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TEMPORARY ADMINISTRATIVE ORDER

INCLUDING STATEMENT OF NEED & JUSTIFICATION

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CHAPTER 291

DEPARTMENT OF CORRECTIONS

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ARCHIVES DIVISION

SECRETARY OF STATE

& LEGISLATIVE COUNSEL

FILING CAPTION: Searches (Institutions)

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NEED FOR THE RULE(S):

These rule amendments are needed to authorize and establish the department's policy and procedures for the implementation and use of electronic searches (body scanners) in Department of Corrections facilities for the searching of adults in custody.

JUSTIFICATION OF TEMPORARY FILING:

For the reasons explained more fully below, the Department of Corrections finds that following the permanent rulemaking process, rather than taking this temporary rulemaking action, will result in serious prejudice to the public interest. The Department believes that incorporating the use of body scanners in Department of Corrections facilities for the searching of adults in custody will materially contribute to the reduction of contraband entering Department facilities, leading to safer and more secure facilities, while fostering the dignity of individuals undergoing searches. Delaying implementation and use of body scanners in Department of Corrections facilities will unnecessarily result in the Department's continued exclusive reliance on more invasive and less effective and efficient manual search practices, leading to less safe and secure facilities. The Department's prompt adoption of these temporary rules will avoid the delay in implementation and use of body scanners that would be necessitated by following the permanent rulemaking process.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

American National Standards Institute (ANSI/HPS N43.17-2009) Radiation Safety for Personnel Security Screening Systems Using X-Ray or Gamma Radiation, August 2009. ANSI/HPS standards are available to the general public for purchase through their exclusive distributor IHS at global.ihs.com/standards.cfm?publisher=HPS&rid=HPS.

RULES:

291-041-0010, 291-041-0020

AMEND: 291-041-0010

RULE TITLE: Definitions

RULE SUMMARY: Amends rule to align some definitions with department's standard definitions; add or amend definitions related to use of body scanning devices; and clarify these rules by defining terms used within these rules.

RULE TEXT:

- (1) Adult in Custody (AIC): Any person under the supervision of the Department of Corrections who is not on parole, probation, or post-prison supervision status.
- (2) American National Standards Institute/Health Physics Society (ANSI/HPS): An accredited standards developer that provides guidelines to manufacturers and system users on non-medical radiation.
- (3) Authorized Legal Material: Pleadings (i.e., complaint, petition or answer), legal motions and memoranda, affidavits, court orders and judgments, correspondence, and other necessary documents (including discovery and exhibits), in or directly pertaining to an AICs own pending and active case(s), lawsuit(s) before the courts or paroling authorities.
- (4) Body Scanner: A whole-body security screening device which utilizes low dose x-ray scanning and millimeter waves to detect contraband, weapons, and similar items hidden on or inside a person's body.
- (5) Body Scanner Operator: Any employee trained in the operation of the full-body scanner whose responsibilities include at least one of the following: initiating or stopping the scan, verifying the system is operating correctly, providing information and instructions to the screened individuals, and controlling access to the inspection zone.
- (6) Body Scanner Viewer: Any employee whose responsibilities are limited to viewing the image results produced by the full-body scanner and are solely responsible for interpreting scan images and reporting findings as required, without direct involvement in the operational aspects of the scanning process.
- (7) Confiscation: To take control of or possession of after the search.
- (8) Contraband: Any article or thing which an adult in custody is prohibited by statute, rule or order from obtaining, possessing, or which the AIC is not specifically authorized to obtain or possess or which the adult in custody alters without authorization.
- (9) Cross-Gender Body Scan: Use of the body scanner in which the operator or viewer and the adult in custody are not the same gender.
- (10) Department of Corrections Employee: Any person employed full-time, part-time, or under temporary appointment by the Department of Corrections.
- (11) Department of Corrections Facility: Any institution, facility, or staff office, including the grounds, operated by the Department of Corrections.
- (12) Exigent Circumstances: Any set of temporary and unforeseen circumstances that require immediate action to address or mitigate a threat to facility or individual safety, security, health, and good order.
- (13) Emergency: Any condition or situation where life, health, or safety may be threatened or where time frame considerations necessitate an immediate response or remedial action.
- (14) Functional Unit: Any organizational component within the Department of Corrections responsible for the delivery of services or coordination of programs.
- (15) Functional Unit Manager: Any person within the Department of Corrections who reports to the Director, Deputy Director, an Assistant Director, or administrator and has responsibility for delivery of program services or coordination of program operations. In a correctional setting the functional unit manager is the superintendent.
- (16) Inspection Device: Any device (i.e., metal detector, fluoroscope, cell phone detector, etc.) that is used to detect contraband in the form of metal or other foreign objects.
- (17) Inspection Zone: A clearly marked area (using tape, paint, rope barrier, etc.) surrounding the full-body scanner where access is restricted to during the operation of the device to prevent unauthorized entry and minimize unnecessary radiation exposure.
- (18) Non-Employee Service Providers (NSP): An individual who provides services or programs to the department or to adults in custody, including an individual who provides services or programs remotely, but not as a paid employee of the department. Examples of non-employee service providers may include contractors, volunteers, mentors, criminal justice partners, and government agency partners
- (19) Non-Intrusive Sensors: Electronic or mechanical devices which do not physically intrude nor permeate human body

orifices, manufactured for the purpose of detecting materials or various types which may be considered contraband (i.e., narcotics, narcotic paraphernalia, weapons). (Examples: metal detectors, body scanners, heartbeat monitor equipment to detect the presence of persons.)

(20) Officer-in-Charge: That person designated by the functional unit manager to supervise the institution and make operational decisions in accordance with policy, rule, or procedure during periods when the functional unit manager or the officer-of-the-day is not readily available.

(21) Officer-of-the-Day: That person designated by the functional unit manager and approved by the Assistant Director for Operations or the Institutions Administrator to act on behalf of the functional unit manager during non-business hours and other periods in which the functional unit manager may be absent.

(22) Oregon Corrections Enterprises: A semi-independent state agency that is a non Department of Corrections agency or division, which is under the authority of the Director of the Department of Corrections. For purposes of this rule only, Oregon Corrections Enterprises shall not be considered an external organization.

(23) Oregon Corrections Enterprises (OCE) Employee: Any person employed full-time, part-time, or under temporary appointment by the Oregon Corrections Enterprises. For the purposes of this rule only, employee shall also include any person under contractual arrangement to provide services to the agency; any person employed by private or public-sector agencies who is serving under agency-sanctioned special assignment to provide services or support to agency programs.

(24) Reasonable Suspicion: An apparent state of objective facts and rational inferences drawn there from that would permit a reasonable and experienced correctional staff person to conclude that an individual or set of circumstances poses a threat to the safety, security, health and good order of the facility, or the safety and security of adults in custody, staff, visitors, non employee service provider or the community, including, but not limited to, committing a crime or rule violation or conspiring or attempting the same.

(25) Search: A close inspection, including touching in an impartial manner, of a person, a person's cell or other living unit, vehicle, possessions, or other property, or buildings or premises. For purposes of entering a correctional institution, searches often require the removal and separate inspection of shoes, belts, jackets, and other accessories during processing. Types of searches include the following:

(a) Clothed: To search a person for something by running the hands over the clothed person, through the hair, inspecting pockets and cuffs, and other items in his/her possession.

(b) Consent: Inspections of a person or their property conducted with prior permission of the person being searched or of a person who own or has in his/her possession that property which is searched.

(c) Electronic Search: A non-invasive, technology-assisted search in which an adult in custody is scanned using an approved body scanner to detect contraband or unauthorized items concealed on or within the body.

(d) Internal: Digital intrusion of body orifices and interiors of rectum or vagina in search for contraband. Also used to describe more than sight inspection of nostrils, ears, and mouth.

(e) Unclothed: A search procedure wherein the person being searched removes all of his/her clothing and is visually examined and clothing removed is carefully inspected before return and redressing, for the purpose of detecting contraband.

(26) Security Inspection: A distinction is made between search and security inspection. An inspection is accomplished by means of an inspection device (i.e., metal detector), without the element of a personal contact search, although accompanying property will be subject to a visual or hand examination.

(27) Special Housing: Housing for adults in custody whose assignment is administrative housing, disciplinary segregation, Intensive Management Unit, Death Row, mental health special housing, or infirmary.

(28) Visitor: Any person, not a DOC or OCE employee, volunteer or other agency liaison who is within the boundaries of Department of Corrections facility property.

STATUTORY/OTHER AUTHORITY: ORS 179.040, 423.020, 423.030, 423.075

STATUTES/OTHER IMPLEMENTED: ORS 179.040, 423.020, 423.030, 423.075

RULE TITLE: Adults in Custody

RULE SUMMARY: Amends rule to establish guidelines for the general application and restrictions for the use of electronic searches (such as, body scanning devices); and guidelines for refusal or intentional interference with body scanning devices.

RULE TEXT:

- (1) Search of adults in custody living units, work areas, other places they inhabit or frequent, and their property will be conducted regularly on an unannounced and unscheduled basis.
- (2) An inspection of each cell, room or dormitory area will occur prior to occupancy by a new adult in custody.
- (3) In conducting searches of an adult in custody's living unit, place of work, or other places frequented or inhabited, the employee conducting the search will be expected to leave the search area in an orderly and neat condition. Care will be exercised to ensure that authorized property is not damaged or disposed of.
- (4) Adults in custody may be subject to search at any time; but no more frequently than is necessary to control contraband or to recover stolen or missing property. However, all adults in custody will be subject to a search on each occasion before and after they leave a Department of Corrections facility and on each occasion before and after visits, entering or exiting special housing units and before or after contact with persons outside the facility.
- (5) The type of search administered will avoid unnecessary force, embarrassment, or indignity to the adult in custody. Non-intrusive sensors and inspection devices may be used when appropriate.
- (6) Clothed Searches: Adults in custody may be searched only by authorized Department of Corrections personnel or a sworn police officer in the performance of their official duty. Cross gender clothed searches of female adults in custody will not occur unless there is an emergency and shall be documented.
- (7) Electronic Searches: Adults in custody may be required to undergo body scanner screening at facilities equipped with the technology. Full-body scans may supplement or replace clothed or unclothed searches, as the department deems appropriate in accordance with these rules.
 - (a) General Application:
 - (A) An electronic search may be required when adults in custody are delivered or are returned to Department of Corrections custody, including but not limited to return from county confinement, a work or program assignment, an out-to-court trip, a medical trip, or a facility transfer, or upon reasonable suspicion an adult in custody may be concealing contraband on or within their body.
 - (B) Each adult in custody will be instructed on the proper way to enter the body scanner for scanning.
 - (C) The body scanner operator will ensure bystanders are outside of the inspection zone.
 - (D) If a technical error occurs during the scanning process, adults in custody may be required to be re-scanned until a proper image is captured.
 - (E) The department will ensure body scanner exposure and limitations comply with The American National Standards Institute/Health Physics Society Standard.
 - (F) Saved images will be utilized solely for investigative or training purposes or confirmation of contraband and should be retained according to the applicable record retention schedule. Images used for authorized training purposes will have identifying information removed from the image.
 - (b) Restrictions:
 - (A) Any adult in custody with a physical limitation that does not enable the adult in custody to stand independently without an assistive device or is otherwise unable to independently transfer into the body scanner will be searched by other means.
 - (B) Any adult in custody with an implanted medical device will be searched by other means.
 - (C) Body scanning devices shall not be used for medical purposes.
 - (D) Body Scanning devices shall not be used on pregnant adults in custody.
 - (i) Adults in custody who declare they are or may be pregnant shall have their pregnancy status verified by Health

Services prior to going through the body scanning device.

(ii) Adults in custody may be subject to alternative search methods and placed on dry cell status in accordance with ODOC Policy 40.1.1 until pregnancy status can be verified.

(iii) Adults in custody verified to be pregnant will be searched using alternative search methods.

(E) Cross-gender body scans of adults in custody are prohibited, except in exigent circumstances. When the full-body scanner is used in exigent circumstances, the facility will document the search as a cross-gender search.

(F) Cross-gender viewing of saved images of Adults in Custody is prohibited except during exigent circumstances, for investigative purposes, confirmation of contraband, and training purposes. Cross-gender viewing of saved images will be documented by the facility as a cross-gender search.

(c) Refusal or Intentional Interference:

(A) Any adult in custody who is not exempt from use of the body scanning device, as outlined in this rule, is required to comply with body scanning when directed.

(B) Any adult in custody who refuses a direct order to be scanned by the body scanning device will be immediately placed in segregation on a dry cell status in accordance with ODOC Policy 40.1.11.

(C) Any adult in custody who fails to remain still for a clear image capture after three attempts or is reasonably believed to be intentionally interfering with the body scanning process, shall be placed in segregation on dry cell status in accordance with ODOC Policy 40.1.11.

(D) If the second or third scan causes the adult in custody to exceed the monthly limit for body scans, an unclothed search shall be conducted in lieu of placing the adult in custody on dry cell status.

(8) Unclothed Searches: Unclothed searches conducted by Department of Corrections staff will be of the same gender as the adult in custody, unless there is an emergency, or the adult in custody has been approved for unclothed searches to be conducted in accordance with Transgender and Intersex (Adult in Custody) OAR 291-210-0050(3). Except in emergencies, adults in custody undergoing unclothed searches will be removed to a private area for the search.

(a) The facility shall document all cross-gender unclothed searches, all cross-gender visual body cavity searches, all cross-gender electronic searches, and all cross-gender pat-down searches of adults in custody.

(b) The facility shall not search or physically examine a transgender or intersex adult in custody for the sole purpose of determining the adult in custody's genital status.

(c) If the adult in custody's genital status is unknown, it may be determined during conversations with the adult in custody, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(9) Visual inspections for security reasons may be conducted by authorized personnel. All internal examinations must be conducted by medical personnel only upon authorization of the functional unit manager or the officer-of-the-day and only when there is reasonable suspicion as defined in OAR 291-041-0010(16) to justify the search. The adult in custody's written consent will not be required; however, an internal search will not be conducted if it could result in injury to the adult in custody or the personnel conducting the search.

(10) Hair:

(a) If staff need to conduct a hair search, it may be necessary to require the adult in custody to unbraid, loosen or cut the hair to complete the search.

(b) The adult in custody will be given an adequate amount of time to unbraid or loosen the hair.

(c) An adult in custody who refuses to unbraid or loosen the hair is subject to disciplinary action in accordance with the rules on Prohibited Conduct and Processing Disciplinary Actions (OAR 291-105).

(d) If the adult in custody is unable to unbraid or loosen the hair so a search can be accomplished, staff shall conduct the search, if possible, in the least intrusive manner (e.g., hand wand, visual inspection, etc.). At no time shall staff cut an adult in custody's hair to complete a search without approval of the functional unit manager or officer-of-the-day.

(e) If an adult in custody's head or facial hair draws undue attention or otherwise compromises internal order and discipline, institutional security, or the health and safety of the adult in custody, other adults in custody, and staff, the functional unit manager or designee will determine what further action shall be taken.

STATUTORY/OTHER AUTHORITY: ORS 179.040, 423.020, 423.030, 423.075

STATUTES/OTHER IMPLEMENTED: ORS 179.040, 423.020, 423.030, 423.075