENCE LETHALITY

According to the Washington State Coalition Against Domestic Violence, 73% of domestic violence homicides in 2015 were due to use of a firearm. In just less than half of the cases (45%), the abuser committed the homicide after the relationship ended, or when the victim was in the process of attempting to leave. In 2016, just over half of the perpetrators in domestic violence homicides had protection orders prohibiting contact with the victim.

Immediate removal of firearms from the possession of domestic violence offenders is the best way to reduce risk, particularly at critical times such as when a victim calls 911, when the respondent is notified the victim/survivor has asked for a protection order, and when the offender has been notified the court is going to order surrender of all firearms.

C. BEST PRACTICES TO REDUCE LETHALITY RISKS

1. Obtain as much information about firearms and other dangerous weapons as early as possible.

When there is a call to 911, the 911 operator is in the best position to obtain as much information as possible about any firearms that the offender has or may have access to, and this information should be relayed to responding officers. An unfortunate reality of the cycle of domestic violence is that even when a call to 911 is made for help by a victim at the time of the violence, when there exists a real fear for the victim’s safety and well-being, over time and after a ‘cooling off’ period, the victim’s willingness to cooperate or be as forthcoming with information can decrease significantly. Concerns such as children being able to see both parents and lack of financial resources to support a family may then start to outweigh personal safety.

As a matter of routine, whenever possible, the 911 operator should ask questions about the presence of weapons as well as the offender’s access to other guns.[[3]](#footnote-3) These questions should include:

1. Was a weapon used or threatened to be used?
2. Whether or not a weapon was used, are there any weapons at the scene? If so,
3. How do you know they are there?
4. How many are there?
5. Describe them as best as you can?
6. Where are they located?
7. When did you last see them?
8. Would you like the officers to remove the weapons from the scene for temporary safe-keeping?
9. Does the offender have access to weapons that are not at the scene? If so,

(i) How do you know they are there?

(ii) How many are there?

(iii) Describe them as best as you can?

(iv) Where are they located?

(v) When did you last see them?

2. In addition to removing any weapons that have evidentiary value, officers should also temporarily remove all firearms for safe-keeping to reduce risk of lethality.

Regardless of whether a firearm was used or threatened to be used during the commission of the domestic violence crime that called law enforcement to the scene, once a suspect has been arrested and removed from the scene, it is within law enforcement’s community caretaking function to offer to remove and store for safe-keeping any weapons that may be in the home or to which the offender has access. Obviously, this is not a guarantee that these firearms will be out of the offender’s possession permanently, however, it is a simple and lawful way to limit the offender’s access to firearms.

If the victim requests law enforcement or gives permission for law enforcement to retrieve the weapons, there should be no legal controversy over the lawfulness of the collection of weapons. The key is the permission given by the victim.

To enhance safety of the victim, officers should ask about firearms once the suspect has been removed from the scene, so there is no opportunity for the suspect to express any objection to removal of his firearms or to further intimidate the victim. With the suspect removed from the scene, the victim can then direct law enforcement to the firearms for collection, whether in plain sight or not.

Use a pictorial graphic of types of firearms on your smart phone to help the victim identify firearms since she may not readily know the make and model.[[4]](#footnote-4)

Explain that if the offender is not otherwise prohibited from possessing firearms (i.e., if he is not a felon or doesn’t have an existing protection order), and if the court does not issue a protection order and an order to surrender weapons, he will be able to petition the court to have the firearms returned. However, law enforcement may not return the firearms to the offender without prior notice to the victim.

List all firearms on the incident report and on\_\_\_. Provide a receipt for the firearms removed.

In Feis v. King County Sheriff’s Dep’t[[5]](#footnote-5), officers were dispatched to a domestic violence altercation at Feis’ residence. After an investigation at the scene, Feis was arrested for assault. The victim, Feis’ son, reported that there were prior incidents of violence and that were firearms in the home and possibly Feis’ car. According to the victim, Feis had previously threatened to use these firearms to ‘take care of business. The victim and his mother both appeared shaken and concerned for their safety, and the responding officers shared this concern. Officers offered to remove the firearms and the victim accepted this offer. Though no firearms were located in Feis’ vehicle after a search, there were four firearms recovered from within the residence – one in a closet and three from a bedroom. This search of the home lasted a few minutes and was limited to the rooms where the firearms were kept. Feis was subsequently charged with assault, however, the victim and his mother, Feis’ wife, did not appear for trial and the criminal charges were dismissed. Feis then filed a civil action against the Sheriff’s Department as well as the individual officers on scene complaining of a violation of his Fourth Amendment rights. Feis’ claim was dismissed by the trial court and was upheld on appeal.

 RCW 10.99.070 also immunizes law enforcement officers from civil liability for good faith conduct stemming from domestic violence incidents:

A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from any alleged incident of domestic violence brought by any party to the incident.

D. Extreme Risk Protection Orders

When issuing an ERPO, “the court shall order the respondent to surrender to the local law enforcement agency all firearms in the respondent's custody, control, or possession and any concealed pistol license issued under RCW 9.41.070.” RCW 7.94.090. In serving the ERPO, a law enforcement officer:

shall request that the respondent immediately surrender all firearms in his or her custody, control, or possession and any concealed pistol license issued under RCW [9.41.070](http://app.leg.wa.gov/RCW/default.aspx?cite=9.41.070), a*nd conduct any search permitted by law for such firearms.* *The law enforcement officer shall take possession of all firearms belonging to the respondent that are surrendered, in plain sight, or discovered pursuant to a lawful search.*

*Id.* (emphasis added). Because the ERPO is a civil order and there is no pending criminal investigation, a standard criminal warrant is unavailable to enforce the respondent’s compliance with the court order, unless there exists a concurrent criminal case. However, the writs of execution procedure set out in RCW 6.17 provides a source of authority that would allow law enforcement to search for firearms and remove them.

Writs of execution, by statute, can be issued to enforce either judgments or orders. There are three kinds of writs of execution *(note- need to add without notice)*:

First, against the property of the judgment debtor; second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and ***third, commanding the enforcement of or obedience to any other order of the court***.”

RCW 6.17.060 (emphasis added). A writ of execution may be issued by either the Superior Court or District Court.  RCW 6.17.020.  Firearms are within the scope of the writ of execution process.  *See* RCW 6.17.080 (“”A]ll property, real and personal” subject to execution.)

A writ of execution issued in conjunction with an ERPO provides direct authority for a sheriff to search for and seize firearms, as well as break and enter for this purpose. The sheriff’s authority to both seize personal property and to search for concealed property is specified in the writ of execution statute:

(2) Personal property, capable of manual delivery, shall be levied on by taking into custody. If the property or any part of it may be concealed in a building or enclosure, the sheriff may publicly demand delivery of the property. *If the property is not delivered and if the order of execution so directs, the sheriff may cause the building or enclosure to be broken open and take possession of the property.*

RCW 6.17.160 (emphasis added). If such language is included in a writ of execution issued with an ERPO, the Sheriff would the writ’s power to enforce the ERPO.

As with a warrant, a writ needs to specify the property to be seized and the likely location of the property. *Condo*, 782 F.2d at 1505. The scope of the allowed search and seizure would need to be delineated similar to the requirements of a criminal warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S. Ct. 1816, 1826, 56 L. Ed. 2d 305 (1978) (discussing scope and specificity requirements for administrative search). In this way, it would serve the “important functions” of a criminal warrant. *Id.* 323–24.

E. Frequently Asked Questions

One particular scenario that may arise involves firearms stored in a lock box or safe. If the victim gives permission or requests the items be removed, then law enforcement may remove as is feasible. If the lock box or safe is not easily transported from the scene, it should be secured according to the victim’s request and pursuant to department policy. If possible, and a basis exists, law enforcement can and should obtain a warrant or a writ to remove the weapons.

For domestic violence incidents, the first question is whether the victim is requesting assistance of law enforcement to remove firearms and thereby giving permission for such removal. For example, the victim may deny the presence of weapons to an officer even when one is in plain sight. Without the victim’s consent, the appropriate avenue to collect firearms would be to seek a search warrant at the earliest possible time, which will be the initial arraignment hearing. Officers should coordinate directly with their supervisors to ensure that the prosecutor includes in the filing of charges a request for an Order to Surrender Weapons and a warrant, and the prosecutor should advocate at the hearing that as a condition of release, the defendant must provide assurance to the court that all firearms have been temporarily removed from defendant’s control or access.

If officers see weapons at the scene and the victim or restrained person does not consent to or request their removal, this should be conspicuously noted in all appropriate documentation so that the court will be aware of it at each future hearing, whether in the criminal process or a separate civil protection order process.

There may be situations where an officer is not responding to an emergency 911 call, but instead is assisting a victim on a civil standby to remove his/her property from the residence shared with the offender, and the officer is aware of or notes the presence of a firearm. Assuming this is after an order to surrender weapons has been issued, the officer can seize any firearms or dangerous weapons observed in plain sight and any other weapons to which the victim draws the officer’s attention. As is done at the original 911 scene, the officer should inquire of the victim about weapons, and explain the officer’s community caretaking responsibility means that he or she should remove any weapons for temporary safe-keeping if there is a concern that the offender or respondent will have access to them and potentially harm the victim. *The offender should not be called to the scene and his permission is not needed.*

If no order to surrender weapons has been issued, and the victim does not authorize or request the officer to remove the weapons, but the officer has a concern for community and victim safety, a search warrant should be obtained if a basis to do so exists.

Another common situation is a request by a friend or family member for law enforcement to remove an offender’s or restrained person’s firearms either for safe-keeping or because the offender is a prohibited possessor. Unless there is a sufficient basis for a court to issue a search warrant, officers may not gain entry into an offender’s or restrained person’s residence based on the request of a non-resident family member or friend. However, if there is good reason to believe the offender or restrained person is a prohibited possessor, he or she would be in violation of the law by having access to or possession of weapons. Officers should have their domestic violence or crisis response detectives obtain the relevant information from the friend or family member to seek a search warrant and pursue appropriate enforcement remedies.

It is impossible to predict every possible scenario an officer may encounter, but some of the more common scenarios that have been asked about by law enforcement in drafting the Model Policy for Service of Protection Orders and Orders to Surrender Weapons have been addressed here. In all situations, department policies will dictate the method and manner of securing a scene to obtain a search warrant. For guidance on unusual circumstances, a supervisor/sergeant should be consulted. Also available is the special firearms prosecutor in the King County Prosecutor’s Office.

E. Enforcement of Orders to Surrender Weapons

There is a common misconception about the requirements of RCW 9.41.804.[[6]](#footnote-6) “A party ordered to surrender firearms, dangerous weapons, and his or her concealed pistol license under RCW 9.41.800 must file with the clerk of the court a proof of surrender and receipt form or a declaration of non-surrender form within five judicial days of the entry of the order.” This is often misinterpreted to mean that the firearms must be surrendered within five days. This is incorrect. As soon as the order is issued, the respondent immediately becomes a prohibited possessor, and as such, must immediately surrender all firearms. The five days applies **only** to the time by which proof of compliance must be submitted to the court.

The respondent must fully and truthfully disclose to the court all the firearms that are in his/her custody, control or possession, and comply with the court’s order to immediately surrender all firearms and CPL as well as provide proof to the court within five court days.

Whether serving the temporary or permanent domestic violence protection order, law enforcement also has the authority to enforce the order to surrender weapons. Based on the information provided in the protection order petition, the serving officer should have some recent information on whether there are weapons present. The officer should advise the respondent that the order requires him/her to surrender the weapons immediately and if he/she does not then the respondent could be subject to civil and criminal penalties. The officer should advise the respondent that the officer can remove weapons at that time. All weapons surrendered should be collected pursuant to department policy. If there is reason to believe that the respondent has firearms and he denies this to the police, then additional steps are required to ensure compliance with the order to surrender weapons and the safe collection of his firearms. (See the model policy for specific steps to be taken.).

If an individual denies possessing any weapons, but law enforcement believes otherwise (perhaps based on what is included in the protection order petition, or perhaps based on information known to law enforcement about the individual or what the officer observes at the time of service of the order), a search warrant should be sought on facts sufficient to support probable cause that the crime of failure to comply has been committed.

The respondent may be prosecuted for unlawful possession of a firearm, for perjury, for contempt,[[7]](#footnote-7) for violations of conditions of release, failing to comply with the order to surrender, or for other violations of law. The court may take action through a bail decision, remand into custody, issue a bench warrant, set an immediate review hearing, a show cause hearing, or other proceedings.

F. Documentation

As noted in the model policy, information describing the process of service of the protection order as well as the order to surrender weapons should always be documented in the return of service packet. This information can be helpful in future proceedings, as well as for law enforcement’s potential future contacts with the respondent. For example, there may be a hearing set by the court to determine whether or not the respondent has complied with the order to surrender weapons. If the serving officer has written a narrative describing the respondent’s hostile denial about having any weapons, the court can easily be made aware of this and can consider it together with the petitioner’s assertions regarding the presence of weapons and the court can take further action as appropriate.

As another example, at a subsequent hearing regarding the issuance of the full protection order, if the serving officer has documented the verbally aggressive or threatening behavior during the service of the temporary protection order, the court can easily be made aware of this and can and should consider this when determining whether to issue the full protection order.

CONCLUSION

Domestic violence cases can be among the most volatile and most deadly, putting both victims and law enforcement at risk. Extreme risk protection orders by their very nature involve individuals about whom there is a concern he/she may harm self or others using firearms. Removing firearms from respondents, offenders, and restrained persons as soon as possible is one way to reduce lethality risks. This can be accomplished by a focused inquiry early on and by removal for safe-keeping by law enforcement wherever possible, particularly at times of heightened risk, such as an incident scene or once there is notification that a protection order is being sought.

Law enforcement agencies are well within their authority when acting under their community caretaking function to accomplish these objectives as described above. When a warrant is required, law enforcement should be prepared to seek and execute warrants quickly to collect firearms and other dangerous weapons.

1. All Orders to Surrender Weapons not only require the respondent to surrender firearms and other dangerous weapons, but also his/her concealed pistol license (CPL) if respondent possesses one. [↑](#footnote-ref-1)
2. Most often, law enforcement will be serving a Temporary Order for Protection. If the court also issued an Order to Surrender Weapons Without Notice, then there was likely evidence that the respondent either possesses or has access to firearms. [↑](#footnote-ref-2)
3. The information about access to weapons that are not on scene can be helpful in subsequent attempts to enforce Orders to Surrender Weapons that will be discussed below. [↑](#footnote-ref-3)
4. To obtain the most accurate and detailed firearms information, agencies should consider using an application or photo display that can help victims describe and identify any firearms. The more detailed description a victim provides, which is then documented by law enforcement, will mean that law enforcement has the best information available, which can be shared with the court for its finding at future proceedings. [↑](#footnote-ref-4)
5. 165 Wn.App. 525 (2011). [↑](#footnote-ref-5)
6. There is an almost identical counterpart codified by Seattle Municipal Code 12A.06.195(G). ’A party ordered to surrender firearms, dangerous weapons, and the party’s concealed pistol license must file with the clerk of the court a proof of surrender and receipt form or a declaration of non-surrender form within five judicial days of the entry of the order. Violation of this subsection 12A.06.195.G is a misdemeanor.’ [↑](#footnote-ref-6)
7. RCW 7.21.010(1)(b) ‘Contempt of court’ means intentional disobedience of any lawful judgment, decree, order, or process of the court. RCW 7.21.030(2)(a) provides for imprisonment as a sanction if the court finds that the person has failed or refused to perform an act that is yet within the person’s power to perform. When an individual disobeys an order to surrender weapons, he/she is not only guilty of the misdemeanor crime of failure to comply, but also is in contempt of court, and this should be brought to the court’s attention. [↑](#footnote-ref-7)