



OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

POLICE ACCOUNTABILITY BOARD REGULATIONS SUBCOMMITTEE

Board Members Chang (Chair), Calavita, Leftwich, Owens; Public Member Saginor

**Tuesday, February 22, 2022
7:00 P.M.**

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE

Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of the attendees. Therefore, no physical meeting location will be available.

To access the meeting remotely: join from a PC, Mac, iPad, iPhone, or Android device using this URL: <https://us02web.zoom.us/j/82281228507>. If you do not wish for your name to appear on the screen, use the drop-down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon on the screen. To join by phone: Dial **1 669 900 6833** and enter Meeting ID **822 8122 8507**. If you wish to comment during the public comment portion of the agenda, press *9 and wait to be recognized.

AGENDA

- 1. CALL TO ORDER**
- 2. APPROVAL OF AGENDA**
- 3. PUBLIC COMMENT**

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on this agenda only.)

The Police Accountability Board and Office of the Director of Police Accountability (ODPA) were created to provide independent civilian oversight of the Berkeley Police Department. They review and make recommendations on police department policies, and investigate complaints made by members of the public against police officers. For more information, contact the ODPA.

1947 Center Street, 5th Floor, Berkeley, CA 94704 TEL: 510-981-4950 TDD: 510-981-6903 FAX: 510-981-4955
Website: www.cityofberkeley.info/dpa/ Email: dpa@cityofberkeley.info

4. OLD BUSINESS (discussion and action)

Continue drafting permanent Regulations, to include consideration of ideas contained in all prior agenda packets.

5. SCHEDULE OR CONFIRM NEXT MEETING DATE(S)

March 10, 2022, at 7:00 p.m.

6. PUBLIC COMMENT

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on this agenda only.)

7. ADJOURNMENT

Communications Disclaimer

Communications to the Police Accountability Board, like all communications to Berkeley boards, commissions or committees, are public record and will become part of the City's electronic records, which are accessible through the City's website. Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record. If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the Board Secretary. If you do not want your contact information included in the public record, do not include that information in your communication. Please contact the Board Secretary for further information.



Communication Access Information (A.R. 1.12)

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date.

SB 343 Disclaimer

Any writings or documents provided to a majority of the Board regarding any item on this agenda will be made available for public inspection at the Office of the Director of Police Accountability, located at 1947 Center Street, 5th Floor, Berkeley, CA.

Contact the Director of Police Accountability (Board Secretary) at dpa@cityofberkeley.info or (510) 981-4950.

**Police Accountability Board
and
Office of the Director of Police Accountability**
**Regulations for Handling Complaints ~~Against Sworn Officers of the Police~~
Department**

Preamble

~~These regulations for handling complaints against sworn members of the Berkeley Police Department (BPD) are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II established a Police Accountability Board (Board) and a Director of Police Accountability (Director), and was intended to promote public trust by providing for prompt, impartial and fair investigations of complaints against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.~~

~~Under Resolution No. 69,531-N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council.~~

~~These regulations reflect the procedures for handling complaints against police officers as set forth in Measure II, and the subsequently amended Charter of the City of Berkeley adding Article XVIII, Section 125.~~

I. GENERAL PROVISIONS

A. Definitions

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential hearing of alleged police misconduct is held.
2. Aggrieved Party: Any person who is the subject of alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.
4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.

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7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: An aggrieved party or an eyewitness who files a complaint with the Office of the Director of Police Accountability.
9. Complaint hearing: a confidential personnel hearing regarding alleged police misconduct as referenced in City Charter Article XVIII, Section 125.
10. Days: calendar days unless otherwise specified.
11. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
12. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
13. Eyewitness: A percipient witness.
14. Hearing Panel: Three Board members impaneled to conduct a confidential hearing of alleged police misconduct.
- 13.15. Informal Complaint: [Subcomm. asked to add 2-3-22. Staff would like to discuss further.]
16. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODPA.
- 14.17. Investigation: The fact-finding process engaged in by the ODPA staff.
- 15.18. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
19. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
20. Preponderance of the evidence: Standard of proof in which the evidence on one side outweighs, or is more than, the evidence on the other side, but not necessarily in number of witnesses or quantity. It is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.
21. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
- 16.22. Toll: Suspension of time period.

Commented [LK1]: Subcomm. asked staff to add 2-3-22.

~~17.23. Witness Officer: A sworn employee of the Berkeley Police Department, other than the subject officer, who witnessed the events described in the complaint or has relevant personal knowledge of those events described in a complaint, but is not a subject officer.~~

Commented [KL2]:

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley Police Department personnel. ODPa staff will likewise have access to such confidential information. It is vitally important to the integrity of the complaint process that all parties understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law.
2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated.
3. Closed hearings; effect on public records. All confidential complaint hearings, confidential investigative records, and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. However, any public records included in, or attached to, investigative reports shall remain public records.
4. Handling confidential information. For any in-person proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. For any proceeding in which copies of confidential information are distributed to Board members, each Board member shall delete or destroy all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so.
5. Effect of violation. A Board member who violates confidentiality before or during a confidential complaint hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendaize an alleged violation of confidentiality for discussion and action at a regular meeting of the

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Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential complaint hearings for the remainder of the Board member's term.

II. FORMAL COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY

A. Initiating a formal complaint

1. Complaint form. A formal complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath."
2. Who may file. Aggrieved parties, as well as eyewitnesses (percipient witnesses) to alleged police misconduct, may file a complaint. Complaints may also be initiated by the Board, upon a vote of five Board members to authorize an investigation. Complaints shall be signed by the complainant, except for complaints initiated by the Board.
3. Filing period. A complaint must be filed within 180 days of the alleged misconduct, except that the 180 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.
4. Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be submitted by the Director to the Board for administrative closure at the next meeting that allows the complainant to be provided at least 5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2.

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5. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPa is notified that a complainant or subject officer is represented, then the ODPa shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives, as well.

B. Mediation

1. Election

- a. ODPa staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. E.1 below.
- b. If the complainant elects mediation, ODPa staff shall issue a Notice of Complaint and Request for Mediation to the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before the mediation session concludes.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and heard at a confidential complaint hearing, unless the subject officer withdraws from mediation.

2. Completion

- a. After receiving notice from the mediator that a mediation has concluded, ODPa staff shall close the case and inform the Board.

C. Complaint investigation

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies, except:
 - a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPa shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPa shall contact the District Attorney's Office

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to determine the status and anticipated resolution of the criminal proceeding.

- b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.N.
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed.
3. Notice of Complaint and Allegations. Within 30 days of a complaint filing, rejection of a recommendation for administrative closure, or officer's rejection of a mediation offer, the ODPa shall prepare and send a Notice of Complaint and Allegations to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complainant requests mediation, or the Director recommends administrative closure. After the initial Notice of Complaint and Allegations is sent, ODPa staff may add, modify, or remove allegations as they deem appropriate, with a brief explanation for any such changes, in by sending a revised Notice of Allegations that is sent to the complainant, the Chief or Internal Affairs, and each subject officer. Notices under this section may be sent by hard copy or electronically.
4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPa staff with the schedules of all sworn employees of the Police Department.
5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence.
6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, unless state or federal law forbids the production of those records and information.
 - a. ~~The~~ Director and/or the PAB may issue subpoenas to compel the attendance of persons and the production of books, papers, and documents, including but not limited to photographic, audio, and video evidence, as needed to carry out their duties and functions.
 - b. While an investigation is in process or tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
 - i. The original Communications Center tapes relevant to the complaint.

Commented [LK3]: Added per Subcomm 2-3-22 request to insert language "Brief explanations shall be provided for any such changes."

Commented [KL4]: Flag for discussion with full Board. Does the Board have a role in investigations? Also, does subpoena power extend to PAB during F&R process? (See Charter Sec. 3(a)(5). Does the Charter allow for additional investigatory work after F&R are presented but before a hearing?

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- ii. All police reports, records, and documentation, including body-worn camera video.
 - iii. Names, addresses, telephone numbers, and statements of all witnesses.
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability.
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The subject officer's exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint.

Commented [kc5]: What about complainant? We discussed this but I don't think resolved it. We had one complainant who refused to answer any question—invoking their constitutional right—and we had to close the complaint.

Commented [LK6R5]: Let's discuss.

D. Pre-hearing complaint disposition.

- 1. Administrative Closure
 - a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. The complainant requests closure.
- iii. Staff have been unable to contact complainant despite at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.

¹ Government Code Sec. 3300 et seq.

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- iv. The complaint is moot, including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.

b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 5 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

c. ~~Effect of Administrative Closure~~

~~Administrative Closure does not constitute a judgment on the merits of the complaint.~~

Commented [LK7]: Staff suggests deleting because closure of some complaints under 1.a.i. does constitute a judgment on the merits.

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.E.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them.

E. Initial submission and consideration of investigative findings and recommendations.

1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a confidential complaint hearing if the Board requests it by a majority vote. This deadline may be extended as provided under Section II.M.
2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is "preponderance of the evidence."
3. Categories of Findings

[Categories of Findings]

The Director's recommended finding shall include one of the following categories:

- a. Unfounded: The alleged actions of the police officer did not occur.

Commented [kc8]: Give examples here

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- b. Not Sustained: The available evidence can neither prove nor disprove whether the alleged actions of the police officer occurred.
 - c. Exonerated: The actions of the police officer occurred, but were found to be lawful, justified, and/or within policy.
 - d. Sustained: The actions of the police officer were found to violate law or department policy.
4. Recommendation of discipline and level of discipline. If the Director recommends a "sustained" finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline.
5. Board decision. Upon reviewing the Director's investigative findings, the Board ~~must then decide whether to hold a confidential complaint hearing shall proceed as follows:-~~
- a. If the Board agrees with the Director on all findings and recommendations, ~~and-or~~ decides there is no need for a hearing, the Director shall send the findings and recommendations to the Chief of Police.
 - a.b. If the Board decides to modify the Director's findings and/or recommendations, the Director shall send the modified findings and/or recommendations to the Chief of Police, stating whether the Director agrees with the modifications. AllThe findings and recommendations must be sent within 195 days of the City's discovery of alleged misconduct, except if extended as provided under Section II.M.2.
 - b.c. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential complaint hearing.

Commented [LK9]: From Julie for 1-27 (All of Subsection 5.)

Commented [KL10]: Kitty 1-20-2022 – to allow for flexibility in deciding when a hearing is needed.

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

- 1. Time. If the Board decides to move forward with a confidential complaint hearing, it must be held within 60 days of the date the ODPa has completed its investigation, absent tolling.
- 2. Scheduling hearing. ODPa staff shall determine the availability of subject officers and complainant before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on the same complaint do not share a common day on duty.
- 3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential complaint hearing. A Hearing Panel shall consist of three

Commented [KL11]: Kitty 1-20-2022.

Commented [KL12R11]: Unsure this is needed (here and elsewhere). Let's discuss.

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Board members, except that in death cases and any cases in which a majority of Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel.

4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing. The hearing will be continued until the challenge can be resolved.
5. Effect of continuance. If a hearing is rescheduled due to the unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened.
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel.
7. Hearing Packet. ~~At least 14 days before the hearing date~~ The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation, ~~at least 14 days before the hearing date, including any body-worn camera footage.~~ The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command Officer, and the Police Chief, ~~and complainant.~~ The complainant shall receive a Hearing Packet ~~without documents-information protected from disclosure by state law containing confidential investigatory materials or findings and recommendations.~~ Witness officers and civilian witnesses shall receive a copy of only their interview transcript.

Commented [LK13]: From Julie for 1-27 meeting.

Commented [LK14]: From Julie for 1-27

Commented [LK15R14]: Staff: Julie, do you mean "access to" BWC footage? Because obviously we can't mail it, and we currently can't send electronically, per BWC policy.

Commented [LK16]: From Julie for 1-27. She also wants to delete the next sentence.

Commented [LK17R16]: Staff: Complainant cannot receive full packet but, as indicated in comment below, perhaps they can receive more than they currently get.

Commented [KL18]: Ask City Attorney if complainant can be entitled to more materials, or to redacted materials. Trying to align with specific language of Penal Code 832.7.

Commented [kc19R18]: Yes

G. Board member impartiality; recusals; challenges

1. Impartiality.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential complaint hearings, they shall hear all viewpoints.
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a

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pending complaint; or pledge or promise to vote in any particular manner in a pending complaint.

- c. No Board member with a personal interest or the appearance thereof in the outcome of a hearing shall sit on the Hearing Panel. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs or affiliations

Examples of personal interest include, but are not limited to:

- i. a familial relationship or close friendship with the complainant or subject officer;
- ii. witnessing events material to the inquiry;
- iii. a financial interest in the outcome of the inquiry;
- iv. a bias for or against the complainant or subject officer.

- d. A Board member who violates Section G.1.b above, before or during a confidential complaint hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendaize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential complaint hearings for the remainder of the Board member's term.

- 2. Recusal. Board members who recuse themselves for personal interest must do so as soon as they become aware of it.
- 3. Disclosure of ex parte contacts. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing.
- 4. Challenges to Hearing Panel member

- a. Basis for Challenge

A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Hearing Panel. Personal interest in the outcome of a hearing does not include political or social affiliations, attitudes, or beliefs. Examples of personal interest include, but are not limited to:

- a) a familial relationship or close friendship with the complainant or subject officer;
- b) witnessing events material to the inquiry;

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- c) a financial interest in the outcome of the inquiry;
 - d) a bias for or against the complainant or subject officer.
- b. Procedure
- i. Within 7 calendar days from the date of mailing of the notice of a confidential complaint hearing, which includes the names of the Board members constituting the Hearing Panel, or 10 calendar days before the hearing date, whichever occurs first, the complainant or the subject officer(s) may file with the ODPa a written challenge for cause to any Hearing Panel member. Such challenge must specify the nature of the personal interest or perceived bias, accompanied by all evidence and argument supporting the challenge.
 - ii. The Director of Police Accountability or their designee shall notify the challenged Board member and send them a copy of the challenge and supporting materials within 1 business day after receipt of the challenge.
 - iii. A Board member challenge and a Board member's response to being challenged may be filed via email to dpa@cityofberkeley.info. ODPa staff may serve a notice of challenge and supporting materials, and response to a challenge and supporting materials, via email.
 - iv. If the Board member agrees, the Director or their designee shall ask another Board member to serve.
 - v. If the Board member does not agree that the challenge is for good cause, the Board member has 3 calendar days from the date of contact by staff to file a written response with supporting materials, if they desire, and ODPa staff must send the response and supporting materials to the challenging party within 1 business day of receipt. The Director or their designee shall convene a special BOI meeting of the two other Board members to occur as soon as practicable to hear the challenge. For the challenge to be granted, both Board members must agree that the challenge is for good cause using the clear and convincing standard. If the challenge is granted, the Director or their designee shall ask another Board member to serve. If there is not unanimous agreement by the two Board members, the challenged Board member will be allowed to serve.
 - vi. At the special meeting to hear the challenge, the party making the challenge shall, under oath, reiterate the basis of the challenge for the Board members. All parties will be allowed the opportunity to present arguments, witness testimony and

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answer questions under oath. Testimony and arguments presented at the special meeting shall be recorded.

- vii. If a challenge to a Board member is rejected, and the Board member serves, the written challenge and the Board member's written response shall be part of the complaint file. If a challenge is upheld, the Board members voting to uphold must prepare a written decision explaining their reasoning. This decision will be furnished to the challenging party and the challenged Board member, and is confidential.

5. Replacement of Board members

- a. If a challenge to a Board member is upheld, DPA staff shall ask another Board member to serve.
- b. In cases where the full Board sits as the Hearing Panel, a Board member who agrees to a challenge or is successfully challenged will be replaced by the alternate Board member.

6. Tolling of time

A challenge to a Board member that is granted at the request of the subject officer shall toll any BPD disciplinary time period.

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for the request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i).
2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODPa staff no later than ~~14~~¹⁰ days before the scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. ODPa staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing

Commented [LK20]: If staff sends the packet out 14 days in advance (the minimum), the parties need a few days to provide new evidence or witness names.

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date, and ODPa staff shall notify both the complainant and the subject officer of the Hearing Panel's decision.

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date.
4. Pre-hearing submission of questions. The complainant, subject officers, or their respective representatives may submit proposed questions related to the incident in writing at least three business days before the hearing to ODPa staff. Hearing Panel members may ask these questions if they deem them appropriate and useful.

I. **Hearing procedures**

1. Who may or must be present at hearing. Hearings are closed to the public. The Director, Investigator, and Hearing Panel members may be present during the entirety of the hearing. The complainant and the subject officer ~~shall~~must be present to answer questions from Board members, subject to state law. An attorney or other representative (up to two in total for the each complainant ~~and or the~~ subject officer) may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for ensuring their representative's presence at the hearing.
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative.
3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained.
4. Good cause for failure to appear at complaint hearing
 - a. A complainant or subject officer who fails to appear at a complaint hearing due to significant, unforeseen circumstances that could not have been anticipated has 7 calendar days from notice of the dismissal or notice of findings to request that the complaint be re-opened and a hearing or re-hearing held. The request must be made to the ODPa in writing and state the reason for not attending the hearing.
 - b. ODPa staff shall notify the Hearing Panel members and the opposing party of the request. On the same date, staff shall notify the requesting party that they must submit, within 5 business days, documentary or other evidence (such as witness statements, a doctor's note, or an obituary) to support their claim of inability to attend the hearing.

Commented [LK21]: From Kitt, to align subsection heading with content.

Commented [LK22]: Added by staff 1-25-22.

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- c. Staff shall schedule a special meeting date to hear the request, and then send written notice thereof. At least 72 hours' written advance notice of the meeting must be sent. The notice to the opposing party and Hearing Panel members shall include the requesting party's evidence. The opposing party may submit a written response before or at the special meeting.
 - d. At the special meeting, the requesting party will have the opportunity to present their case to the Hearing Panel members, who may ask questions of the requesting party. The opposing party may not ask questions of the requesting party but may present their argument in opposition. Hearing Panel members may ask questions of the opposing party. Each side shall have an opportunity for rebuttal.
 - e. Following the parties' arguments, everyone except ODPa staff is excused while the Hearing Panel members deliberate. In determining whether good cause has been shown, the Hearing Panel members shall consider the reason for not appearing, the prejudice to the opposing party, and other relevant information. The finding of good cause must pass by a majority of the Hearing Panel. The decision of the Hearing Panel will be announced orally and issued in writing. If good cause is found, staff will schedule a hearing or re-hearing.
 - f. A re-hearing granted at the request of the subject officer shall toll any BPD disciplinary time period and the one-year investigatory time period under Government Code section 3304(d).
5. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued (i.e. delayed) until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous.
 6. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing.
 7. Viewing body-worn camera footage. Hearing Panel members, complainants and their representatives, and subject officers and their representatives (in accordance with BPD policy), may view relevant body worn camera footage in advance of the hearing. Relevant body-worn camera footage may also be shown during the hearing.
 8. Taking testimony at the hearing. Testimony at the hearing will include the following elements:
 - a. The complainant, witnesses, and officers will be called into the hearing room to testify separately. Hearing Panel Members may ask previously submitted questions, if deemed appropriate and useful.
 - b. The complainant will generally testify first and may be accompanied by their representative. The complainant and/or their representative may make a statement or rely on their interview statement. The

Commented [LK23]: Added subsection heading where there was none.

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representative may ask the complainant questions. Hearing Panel Members may then ask questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement.

- c. The complainant and their representative will be excused from the hearing room after their testimony or representation is completed.
 - d. Any civilian witnesses will be called into the hearing room to testify separately. They may make a statement or rely on their interview statement. Hearing Panel Members may ask questions. After their questioning is completed, witnesses will be excused.
 - e. The subject officer(s) and any witness officers will be called into the hearing room to testify separately, and will not be present during the complainant's and civilian witness's testimony. Subject officer representatives may be present for all of their subject officer's testimony. Subject officers may make a statement or rely on their interview statements. The subject officer may be questioned by their representative, after which the officer may be questioned by up to 2 Hearing Panel Members, unless the officer waives this limitation. After questioning is completed, subject officers or their representative will have up to 15 minutes to provide a summary of their case and a closing statement.
 - f. Witness officers will then be called into the hearing room. They may make a statement or rely on their interview statement. Hearing Panel Members may then ask questions. After questioning is completed, the officer witness(es) will be excused.

The Duty Command Officer (DCO) may be present during the subject officer and witness officer's testimony. The DCO appears on behalf of the Berkeley Police Department to answer questions from the Board about Department policies and procedures. The DCO is not to testify as to the events pertaining to the complaint, offer any opinion about whether misconduct occurred, or act as a representative of a subject officer.
 - g. Board members may call any participant back into the hearing room for follow-up questions.
9. Subpoenas. The Director and ~~or~~ Board may issue subpoenas to compel the production of books, papers, and documents, and the attendance of persons to take testimony, as needed to carry out their duties and functions. The testimony of any sworn employee of the Police Department is subject to the due process and confidentiality provisions of applicable state and federal law.
10. Maintaining order. No person at the hearing shall become subject to undue harassment, personal attack, or invective. If the Chairperson fails to maintain reasonable order, BPD employees may leave the hearing

Commented [LK24]: From Kitt: See comment above in II.C.6.a. re who may issue subpoenas. This section should be consistent.

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without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient.

J. Investigations Initiated by the Board

1. Investigations into possible police misconduct may be initiated by the Board upon a vote of five Board members. Rules of procedure shall follow those set out for formal complaints initiated by aggrieved parties or percipient witnesses of alleged police misconduct. ~~This includes, but is not limited to, standard of proof, categories of findings, body camera footage, recommendations of discipline, Board Member impartiality, continuance requests, and newly discovered evidence.~~ Two exceptions to this general principle apply:

- 1) When ~~there are no aggrieved parties~~ no formal complaint has been filed, regulatory references to "complainant" are moot.
- 2) When there ~~are no aggrieved parties~~ is no complainant only subject officer(s), their representative, and ~~officer~~-witnesses shall testify.

Commented [LK25]: Staff suggests deleting as unnecessary.

Commented [LK26]: From Kitt for 1-27. Suggest rewording because definition of complainant in I.A. requires filing of a complaint, and complainant can be a percipient witness.

Commented [LK27R26]: Staff suggests that, better yet, start the sentence with, "Regulatory references . . ."

Commented [LK28]: From Kitt for 1-27.

Commented [LK29R28]: Staff similarly thinks the initial clause can be deleted and the sentence can begin, "Only subject officer(s) . . ."

K. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be considered if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be considered in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, ~~they may be called and questioned~~.
 - b. All oral evidence shall be taken under oath.
 - c. The Chairperson shall exclude irrelevant ~~and or~~ unduly repetitious evidence.
 - d. The Chairperson shall conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPa staff will answer Board members' questions on the evidence, points of law, and procedure.
 - e. The City Attorney's opinion shall be sought whenever the interpretation of a City Ordinance or the City Charter is contested and pivotal to the case, or when a case raises substantial legal issues of first impression. If a conflict of interest exists for the City

Commented [KL30]: Kitty 1-20-2022 would like to clarify what this phrase means.

Commented [KL31]: Kitty asked whether we are allowed to ask questions about or see evidence of prior sustained allegations, including IA investigations, against the subject officer. See also comment in L.5. below. Discussed 11-30.

Commented [KL32]: Kitty 1-20-2022 wonders what the problem is with repetitious evidence.

Section II.K.

Attorney, outside counsel may be obtained (Article XVIII, Section 125 (15) (b)).

- f. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - g. If either party requests that the hearing be continued at a later date to consider motions or points of law, any applicable BPD disciplinary time limit may be tolled for the period of such continuance. The Hearing Panel, in consultation with the parties, shall decide on the continuance and any possible tolling.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

Commented [LK33]: At 11-30 meeting, Lt. Montgomery said 240 days cannot be extended unless subject officer agrees. Even if officer agrees with PAB to toll, the BPD is still abiding by the original 240? Staff would like to consult with City Attorney's office.

L. Deliberation and Findings

1. Deliberation. After the hearing has concluded, the Hearing Panel shall deliberate outside the presence of everyone except ODP staff. The Hearing Panel shall only consider information provided in the hearing packet, through body-worn camera footage, or during the hearing.
2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability, as set forth in Section E.3. All actions of the Hearing Panel shall be by majority vote of those Board members present.
3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing, unless extended as provided under Section II.M.2. The decision shall also be transmitted to the complainant and the subject officer(s).
4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision.
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning, unless the dissenter agrees with the Director's finding and recommendation.
5. Discussion re whether past sustained findings on an allegation are relevant to sustaining in current matter. Are we entitled to disciplinary

Section II.L.

records in non-serious (SB 1421) cases? Staff to check with City Attorney's Office.]

M. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.E.5.a. above, or from the Hearing Panel under Section II.K.L.4.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision including any disagreement with the Director or the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision disagreeing with any findings or recommendations of the Director or Board, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.
3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.
4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.N.2.

N. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies.
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days, absent tolling. The timeline for completing an investigation shall not be extended beyond 195 days, absent tolling.

Section III.A.

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT

A. Application

This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code.
2. If a finding is "not sustained," "unfounded," or "exonerated," the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief's determination to the Director. The Director, if appropriate, may request to review all files, transcripts, and records related to the complaint.
3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.
4. If the Director decides that the Board will conduct a review, ODPa staff shall ask the Board to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Board members and ODPa staff will be present. A Duty Command Officer may be present.
 - b. The Board shall evaluate the investigative record to determine whether the complainant's objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief's decision is not supported by the evidence in the record.
 - c. All action of the Board must be by majority vote.
5. The Board must, within 45 days of the date the Director accepts an objection:

Section III.B.

- a. Dismiss the complainant's objection;
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Board finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.
6. Within 15 days of receiving a Board's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections.
 7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief, and send a final determination with a written explanation to the Director, the Board, and the Chief.
 8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies.

IV. INFORMAL COMPLAINTS

- A. An informal complaint is a communication from any member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features or specific circumstances, and alleges any act of police misconduct. Such complaints may be anonymous, if requested by the complainant, and shall be treated confidentially. The confidentiality of the officer(s) shall be preserved.
- B. ODPa staff shall contact the complainant to explain the policy complaint process, the formal misconduct complaint process, and the informal complaint process.
- C. If the complainant chooses to go forward with the informal complaint, the complaint shall be agendaized for a closed session at the next Board meeting, at least four days before the meeting. Notice shall be sent to the subject-named officer(s). If requested by the complainant, the complaint will remain anonymous.
- D. The Board shall consider the informal complaint and, upon a majority vote of Board members, may initiate an investigation.

Commented [KL34]: Clarify: anonymous to us or known to us but identity kept confidential. Speaker from San Diego? Lots more issues.

Section IV.

- E. If the Board votes to initiate an investigation, it will proceed as a Board-initiated investigation, while retaining anonymity of complainant, if anonymity is requested.

V. COMPLAINT FOLLOW-UP

~~Subsequent to the disposition of alleged police misconduct hearings, staff shall conduct an exit interview and/or survey with subject officer(s), complainant, and any witnesses who testified. Participation in such interviews/surveys shall be optional. After the Chief of Police or City Manager has issued a final decision on a complaint, ODPa staff shall invite the subject officer(s), complainant, and witnesses who testified, to participate in an exit interview or survey, and ODPa staff shall conduct the exit interview or survey with those who are willing. If warranted, the complainant will be directed to relevant resources. The complainant may also be informed of potential policy reviews related to their complaint.~~

Commented [KL35]: Staff's proposed revision, as promised during 1-27 meeting. Would like to discuss "relevant resources" obligation.

VI. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A. These Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPa staff shall furnish them to any person requesting a copy.
- B. Amendments to these Regulations require a majority vote of the Board and ratification by the City Council.