



NSA Ad Hoc Committee of the Oakland Police Commission

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TO: NSA Parties

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SUBJECT: Discussion Draft Outline of Tentative Reform Plan to Bring the City of Oakland Into Sustained NSA Compliance

DATE: March 7, 2023

Introduction

This Ad Hoc Committee discussion draft memorandum sets forth the outlines of a tentative plan for the Oakland Police Commission (“Commission”) to reform the internal affairs investigation process of the Oakland Police Department (“OPD”) and keep the City of Oakland in sustained compliance with the goal of resolving the need for the Negotiated Settlement Agreement (“NSA”). As an Ad Hoc of the Commission, the work in this document is iterative, pending the full Commission’s deliberation and decisionmaking after hearing from the public. This outline is for discussion, not final action.

The proposals outlined in this memorandum operate on a parallel track with OPD’s own efforts to implement the recommendations made in the Reports of Investigation issued by Clarence Dyer Cohen, LLP related to IAD Numbers 22-0858 and 22-0443 (collectively, “CDC Report”). They build on that important work by looking at deeper systemic and cultural issues, including those revealed by the major compliance incidents that were the subject of the CDC Report, and focusing on the Commission’s unique Charter authorities to address those issues over time.

To formulate a final plan to address the issues outlined below, the Commission will meet and identify information gaps the City/OPD can address, grapple in its public meetings with important policy questions, survey its relevant Charter and Municipal Code authorities, and compile a final incident response plan for review by the NSA Parties and the Court.

The scope of reforms applies to all entities with authority over policing in Oakland, including the Commission itself and the entire City. Years of NSA Court transcripts warn us against artificially separating OPD from the City in implementing needed reforms.

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OUTLINE OF ISSUES/REFORM PLANS:

A. STRUCTURAL ISSUES

1. Issue: Post-NSA Transition to Community Oversight Authority

As envisioned in the Oakland City Charter's civilian oversight structure, the Commission's exercise of its oversight authority, as informed by audit work of the Inspector General and the investigatory work by the Community Police Review Agency, should eventually replace the proactive compliance work and policy changes currently imposed by the Monitor and the Independent Monitoring Team.

Proposed Solution: To honor the choice of the overwhelming majority of Oakland residents who voted in two successive ballot measures to codify the Commission's authority, the Parties must prepare and commit to a transition of the Monitor's current role to be entirely replaced by a fully staffed and properly budgeted body of Oakland community members serving as Police Commissioners, overseeing OPD, exercising all of its Charter authorities, and giving direction to the two civilian oversight agencies that report to it: CPRA and OIG.

2. Issue: Ensuring Needed Investment for Police Commission-Dedicated Staff to Carry Out Charter Obligations

Due to lack of sufficient staff, Oakland requires volunteer Commissioners to balance the demands of exercising its oversight authority and shaping the overall direction of police reform in Oakland against completing several, onerous administrative and bureaucratic requirements. The same is true as to CPRA and OIG. A fully staffed team of Commission-dedicated employees would ensure the Commission maintains a proactive approach to reform and focuses on its most important policy and personnel authorities. The City has demanded budget cuts, but the Commission has yet to staff a full team that would enable it to carry out all its duties and responsibilities.

Proposed Solution: As a long-term strategy, the City must commit to adopting a budget that fully funds staff for the Commission, as well as CPRA and OIG. The overhaul changes likely to come with a complete NSA transition will be significantly taxing on the limited resources of the Commission, CPRA, and the OIG.

3. Issue: Untimely or Absent Notifications and Referrals to the Commission and CPRA

Dozens of high profile IAD investigations have been handled by outside firms, yet there is no comprehensive policy that formally standardizes these referrals, governs the details of required notice to the other Charter entities in Oakland, or details the process and timeline for the City to implement discipline based on them, particularly discipline of the Police Chief or other non-union police officers. The City has been applying individual provisions of M-03, which on its face does not contemplate dozens of outside referrals.

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The Oakland Charter Section 604(f)(1) indicates in relevant part:

...[T]he Agency shall receive, review and prioritize all public complaints concerning the alleged misconduct or failure to act of all Department sworn employees, including complaints from Department non-sworn employees.

The Agency shall not be required to investigate each public complaint it receives, beyond the initial intake procedure, but shall investigate public complaints involving uses of force, in-custody deaths, profiling based on any of the protected characteristics identified by federal, state, or local law, untruthfulness, and First Amendment assemblies.

The Agency shall also investigate any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint, as directed by the Commission.

As a result of CPRA's mandate to investigate *public* complaints, IAD only sends CPRA complaints made by members of the public. Complaints that are initiated within the Department, considered "internal complaints," are not sent to CPRA for investigation.

The Commission could have referred the CDC Report IAD investigations to the CPRA in early 2022 had the Commission known about the outside referral at the time the City Administrator and Office of the City Attorney referred them to Clarence Dyer Cohen, LLP. Prompt referral to the CPRA would have given its investigators enough time to fully investigate the matter in parallel with the outside investigation and not miss any state-imposed completion deadlines.

Proposed Solution: The internal affairs investigation policy, including any policies related to referrals to outside investigations, must be reformed. In addition, a broader multi-pronged approach is needed to address the issue. The Chair of the NSA Ad Hoc Committee also serves as Chair of the CPRA Policies Ad Hoc Committee, and is hereby proposing to fold several conceptual ideas from that Committee's work with the CPRA Director into this set of proposed solutions, as follows:

- The Commission should review the referral process for CPRA to take up non-civilian complaints as well as CPRA's policies and approach for taking on complaints that are traditionally handled internal to the Department.
- The City should enter an MOU to require it to notify the Commission Chair and CPRA in writing whenever an internal complaint is referred to an outside agency for investigation. Such notification shall include sufficient information for the Commission and CPRA to understand all allegations that need to be investigated. The City shall also provide the Commission Chair and CPRA a copy of any contract entered into with the outside agency.
- The Commission should direct OPD to report to the Commission on a monthly basis the number of IAD complaints, both public and internal complaints, to track against CPRA's monthly reported number.

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- The Commission should direct OPD to submit all internal complaint “Complaint Investigation Reports” or “CIRs” to CPRA via email, within 24 hours of initiation, with detailed allegations including brief narratives sufficient to clearly understand the allegations and the applicable policies and provisions of OPD’s Manual of Rules.
- The Commission should direct OPD to notify CPRA via email, within 24 hours of determination, of any criminal allegations or implications that arise during the course of an administrative investigation.
- The Commission should direct OPD to notify CPRA via email, within 24 hours of any decision, to have an outside entity investigate issues or allegations of police misconduct.
- The Commission should direct CPRA to document the numbers, types, and brief narrative of the internal complaints received from IAD.
- The Commission should direct CPRA to investigate mandated allegations for the internal complaints in the same manner as is done with mandated allegations for public complaints.
- The Commission should direct CPRA to investigate any mandated and non-mandated allegations against executive level supervisors ranked Captain or higher.
- The Commission should direct CPRA to determine if there is an administrative investigation that should be conducted in relation to any criminal investigation and to document the rationale for the decision.
- The Commission should direct CPRA to reopen a case and conduct an investigation if the Commission decides, based on a brief narrative of the closed internal cases, that reopening is merited.

4. Issue: Lack of a Clear City Administrator Protocol for Serious Incident Notifications to OPC Chair, IG, CPRA Director

Related to the general problem of untimely notifications is the lack of a proper protocol for alerting the OPC Chair, CPRA, and the Inspector General of an internal affairs investigation of the Chief of Police, the Assistant Chief, or any Deputy Chief. Such an investigation should be considered a “serious incident,” which is very narrowly defined in the Municipal Code. The City Administrator is responsible under the Municipal Code for developing a “protocol for notifying the Commission Chair, the Agency Director and the Inspector General of serious incidents within forty-eight (48) hours of the Chief knowing or having a reasonable suspicion that a serious incident has occurred.” (OMC 2.45.075.) The protocol also must include “a confidential status report to the Chair of the Commission, the Agency Director and the Inspector General within ten (10) calendar days of the date on which the serious incident occurred, and a second confidential status report to the Chair of the Commission, the Agency Director and the Inspector General within forty-five (45) calendar days of the date on which the serious incident occurred.”

Proposed Solution: As a medium or long-term strategy, the City Council should consider broadening the definition of “serious incident” to include any internal affairs investigation of the Chief, Assistant Chief, and Deputy Chiefs. If such a protocol is developed while the Monitor is still in place, the City Administrator should include a notification protocol for the City to follow when the Monitor notifies the City that he or the IMT suspect a serious incident has occurred.

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5. Issue: Future Merger of CPRA and IAD

The Commission and the City should make a plan to achieve full civilianization of sworn officer investigations. Dating back to 2009, the City of Oakland has studied how to “civilianize sworn positions in the Internal Affairs Division.” Renewed attention arose through Oakland’s “Reimagining Public Safety” process in 2020 and 2021, resulting in Recommendation 31/84: “The investigation of all public complaints of police misconduct should continue to be conducted by the Community Police Review Agency (CPRA), a Department of the City that reports to and is overseen and supervised by the Police Commission. OPD’s Internal Affairs Division (IAD) should no longer conduct parallel investigations of the same public complaints.” In 2021, City Council issued a budget directive to the Commission to oversee an RFP for a consultant to continue studying the issue, which the CPRA Director is administering (as the Commission’s Contract Administrator).

Proposed Solution: As a short-term strategy, CPRA should continue to proactively monitor and manage the consultant hired for the RFP. As a long-term strategy, and given CPRA’s anticipated increased workload, the Commission should consider whether to seek a Charter change regarding deadlines for completing CPRA investigations.

B. CULTURAL ISSUES:

1. Issue: Chain of Command Instilling a Fear of Insubordination by Inferior Officers

Inferior officers fear the prospect of insubordination, which chills their willingness to speak up, even when doing so would help keep Oakland in compliance with its reform tasks. This is a cultural issue that calls for a review of management training and a rethink of any aspects of chain of command culture that could compromise investigation integrity.

Proposed Solution: The Commission should review relevant aspects of OPD’s management training and help its leadership conduct a rethink of any aspects of chain of command culture that could compromise investigation integrity. OPD and the City should develop an anonymous channel to report investigation integrity issues, so inferior officers feel more comfortable that they will not face adverse actions for calling attention to compliance concerns. The Commission, the OIG, and the CPRA should have access to the anonymous channel reports to ensure it can properly exercise Department oversight.

2. Issue: Lack of City of Oakland/Monitor/IMT Coordination with OPC and CPRA

The lack of thorough and repeated Commission briefings about the Monitor’s concerns in early 2022 calls out for reform in overall approach to empowering civilian oversight. The Commission should have been brought into this matter at a far earlier stage, rather than learning about it from the Monitor’s public status reports. Without prompt and comprehensive notice about the substance of OPD compliance concerns, the Police Commission cannot know what documents to formally request (as it has Charter authority to do) to properly exercise all of its Charter authorities. Delayed notifications, in turn, prevent the Commission from promptly introducing new reforms at the same

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speed that fast-moving compliance incidents arise (as the Monitor does). For instance, the Commission could have promptly set about reforming investigation policies in early 2022, regardless of whether any OPD officer was ultimately sustained for discipline or dismissal.

Proposed Solution: In the short term, the City and OPD (and for the period of time when the Monitor is standing in the shoes of OPD,) must immediately be required to provide regular closed session briefings to the Police Commission and CPRA on the status of compliance issues that pose a risk to the City's resolution of the *Delphine Allen* settlement.

Over the medium term, the Commission and the City should coordinate to develop a recurring Commission agenda item that requests to receive all personnel documents from the City and OPD related to all its Charter authorities, consistent with Section 604(f)(2), and all three of the Department Heads under the Commission's authority should routinely recommend any confidential files and records related to the Commission's Charter authority that they believe the Commission should be requesting to successfully carry out its oversight authority.

Over the long term, the City may need to revisit Section 604(f)(2) of the Charter and determine if it is inconsistent with the purpose of civilian oversight for the Commission to be required to know about a confidential document it does not have before it can lawfully request and access that document.

3. Issue: Distributed Leadership and Accountability at OPD

Clarence Dyer Cohen's findings about the Police Chief should have extended to the entire leadership team. There should have been documented standards setting the expectation of accountability for every individual in the chain of decisions that led to the Department failures culminating in the December 23, 2021 meeting and from witnesses as well.

Proposed Solution: OPD and the Commission must set the expectation going forward that all participants in the chain of decision-making related to internal investigations will be held to account for any issues they observed that compromise investigation integrity and best practices. In the medium term, the Commission should consider whether to require that every level of the chain of decisionmakers involved in any given investigation must sign and be responsible for the finished product.

4. Issue: Availability of Mental Health Services and Support for Sworn Officers

Mental health challenges inherent to police work, if left unaddressed, lead to major compliance incidents. One investigation subject described another's symptoms to include night terrors related to job duties. Oakland's officers should get the best support and services we can offer. Untreated mental health issues on a police force have deleterious effects on individual officers, the culture of the entire police force, as well residents and community the force serves.

Proposed Solution: The Commission should determine what services are offered and whether proactive outreach ensures officers feel supported in using the services. The Commission should also work to set about fostering a Department culture that rewards officers for self-care and commends them for seeking out and accepting needed services.

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5. Issue: OPD Officer Perception of Alleged Favoritism in Discipline

The NSA Plaintiffs tie the findings and conclusions in the CDC, LLC Report to a general perception among a supermajority of officers that OPD’s discipline is not fair. One oft-cited but ambiguous quote from OPD employees is: “who you know, and to which cliques you belong, influence whether an investigation will be sustained and what level of discipline will be administered.”

Proposed Solution: OPD needs far more granular information about the widely expressed perception of unfair discipline, including information about what OPD employees perceive as “cliques.” The Commission will also consider OPD policy revisions to address this problem.

Conclusion

The NSA Ad Hoc reiterates that the Police Commission is designed to replace the proactive compliance work currently imposed by the Monitor and the Independent Monitoring Team, as the singular civilian oversight body with authority to make policy changes for OPD related to all NSA tasks, and the sole entity named in the City Charter that “shall oversee the Oakland Police Department.” (Charter Section 604(a)(1).)

Without committing to an exclusive list, the Commission should implement its final proposed plan using the following official actions:

- formal action by the Police Commission;
- official MOUs between the Commission, OPD, City officials, City bodies, and any other relevant Charter entities or stakeholders;
- new or changes to existing OPD policies, procedures, training bulletins;
- recommendations pursuant to Charter Section 604(h) to the City Council to revise Sections 2.45.00 and 2.46.00 of the Municipal Code; and
- recommendations to the City Council to put an additional ballot measure before the voters of Oakland.

Going forward, after the Police Commission approves a plan, implementation must under the Charter run through a public-facing, policy-specific ad hoc process that ensures significant input and engagement from members of the public as well as the full Commission, with all final actions to take place after the April 4 Joint Case Management Conference Statement deadline.