

OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

POLICE ACCOUNTABILITY BOARD REGULAR MEETING

Wednesday, September 14, 2022
7:00 P.M.

Board Members:

MICHAEL CHANG, CHAIR
NATHAN MIZELL, VICE-CHAIR
KITTY CALAVITA

REGINA HARRIS
JULIE LEFTWICH
DEBORAH LEVINE

JOHN MOORE III
CHERYL OWENS
ISMAIL RAMSEY

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/82237902987>. 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 3790 2987**. 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 & ROLL CALL** (2 minutes)
2. **APPROVAL OF AGENDA** (5 minutes)
3. **PUBLIC COMMENT** (TBD)

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on any matter within the Board's jurisdiction at this time.)

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. APPROVAL OF MINUTES

Regular meeting of July 27, 2022.

5. ELECTION OF NEW CHAIRPERSON

6. BOARD MEMBERS' REPORTS (5 minutes)

7. CHIEF OF POLICE'S REPORT (10 minutes)

Crime/cases of interest, community engagement/department events, staffing, training, and other items of interest.

8. SUBCOMMITTEE REPORTS (discussion and action) (5 minutes)

Report of activities and meeting scheduling for all Subcommittees, possible appointment of new members to all Subcommittees, and additional discussion and action as noted for specific Subcommittees:

- a. Renew Fair & Impartial Policing Implementation Subcommittee.
- b. Dissolve or renew Director Search Subcommittee.
- c. Regulations Subcommittee – see Item #9.a. below.
- d. Dissolve Controlled Equipment Subcommittee.

9. OLD BUSINESS (discussion and action)

- a. Finalize review of draft proposed permanent Regulations for Handling Investigations and Complaints. (1 hour)
- b. Review Annual Equipment Use Report. (1 hour)

10. NEW BUSINESS (discussion and action)

- a. Public comment made at July 27 meeting regarding Board member Calavita. (15 minutes)
From: Board member Owens.

11. PUBLIC COMMENT (TBD)

(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.)

12. ADJOURNMENT (1 minute)

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.

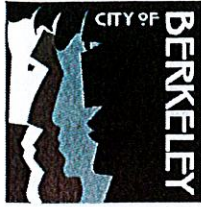
SB 343 Disclaimer

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

**POLICE ACCOUNTABILITY BOARD (PAB)
REGULAR MEETING ATTACHMENTS
SEPTEMBER 14, 2022**

<u>MINUTES</u>	
July 27, 2022 Regular Meeting Draft Minutes	Page 7
<u>AGENDA-RELATED</u>	
Item 8. – 8-31-2022 PAB Subcommittee List.	Page 11
Item 9.a. – Draft Permanent Regulations, as of 8-29-22 PAB meeting.	Page 13
Item 9.a. – Board member Levine's proposed language	Page 37
Item 9.b. – Police Equipment and Community Safety Ordinance, 2021 Annual Report.	Page 39
Item 9.b. – B.M.C. Sec. 2.100.050 – Reports on the Use of Controlled Equipment.	Page 55
<u>COMMUNICATIONS</u>	
9-20-22 Information Calendar. From the City Manager to the Mayor and Councilmembers re Update on the Implementation of Fair and Impartial Policing Task Force Recommendations.	Page 57
Police Accountability Board and Office of the Director of Police Accountability 2021-2022 Report.	Page 67
2022 Annual Commission Attendance Report for period Sept. 1, 2021 through Aug. 31, 2022.	Page 77



OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

**POLICE ACCOUNTABILITY BOARD
REGULAR MEETING
MINUTES**

Wednesday, July 27, 2022, 7:00 P.M.

No physical location; meeting held exclusively through videoconference and teleconference.

1. CALL TO ORDER & ROLL CALL BY CHAIR CHANG AT 7:01 P.M.

Present: Board Member Michael Chang (Chair)
Board Member Nathan Mizell (Vice-Chair)
Board Member Kitty Calavita
Board Member Juliet Leftwich
Board Member Deborah Levine
Board Member John Moore
Board Member Cheryl Owens
Board Member Ismail Ramsey (arrived late)

Absent: Board Member/s Regina Harris

ODPA Staff: Katherine J. Lee, Interim Director of Police Accountability
Beneba Thomas, DPA Investigator

BPD Staff: Lt. Melanie Turner
Lt. Daniel Montgomery

DCA Staff: James Chang

2. APPROVAL OF AGENDA

Motion to approve the agenda.

Moved/Second (Calavita/Moore) Motion Carried by general consent.

3. PUBLIC COMMENT

4 speakers.

4. APPROVAL OF MINUTES

a. Regular meeting of July 13, 2022

Motion to approve Regular Meeting Minutes of July 13, 2022

Moved/Second (Leftwich /Levine) **Motion Carried by general consent.**

b. Special meeting of July 20, 2022.

Motion to approve Special Meeting Minutes of July 20, 2022

Moved/Second (Leftwich / Moore) **Motion Carried by general consent.**

5. CHAIR AND BOARD MEMBERS' REPORTS

Chair Chang reported on the upcoming departure of Interim Director of Police Accountability, Kathy Lee. Chair Chang held a "Moment of Celebration for Director Lee" and each Board Member expressed kind thoughts and well wishes to Director Lee for her retirement.

The new Senior Advisor for Public Safety in the Mayor's Office, Anthony Rodriguez, introduced himself and outlined his goals for this position.

6. DIRECTOR OF POLICE ACCOUNTABILITY'S REPORT

The Interim Director reported:

- No new complaints filed since the last meeting.
- Thank you to Board members for the well wishes.
- Military Policy 709 was approved by the City Council without revisions.
- Neither staff nor Board members can attend the NACOLE conference because of the travel restrictions imposed by the Berkeley City Council resolution in support of AB 1887 (which prohibits travel to certain states due to some discriminatory laws enacted in those states). Board members and staff are encouraged to attend the virtual NACOLE conference in October.
- The selection process for the next Director of Police Accountability is not finished yet. The process is now in the hands of the Beyers Group and the City Council. There is a possibility that the new Director could be announced a Special City Council meeting on August 3, 2022.

7. CHIEF OF POLICE'S REPORT

Because Chief Louis is on vacation, Lt. Melanie Turner reported the following:

- No update on the Weck/death case. Chief Louis will provide information when she returns.
- BPD is currently staffed at 149 officers with three people in the field training program. One sergeant recently resigned and there are several upcoming retirements. They are in the testing process to select the Communications Center Manager.
- Significant Incident Reports include: July 25, 2022, injury collision between a pedestrian and a vehicle caused serious injury to the pedestrian; July 26, 2022,

two people were shot at but not hit by two people trying to remove catalytic converters; and on July 27, 2022, there was shooting at Channing & West.

8. SUBCOMMITTEE REPORTS (discussion and action)

Report of activities and meeting scheduling for all Subcommittees, possible appointment of new members to all Subcommittees, and additional discussion and action as noted for specific Subcommittees:

- a. Fair & Impartial Policing Implementation – Subcommittee chair Calavita reported that they have not scheduled another meeting and the subcommittee will reconvene in September.
- b. Director Search – Subcommittee chair Levine and board members elected to wait until the new Director is announced before dissolving this subcommittee.
- c. Regulations Subcommittee – discussed below at Item 9.a.
- d. Controlled Equipment Subcommittee – discussed below at Item 10.a.

9. OLD BUSINESS (discussion and action)

- a. City Attorney's Opinion – Deputy City Attorney Chang reported that the City Attorney's Office is preparing a comprehensive confidential memorandum regarding the board's authority to initiate investigations/complaints or to act as a complainant as well as analyzing generally the board's authority in the areas of investigation and fact-finding, along with related issues, including: (1) if the conclusion remains that the Charter does not currently authorize board initiated investigations, how could such authority be granted; (2) could an ordinance be enacted along with model language; (3) the effect of the conclusion on the pending investigations; (4) breadth and scope of the board's subpoena power(s). The memo will be distributed to the board during the August break so that board members will have time to review the contents before the September 14th meeting. The City Attorney's review of the interim regulations will be completed in a separate memo.
- b. After much discussion regarding the language in section II.A.2 regarding Who May File complaints (*See materials in July 13, 2022 packet*), the following motion was presented:

Motion to table further discussion regarding all substantive aspects of the interim regulations until after the memorandum from the City Attorney's office is received and discussed.

Moved/Second (Calavita/Ramsey) **Motion Carried**

Ayes: Calavita, Leftwich, Levine, Mizell, Moore, Owens, and Ramsey.

Noes: Chang

Abstain: None

Absent: Harris

10. NEW BUSINESS (discussion and action)

- a. Discuss process and timing for reviewing BPD's Annual Equipment Use Report, submitted under the Controlled Equipment & Community Safety Ordinance. *(See Annual Report published in June 8, 2022 packet, starting at p. 135.)*

Motion to agendaize this item for September 14, 2022.

Moved/Second (Owens/Calavita) Motion Carried by general consent.

- b. Interim Director Lee provided an update on the status of: pending complaint investigations by ODPA; policy work by PAB and ODPA (ongoing and to be started); other projects, such as outreach, by PAB and ODPA; and ODPA staffing, including transition to new Director.

- c. i) Consider opening a policy review on the discharge of inebriated individuals from BPD custody.

Motion to Open a policy review regarding the discharge of inebriated individuals from BPD custody, including policies I-15, 900, and 411.

Moved/Second (Ramsey/Calavita) **Motion Carried carried by general consent.**

- ii) Request made by various board members to keep a list of requests/inquiries made to BPD during the board meetings and include an agenda item for BPD to provide follow-up and answers.

**11. REMARKS BY OUTGOING INTERIM DIRECTOR OF POLICE
ACCOUNTABILITY**

12. PUBLIC COMMENT

4 speakers.

13. ADJOURNMENT

Motion to adjourn the meeting.

Moved/Second (Moore/Leftwich) By general consent, the meeting was adjourned at 10:06 p.m.

**POLICE ACCOUNTABILITY BOARD
SUBCOMMITTEES LIST
8-31-2022**

Subcommittee	Board Members	Chair	BPD Reps
Regulations Formed 7-7-21 Renewed 6-22-22	Calavita Leftwich Owens <u>Public:</u> Kitt Saginor		Lt. Dan Montgomery
Director Search Formed 8-4-21	Levine Mizell Moore <u>Public:</u> Rivka Polatnick Marc Staton	<u>Co-chairs</u> Levine Moore	
Fair & Impartial Policing Implementation Formed 8-4-21	Calavita Moore Owens Ramsey <u>Public:</u> George Lippman Elliot Halpern	Calavita	Sgt. Peter Lee
Mental Health Response Formed 11-10-21 Scope expanded 3-9-22	Harris Levine <u>Public:</u> Elena Auerbach		Sgt. Joe LeDoux
Fixed Surveillance Cameras (Policy 351) Formed 2-9-22	Mizell Ramsey		
Controlled Equipment Use & Reporting Formed 5-11-22	Moore Ramsey	Moore	Sgt. Peter Lee Sgt. Joe LeDoux

**Police Accountability Board
and
Office of the Director of Police Accountability
Regulations for Handling Investigations and Complaints**

Preamble

These regulations for handling complaints against sworn members of the Berkeley Police Department (BPD) and investigations are issued in accordance with City of Berkeley Charter Article XVIII, Section 125.

I. GENERAL PROVISIONS

A. Definitions

The following definitions shall apply:

1. Administrative Closure: Closure of a complaint before findings and recommendations are sent to the Chief of Police.
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.
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).

Section I.B.

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 Departmental policy.
13. Eyewitness: A percipient witness.
14. Formal complaint: A complaint filed on the ODPa complaint form by a member of the public or a complaint initiated by the Board upon the Director's recommendation.
15. Hearing Panel: Three Board members impaneled to conduct a confidential hearing of alleged police misconduct.
16. Informal complaint: A communication not on the official ODPa complaint form from any member of the public that identifies an officer by name, badge number, other identifying features, or specific circumstances, and alleges an act of police misconduct.
17. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODPa.
18. Investigation: The fact-finding process engaged in by the ODPa staff.
19. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
20. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
21. Preponderance of the evidence: Standard of proof in which the evidence on one side outweighs, or is more convincing than, the evidence on the other side, but not necessarily because of the number of witnesses or quantity of evidence.
22. Subject officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
23. Toll: To suspend a time period.
24. 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.

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. The testimony of any sworn employee of the Police Department is

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subject to the due process and confidentiality provisions of applicable state and federal 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. Each Board member shall shred or return to ODPa staff all hard copies of confidential material and delete all confidential material sent electronically, at the close of any proceeding or as soon as the information is no longer needed. Board members shall inform ODPa staff after the confidential material has been shredded or electronically deleted.
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 agendize an alleged violation of confidentiality for discussion and action at a closed session 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.

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. Complaints must include 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

Commented [KL1]: Ask CAO

Section II.A.

complaint. The form shall require the complainant to sign the following statement: "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-filed~~ by the Board upon the recommendation of the Director, upon and a vote of five Board members ~~to authorize an investigation~~. Complaints shall be signed by the complainant, except for complaints ~~initiated-filed~~ 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.
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.

Commented [LK2]: Board revised 6-29-22 following revision to Secs. IV and new V.

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.

Section II.B.

- 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 by a person authorized to initiate an investigation 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 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.~~
2. 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

Commented [KL3]: 6-29-2022 DPA to combine [former] sections 2 & 3.

Section II.C.

officer. The Notice of Complaint and Allegations need not be sent if the complainant requests mediation, or the Director recommends administrative closure. A copy of each complaint accepted by the Director shall be sent to Board members within 30 days of filing.

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 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.

3. 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.
4. 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.
5. 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.
 - ii. All police reports, records, and documentation, including body-worn camera video.
 - iii. Names, addresses, telephone numbers, and statements of all witnesses.
6. 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

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?

Section II.C.

interview shall contact the Director or the Investigator immediately to state the reason for their unavailability.

7. 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.

Both the subject officer and the complainant retain all their constitutional rights throughout the process, and any such exercise shall not be considered by the Board in its disposition of a complaint.

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. The complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. The complainant requests closure.
- iii. Staff have been unable to contact the 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.
- 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.

¹ Government Code Sec. 3300 et seq.

Section II.D.

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.

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 enters 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 disciplinary recommendations.

1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and disciplinary 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.

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

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

Section II.E.

Penal Code 832.7, as enacted pursuant to Senate Bill 1421 on January 1, 2019, the Director must include a recommendation regarding the level of discipline.

Commented [LK5]: Bd mbr Leftwich suggests deleting but this is taken from Charter sec. 18(m) (and now I think we should add, after 1421, "on January 1, 2019" as the Charter states).

5. **Board decision.** Upon reviewing the Director's investigative evidence ~~(other than body worn camera footage)~~ and the Director's findings and disciplinary recommendations, and viewing any relevant body-worn camera footage, the Board shall proceed as follows:

Commented [LK6]: Subcomm. 5-4: flag for full Board – potential prejudicial effect of BWVC footage at this stage, prior to hearing.

Commented [KL7R6]: Full Board rejected 6-22-22

- a. If the Board affirms or proposes a sustained finding or a recommendation of discipline on any allegation, or decides that further fact-finding is warranted, a confidential complaint hearing ~~shall~~ may be convened on all allegations in the complaint upon the election of the subject officer. The Board may request that ODPa staff conduct further investigation as needed.
- b. If the Director and the Board agree on all proposed findings, none of the findings are "sustained," and the Board decides there is no need for a hearing, the Board shall send its findings to the Chief of Police.
- c. If the Board modifies the Director's findings, none of the findings are "sustained," and the Board decides there is no need for a hearing, the Board shall send its findings to the Chief of Police.
- d. All findings and recommendations must be sent to the Chief of Police within 195 days of the City's discovery of alleged misconduct, except if extended as provided under Section II.M.2.

Commented [LK8]: Board added 6-22-22

Commented [LK9]: 3-22-22: Very complicated issue that should be discussed at full Board.

Commented [LK10]: See comment from Bd mbr Leftwich at II.L. 1, p. 19. They are Board's findings but Director (or ODPa staff) performs the act of sending. Suggest, "The Board's findings shall be sent to the Chief of Police."

Commented [LK11R10]: 6-29-22 Board preferred to leave as is.

Commented [LK12]: 6-29-22 Board preferred to leave as is.

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.
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 identified in 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 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

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possible. If substituted within 7 days of a hearing, the subject officer and complainant retain 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, and provide access to any relevant 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. The complainant shall receive a Hearing Packet without information protected from disclosure by state law. Witness officers and civilian witnesses shall receive a copy of only their interview transcript.

Commented [KL13]: 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.

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 consider all viewpoints and evidence.
 - 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 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:

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- 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 as defined in Sec. II.G.1.c. shall not sit on the Hearing Panel.
 - 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

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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 to recuse themselves, 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 meeting of the two other Hearing Panel 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. "Clear and convincing" means evidence that is so clear as to leave no substantial doubt; or that shows a high degree of probability."
- 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 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.

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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 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.

Commented [KL14]: Add language to section above re notice to parties of new witnesses or evidence and time frame. (IF further investigation is authorized.)

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODPa staff shall notify both the complainant and the subject officer of the Hearing Panel's decision.

3. Procedural issues or objections. The complainant and subject officer shall-should raise any procedural issues or objections 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**

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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 must be present to answer questions from Board members, subject to state law. An attorney or other representative (up to two for each complainant and 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 to another date 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.
 - 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.

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- 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 questions submitted previously in accordance with Section II.H.4, if deemed appropriate and useful.
 - b. The complainant will generally testify first and may be accompanied by their representatives. The complainant and/or their representatives may make a statement or rely on their interview statement. The representatives may ask the complainant questions. Hearing Panel Members may then ask questions. After questioning is completed, the complainant or their representatives 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

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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. 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 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. 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. 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.

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3. 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 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 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.
4. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a matter relating to the incident in question 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 [KL15]: Kitty 1-20-2022 would like to clarify what this phrase means. 3-31 City Attorney will be asked about this (Board's role, if any in extending subpoena power)

Commented [LK16]: 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.

K. Deliberation and Findings

1. Deliberation. After the hearing has concluded, the Hearing Panel shall deliberate outside the presence of everyone except ODPa 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 II.E.3. All actions of the Hearing Panel shall be by majority vote of those Board members present.

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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 Board modifies or rejects the DPA's findings and recommendations, the Director shall, if the Hearing Panel desires, reconvene the Hearing Panel within 10 days of the confidential hearing to review and approve the written findings draft prepared by the Director, except as stated below.

If the Director is unable to reconvene the hearing panel or there is insufficient time to meet the investigative deadlines, the Director will circulate the draft findings separately and only once to Hearing Panel members for comment and feedback to the Director, who shall not share the comments or feedback of Panel members with one another. The Director shall prepare and submit the findings and recommendations.

Commented [LK17]: This section b. and alternate language proposed by Bd. Member Leftwich was flagged for 5-4 meeting but not discussed. New proposed language below.

Commented [KL18]: 6-29-2022 Bring back revised language for next meeting.

b. If the Hearing Panel modifies or rejects the Director's findings and recommendations, the Director shall prepare and electronically submit a written draft of the new findings and recommendations to the Hearing Panel. If any member of the Hearing Panel advises the Director that the member seeks to make substantive changes to the draft, the Director shall reconvene the Hearing Panel to ensure the Panel has reached consensus on the findings and recommendations.

Commented [LK19]: Director okay with this but believes additional language to address situations where meeting can't be convened.

b. If the Hearing Panel modifies or rejects the Director's findings and recommendations, the Director shall prepare and electronically submit a written draft of the revised findings and recommendations to the Hearing Panel majority and inquire about their availability for a potential reconvening of the panel. If any member of the majority advises the Director that the member seeks to make substantive changes to the draft, the Director shall attempt to reconvene the Hearing Panel majority to ensure they have reached consensus on the findings and recommendations.

Commented [LK20]: NEW language for consideration at 7-13-22 meeting.

If the Director is unable to reconvene the Hearing Panel majority or there is insufficient time to meet the investigative deadlines, the Director will ask the majority to submit comments and feedback in writing. The Director will not share the comments or feedback among Hearing Panel members, but will, in the Director's best judgment,

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harmonize their opinions in preparing final findings and recommendations.

b.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.

L. 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.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 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.M.2.

Commented [LK21]: Bd mbr Leftwich 4-26 notes should say "Board" for consistency with Sec. II.E.5., p. 9 above. However they are Board's findings, which are sent by the Director.

M. Time limits; extensions; tolling.

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

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by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days.

3. Tolling. If a subject officer is unavailable for an interview with ODPA staff or to attend a confidential personnel hearing due to any leave of absence, the 240-day time limit for complaint investigation and notification of discipline under Section 18(d) of Article XVIII of the City Charter shall be tolled pending availability of the officer. This provision shall apply only when the subject officer's leave of absence exceeds 14 consecutive days.

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.

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- 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:
- 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. INVESTIGATIONS INITIATED-REQUESTED BY THE BOARD

The Board may request that an investigation be initiated by the ODPa upon a vote of sixfive Board members.

Commented [LK22]: Section IV and V revised as shown by a vote of the Board on 6-29-22.

V. COMPLAINTS FILED BY THE BOARD

Subsequent to an investigation pursuant to Section IV, the ODPa may recommend to the Board that a complaint process be initiated filed by the Board. Investigations may be initiated by the Board upon a vote of six Board

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~~members. Subsequent to an initial inquiry or investigation, a formal complaint may be initiated by the Board in cases of potential serious misconduct, by a vote of six Board members. Upon a vote of five Board members, the Board may file a complaint. Criteria for Board-filed complaints include:~~

1. Whether the complaint alleges prima facie misconduct;
2. The seriousness of the alleged misconduct;
3. The timeliness of the complaint;
4. Whether a formal complaint has already been filed about the incident.

Rules of procedure (including, but not limited to, the sufficiency of the complaint) shall follow those set out for formal complaints initiated by aggrieved parties or percipient witnesses of alleged police misconduct. Two exceptions to this general principle apply:

- 1) Regulatory references to "complainant" are moot.
- 2) Only subject officers, their representatives, and witnesses shall be interviewed and testify.

VI. INFORMAL COMPLAINTS

- A. An informal complaint is a communication not on the official ODPa complaint form from any member of the public that identifies an officer by name, badge number, other identifying features, or specific circumstances, and alleges an act of police misconduct. The individual who initiates an informal complaint may request anonymity (i.e., remain anonymous to all, including ODPa staff) or confidentiality (i.e., remain known only to ODPa staff and Board members).
- B. ODPa staff shall contact the individual to explain how to file a formal complaint.
- C. If ODPa staff is unable to contact the individual, or if the individual declares their intention not to file a formal complaint, staff shall agendize the informal complaint for closed session at the next PAB meeting with notice to the named officer. At said meeting, the Board shall determine whether to initiate an investigation under Section IV. based, in part, on the following considerations:
 1. Whether the informal complaint alleges prima facie misconduct;
 2. The seriousness of the incident;
 3. The timeliness of the complaint;
 4. Whether a formal complaint has already been filed about the incident.

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- D. The identity of an individual who submits an anonymous or confidential informal complaint shall remain anonymous/confidential, if requested.
- E. A complaint filed anonymously on the official ODPa complaint form shall be treated as an informal complaint

VI]. COMPLAINT FOLLOW-UP

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.

VII]. 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.

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. Complaints must include language advising complainants they should seek legal advice before completing the complaint if they either intend to pursue a civil action against the Berkeley Police Department or its officers or if they have a criminal case pending or likely to be filed which is related to the complaint.

INTRODUCTION

ON MAY 12, 2021, THE POLICE CITY COUNCIL PASSED ORDINANCE 2021-01, WHICH AMENDS THE POLICE COMMUNITY SAFETY ORDINANCE TO REQUIRE THE POLICE DEPARTMENT TO REPORT ANNUALLY TO THE CITY COUNCIL ON THE STATUS OF THE POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE. THE POLICE DEPARTMENT HAS COMPLETED THE 2021 ANNUAL REPORT AND IS SUBMITTING IT TO THE CITY COUNCIL FOR REVIEW AND APPROVAL.

Police Equipment and Community Safety Ordinance 2021 Annual Report



INTRODUCTION

On May 11, 2021 the Berkeley City Council passed Ordinance NO. 7,760-N.S., the Police Equipment and Community Safety Ordinance. Section 2.100.050 of the ordinance mandates an annual report for the deployment of specific equipment the Berkeley Police Department possesses. This annual report also fulfills the obligations set forth in Assembly Bill No.481. Below is a list of the reportable equipment under the city ordinance and Assembly Bill No.481:

- Patrol Rifle
- Less Lethal single 40MM launcher
- Less Lethal Milkor LTL 40 MM multi-launcher
- Less Lethal FN 303 Launcher
- FN Pava rounds
- Oleoresin capsicum (OC spray)
- Chlorobenzylidene Malononitrile and Oleoresin capsicum (tear gas)
- Remington 700 Precision Rifle
- ReconRobotics Recon Scout XT Robots
- Andros Remotec HD-1 Hazardous Duty Robot
- Light/sound distraction device
- Long Range Acoustic Device (LRAD)
- 36" batons
- Mobile Command Vehicle
- Barret Model 99 Precision Rifle

The annual report on the controlled equipment shall contain the following information per Ordinance NO. 7,760N.S.:

- (a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.
- (b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to equipment that is Deployed, not to transfers of location or placement of equipment inside Department vehicles.

- (c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days or instances in which Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.
- (d) A summary of any complaints or concerns received concerning Controlled Equipment.
- (e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

There have been no internal audits (other than those conducted to gather and confirm data for this report), identified violations of equipment use, or any complaints concerning the above listed equipment. For inventory numbers and description of each equipment refer to the Impact Statements.

Section 2.100.020 (D) defines deployment as “to utilize or employ Controlled Equipment for a deliberate purpose in the presence of members of the public during management or control of crowds, during any Special Response Team deployment or to affect some response from members of the public during any other operation or critical response. “Deployed” shall not mean an officer merely wearing a piece of Controlled Equipment on their belt or elsewhere on their person.” Deployment means the display of the equipment to affect some response from members of the public. The equipment does not have to be used; simply having it and in view of a person to specifically affect a response would be considered a deployment. Deployments are to be reported per the ordinance and the table on page 5 of this report reflects both deployments and uses of equipment.

On the date of passage of the Police Equipment and Community Safety Ordinance on May 11, 2021 the Police Department’s Blue Team system was already being utilized to capture the deployment of patrol rifles as well as all uses of force, including the use of less-lethal systems. However, although the use of the above listed equipment was thoroughly documented in police incident or crime reports, no system existed where the deployment of each defined equipment could be

extracted. In response to this, the Professional Standards Bureau and the Police Technology Unit collaborated to develop a new system that was capable of fulfilling the obligations set forth by the ordinance.

The development of the new system began immediately after the ordinance was adopted and the new Equipment Ordinance System was created. Every sworn member of the Berkeley Police Department was trained on this new Equipment Ordinance System, hereinafter referred to as EO System. The EO System was fully implemented in October 2021.

It should be noted that the data on equipment deployments in 2021 does not capture deployments for the entire year. The ordinance was passed in May of 2021. The development and implementation of the EO System and the training of all sworn personnel was completed in October 2021.

The Police Department responded to over 42,500 calls from the community in 2021 and 11,262 were calls which occurred following the development of the new EO System that captured equipment deployments mandated by the ordinance. Of the 11,262 calls received, 29 of them resulted in the deployment of either a patrol rifle or a less-lethal system capable of launching a rubber projectile or a projectile similar to that of a paintball. For details on these systems refer to the Impact Statements located on the Berkeley Police Department website.

The Blue Team system was fully implemented in March of 2021. The system documents all uses of force which includes patrol rifle deployments and uses of less-lethal systems. This system is maintained by the Internal Affairs Bureau. In 2021 there were five incidents where less-lethal systems were used and 14 incidents where a patrol rifle was deployed. These incidents were recorded prior to the EO System going live. Three of the five less-lethal system uses were also entries into the EO System because they occurred after the launch of the EO System.

The table on page 5 details each of the 47-equipment deployment/use incidents extracted from the Blue Team and EO systems as well as 2 deployments of the Hazardous Duty Robot by the Berkeley Police Bomb Squad. Each row within the table represents an incident where a specified equipment was deployed/used. The number of specified equipment deployed per incident is not represented. The

table includes the service of 14 search warrants; 6 of which were served by the Special Response Team in cases involving a violent suspect. Equipment that is not outlined in the table was not used in 2021.

It should be noted that all other equipment deployments that are not related to the service of a search warrant were incidents where officers responded to a call for service by community members. Incident #6 & #17 are the only exceptions. #6 is an incident where an officer witnessed a stabbing and had to take immediate action to save the victim and apprehend the suspect and #17 is an incident where a stolen car and suspect were tracked down by officers. The 5 incidents where less-lethal systems were actually utilized are marked with asterisks next to the incident number. The incidents are listed in chronological order.

#	Equipment	Summary of Deployment and Use	Beat
1*	40MM Launcher	Victim called and reported being victim of a robbery. Suspect located still armed and refused many orders to drop the weapon. Attempts to deescalate not effective. Less-lethal and lethal force used.	6
2	Patrol Rifle	The victims reported that they were robbed via gun. A search warrant was conducted at the suspect's residence in another Bay Area city. Arrest made and evidence seized.	X
3	Andros Remotec HD-1 Hazardous Duty Robot	Suspicious package left in front of Bank of America with Hong Kong postage. Robot used for initial approach to ensure package is safe.	6
4	Patrol Rifle	Victim called and reported someone brandished him with a gun during an argument. Suspect located, but no gun found. Victim later advised that he never saw a gun. Suspect released on scene.	14
5	Patrol Rifle	Victim reported that his brother brandished him with a gun. The suspect was located in a vehicle nearby. Victim requested suspect be arrested.	4
6*	40MM Launcher	Officer witnessed a stabbing. Victim stabbed in neck. Suspect ran from officers still armed with the knife. 40MM used to stop suspect. She stopped, but held onto knife. Attempts to deescalate failed. Still non-compliant and with knife in hand, a sergeant snuck up behind the suspect and grabbed her hand and knife. Suspect arrested.	6

7	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrant on a shooting suspect. Suspect arrested and evidence seized.	9
8	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrant assist to outside agency. Suspect known to carry and sell firearms. Suspect later located by outside agency.	12
9	Patrol Rifle	Caller reported that someone was armed with a gun inside a store. The caller provided details on the gun and the suspect. Suspect was located inside of the store and was identified as the same person by the caller. No gun was located. No arrest.	15
10	Patrol Rifle	Victim reported that her vehicle was stolen. Investigations lead to the service of a search warrant by investigators at the location the suspects were residing. Suspects located and arrested	8
11	Patrol Rifle	Victim reported that the suspect forcibly entered her RV armed with a handgun and attempted to rape her. Search warrant served for suspect in another Bay Area city. Suspect arrested	X
12	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrant conducted in another Bay Area city on a Berkeley shooting suspect. Suspect attempted to flee, but was stopped and arrested. A loaded-fully-automatic pistol was located.	X
13	Patrol Rifle	Multiple witnesses reported a drive-by shooting into a vehicle near a park. The victim later reported that the suspect fired multiple rounds at their vehicle for no apparent reason. A search warrant was conducted at the suspect's residence by investigators. Suspect located and three guns seized for evidence.	11
14	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrant assist to an outside agency on murder suspect. Suspect not located but evidence collected.	9

15	Andros Remotec HD-1 Hazardous Duty Robot	Employees at a business reported a disturbance. The employee pointed the suspect out to the officer. Officer contacted suspect and his friend in a stolen car. One of them had an improvised explosive device in his pocket. Both arrested. Bomb squad relocated the device to a safe location and utilized robot for "render safe procedure."	15
16	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrant on a shooting suspect. Suspect arrested and evidence located.	14
17	Patrol Rifle	Officers recognized a vehicle that was involved in a carjacking via gun and several other armed robberies in Berkeley. The car failed to stop for the police. The vehicle was eventually stopped after a lengthy pursuit. Patrol rifles deployed. Suspects arrested.	14
18	Patrol Rifle	Victim employee reported that someone brandished a firearm at him after an argument inside of a liquor store. The suspect was located down the street. Patrol rifle deployed. Suspect was detained. He was identified by the employee as the suspect. Surveillance video showed the suspect pointed the gun at the employee. Gun was later located and suspect arrested.	8
19	Patrol Rifle, Remington 700 Rifle, LRAD, Diversionary Device, FN303, 40mm launcher, Recon Scout XT	Special Response Team, search warrants on suspects residences who were involved in a daytime gun battle. Suspects arrested. Assault rifles located.	14
20	40MM Launcher	Community member reported a man having a "psychotic episode" and broke into an office. The man was naked and has prior history of smashing windows to use to harm himself. 40mm deployed. Subject safely detained. Property manager of office did not want to prosecute man. Mental Health professionals requested by PD and placed subject on psychiatric hold.	13
21	40MM Launcher	Burglary in progress, community member locked the suspect inside a workshop full of tools. Subject is a known to resist and fight the police. Subject was detained without incident. He was arrested and meth was located in his pockets. He later made suicidal statements and was placed on a psychiatric hold.	3

22*	FN303 Launcher	BART PD requested emergency assistance. Mental Health crisis, subject possession of knife refusing to drop. Verbal de-escalation attempts failed. Subject ran with knife still in hand. FN303 deployed and used, but had no effect. BART PD used taser which disarmed her. BARD PD placed subject on a psychiatric hold.	9
23	40MM Launcher	Officers responded to a residence after the caller reported a suspicious person prowling outside his house. As officers were at this house, they heard a female screaming from the house next door. A female came out of that house and screamed, "Help! Someone call the police!" She reported that a man broke into her house with no pants on. Officers entered the house. 40mm deployed. The subject was located and arrested.	11
24	Patrol Rifle, 40MM Launcher	Search warrant on sexual assault suspect who victimized a child. Suspect arrested and evidence seized.	1
25	Patrol Rifle, 40MM Launcher	Caller reported that a neighbor fired a gun while yelling threats to shoot. The subject cooperated with officers and exited his house and was detained. Further investigations showed no other neighbors heard gunshots. No firearms were located. No arrest made.	9
26	40MM Launcher, FN303 launcher	A caller reported a suspect pulling off a window to make entry inside. Officers arrived and the suspect locked himself inside of a room and did not comply with call out commands. Unknown if armed with a weapon. Less-lethal deployed but not used. Subject detained and arrested without incident.	3
27	40MM Launcher	Multiple community members called the police about a person who instructed her dog to bite the victim. Victim transported to hospital via ambulance from multiple bites/puncture wounds. Victim pointed suspect out to officers. Suspect refused to stop for the police and yelled at the officers causing the dog to lunge and try to bite officers. 40MM deployed. Mental health professionals were requested. Suspect placed on psychiatric hold by MH. Out of custody charges requested.	6
28	Patrol Rifle	Officers responded to reports of an armed robbery (gun) and located a vehicle fleeing the area that matched the description of a get-away car for other armed robberies in Berkeley. A high-risk stop was conducted where one of the 3 suspects fled. Patrol rifle was deployed during the block search. Two suspects were arrested. Stolen items recovered.	8

29	40MM Launcher, Patrol Rifle	<p>Caller reported multiple subjects inside a construction site after hours. Officers arrive and heard sawing items inside.</p> <p>Burglary subjects failed to comply with commands, barricaded, and hid during the search. Less-lethal was deployed but not used. Burglary tools located, two arrested. One suspect has extensive arrest history and a warrant for his arrest.</p>	14
30	40MM Launcher	<p>Responded for a medical call of a person badly cut (needed stitches) following a dispute. Officers had reasons to believe it was possibly an assault with a deadly weapon. Requested the 40mm on scene while contact was made with the involved party inside of residence where the assault may have occurred. Further investigation showed no domestic violence. No crime, no arrest made.</p>	4
31	FN303 launcher, 40MM Launcher	<p>Officers responded to victim's call for help after being assaulted by her husband. Officers arrived on scene and deployed a 40mm and FN303 due to the suspect's continued violent behavior. He was still breaking things in the house and yelling. Contact made with husband, husband arrested for domestic violence.</p>	1
32*	40MM Launcher	<p>Caller requested help with roommate who was "high on drugs" yelling and causing a disturbance. Officers arrived and located the front door unlocked, blood in the living room, broken window, and incoherent speech coming from a bedroom. Occupants including caller was evacuated for their safety while officers attempted to negotiate with subject to exit his room. Subject was naked, covered in blood and threatened to kill officers. Negotiations failed. Subject did not comply with commands and was ultimately hit with 2 rounds from the 40 mm launcher. Officers were able to detain the subject and provide him with medical attention. He was transported to the hospital by the fire department and placed on a psychiatric hold. Illegal drugs were located in subject's room. Out of custody charges requested.</p>	6
33	FN303 launcher	<p>Caller is social worker who requested a welfare check of her health client, a subject with a history of violence and history of fighting police. FN was deployed. Subject refused to speak to officers and grabbed several bricks and smashed them while screaming; there were children nearby that had to be escorted out of harm's way. Negotiations not effective.</p> <p>Subject tackled by own father. Subject detained, but continued to fight. Mental Health professions responded and placed a psychiatric hold on subject.</p>	11

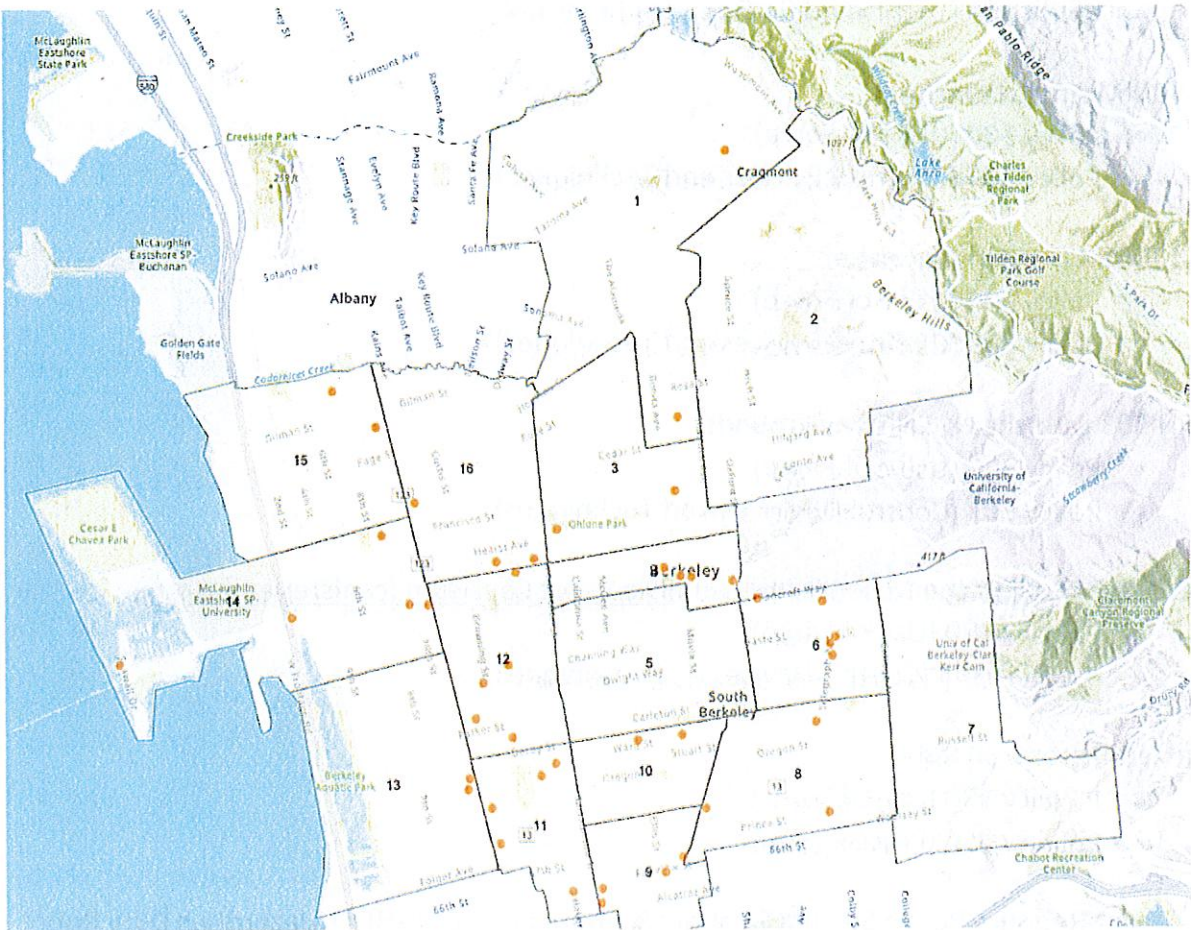
34	40MM Launcher	Caller reported ex-boyfriend had a knife and brandished it at him. While on phone with Dispatch caller yelled, "He's got a knife!" All parties located and detained. No knife located and further investigation shows no criminal threats were made. 40MM was deployed during detention. No arrest.	13
35	Patrol Rifle, FN303 launcher, 40MM Launcher	Highland Hospital reported a stabbing victim. Contact made with victim at hospital and she reported being stabbed at a specific location. Search warrant conducted at this location and less-lethal and patrol rifle deployed for service of search warrant. Suspect located and arrested for stabbing victim and puncturing victim's lung.	10
36	Patrol Rifle, FN303 launcher	Stolen vehicle was tracked by Officers. Stolen vehicle located abandoned by officer and suspect fled on foot into an apartment. Rifle and less-lethal deployment during service of search warrant. Suspect arrested	16
37	Patrol Rifle	Caller reported a suspect armed with a gun threatened to kill him. Officers located the suspect and patrol rifle was deployed. Suspect detained and identified by victim as the same person who threatened him. No gun located, but witnesses corroborated victim's account of events and how the suspect had a gun. Suspect had an alter state of mind. Psychiatric hold was placed on subject. Out of custody charges requested.	15
38	Patrol Rifle	Caller reported armed subject in a vehicle waving a firearm around. Car and subject description provided by caller. Car and driver that matched description were located by an officer. Patrol rifle deployed. Driver ordered out of car. Caller identified the driver as the same person he saw with a gun. A realistic black Beretta BB gun located in the car. Driver said he was shooting fish. Driver relinquished ownership of BB gun. No arrest made.	12
39*	Patrol Rifle, 40MM Launcher, FN303 launcher	Caller reported that a subject had hit his mother over the head with a saw-off shotgun. Victim sustained injuries to her head that required stiches. The suspect was reported as being agitated and was heard yelling on the phone by dispatch. Officers arrived on scene and could still hear the suspect yelling. Victim/mother was contacted outside of residence. Subject still had access to the shotgun. Many attempts to deescalate and negotiate for the suspects surrender failed. Subject was on the porch and refused to comply with orders. Patrol rifles and less-lethal deployed. 40mm and FN303 were utilized and caused suspect drop fall onto the ground. Subject immediately taken into custody. Medical attention provided to all parties	16
40	Patrol Rifle, 40MM Launcher	Search warrant service on rape suspect. One officer wore rifle slung on body. One officer wore 40MM slung on body. Suspect located and arrested	12

41	40MM Launcher	Victim called and reported that a neighbor and brandished a knife at him. Victim wanted to press charges. Officers arrived. Subject came out of his apartment and yelled at officers then went back in. 40mm deployed. Subject refused to come outside. Out of custody charges requested.	11
42	FN303 launcher	Caretakers called and reported a subject with a butcher knife chased caregivers who were attempting to bathe him. Caretakers ran out of the house to call the police. Officers responded with FN303. Subject's son was called to help speak to subject who suffers from dementia. The son agreed to stay to help care for subject and help caretakers. No prosecution requested by caretakers. No injuries sustained by caretakers.	10
43	Patrol Rifle, 40MM Launcher, FN303 launcher	Caller (ex-girlfriend) reported subject (ex-boyfriend) is suicidal and requested welfare check. Officers attempted a welfare check on a suicidal subject inside of his home. The subject told officers he was armed and told officers to leave. Subject hands were not visible to officers. Threat was deemed credible. Less-lethal systems and a Patrol rifle were deployed. Negotiator attempted to negotiate for the subject to exit his residence, but failed. Subject said officers are going to force a confrontation with him. Subject not a threat to others and refused officer's help. No crimes committed. Officers left the area.	11
44	Patrol Rifle, FN303 launcher	Officers responded to a call of a possible burglary. A patrol rifle and less-lethal were deployed to clear the building. Suspect located and arrested burglary.	4
45	40MM Launcher	Caller is security and reported a subject was verbally threatening staff and residents and assaulted security. Staff wanted him to leave. Subject is a known burglar and have fought officers in the past. Less-lethal deployed. Request subject to leave and he complied. No prosecution requested.	16
46	40MM Launcher	Caller (wife) reported subject (husband) had a knife and was threatening to kill himself. Caller was contacted outside of house while subject was still inside. 40MM deployed as officers contacted subject. Subject located safely and placed on a psychiatric hold.	12
47	40MM Launcher	Caller (mother) reported subject (son) having a mental health crisis. Caller reported the subject was armed with a knife and standing outside the house. 40mm deployed, subject safely located and placed on 5150 hold.	12

Below is a table that shows the total number of incidents a specified equipment was deployed in 2021. It should be noted that different types of equipment may be deployed in one incident and the same equipment may be deployed by multiple officers within a single incident.

EQUIPMENT	Number of Incidents
Patrol Rifle	27
40MM Single Launcher	27
40MM LTL Multi-Launcher	0
FN 303 Launcher	16
FN Pava Impact Projectile	0
Oleoresin Capsicum Spray	0
Chlorobenzylidene Malononitrile and Oleoresin capsicum	0
Remington 700 Rifle	6
ReconRobotics Recon Scout XT Robots	6
Andros Remotec HD-1 Hazardous Duty Robot	2
Light/Sound Diversionary Device	6
Long Range Acoustic Device	6
36" Batons	0
Mobile Command Vehicle	0
Barret Model 99	0

Below is a map showing where each of the above 44 equipment deployments occurred in Berkeley. 3 occurred in other Bay Area cities.



Appendix:

Applicable Lexipol Policies Respective to Each Equipment

Patrol Rifle

- Policy 300 (Use of Force)
- Policy 349 (Tactical Rifle Operator Program)

40MM single launcher

- Policy 300 (Use of Force)
- Policy 303 (Control Devices and Techniques)

40MM LTL multi-launcher

- Policy 300 (Use of Force)
- Policy 303 (Control Devices and Techniques)

FN 303 Launcher & FN Pava rounds

- Policy 300 (Use of Force)
- Policy 303 (Control Devices and Techniques)

Chlorobenzylidene Malononitrile and Oleoresin Capsicum (canister and spray)

- Policy 300 (Use of Force)
- Policy 303 (Control Devices and Techniques)

Remington 700 Rifle

- Policy 300 (Use of Force)
- Policy 354 (Precision Rifle)

ReconRobotics Recon Scout XT Robots & Andros Remotec HD-1 Hazardous Duty Robot

- Policy 708 (Robot Cameras)

Light/Sound Diversionary Device

- Policy 353 (Diversionary Device)

Long Range Acoustic Device

- Policy 707 (Long Range Acoustical Device)

36" batons

- Policy 300 (Use of Force)
- Policy 303 (Control Devices and Techniques)
- Policy 428 (First Amendment Assemblies)

Mobile Command Vehicle

- Policy 811 (Mobile Command Vehicle (MCV))

Barret Model 99

- Policy 300 (Use of Force)
- Policy 354 (Precision Rifle)

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. If the Department fails to do so, it must cease use of such equipment.

(2) To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment, and the Police Accountability Board shall consider this ranking in determining the order in which to perform its review.

(H) *City Council Approval Process*

(1) After the Police Accountability Board review requirements have been met, the Police Department shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Accountability Board recommendations, at least fifteen (15) days prior to a public meeting.

(2) If the City Council does not approve such item within four (4) regular City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment until such review and approval occurs. (Ord. 7760-NS § 1, 2021)

2.100.050 Reports on the Use of Controlled Equipment.

(A) *Annual Report on Controlled Equipment*

(1) The Police Department shall submit a report on Controlled Equipment to the Police Accountability Board within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The report shall be provided no later than March 15th of each year, unless the Police Accountability Board advises the Department that an alternate date is preferred. The Department shall also make each annual report publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to equipment that is Deployed, not to transfers of location or placement of equipment inside Department vehicles.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days or instances in which Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

(B) *Compliance or Revocation of Approval*

(1) Within 60 days of the Police Department submitting an annual report, the Police Accountability Board shall place the report as an agenda item for an open session of a regular meeting. The Police Accountability Board shall determine, based on the report, whether each piece of Controlled Equipment reported on has complied with the standards for approval set forth in Section 2.100.040.

(2) If the Police Accountability Board determines that any Controlled Equipment has not complied with the standards for approval set forth in Section 2.100.040, it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations shall be forwarded to City Council in accordance with the approval process in Section 2.100.040.

(3) After review by the Police Accountability Board, the Police Department shall submit the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment. (Ord. 7760-NS § 1, 2021)

2.100.060 Enforcement.

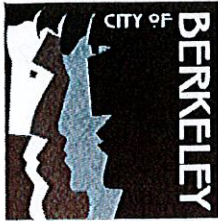
(A) *Remedies for Violations of this Ordinance*

This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in their official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees. (Ord. 7760-NS § 1, 2021)

2.100.070 Transparency.

(A) *Disclosure Requirements*

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.



Office of the City Manager

INFORMATION CALENDAR
September 20, 2022

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Jennifer Louis, Interim Chief of Police
Subject: Update on the Implementation of Fair and Impartial Policing Task Force Recommendations

INTRODUCTION

On February 23rd, 2021 during a City Council Special Meeting, Council referred the recommendations from the Mayor's Fair and Impartial Policing (FIP) Task Force to the Berkeley Police Department for implementation. Quarterly updates were requested by Council and the last quarterly update was provided on June 14, 2022.

CURRENT SITUATION AND ITS EFFECTS

This report provides a quarterly update on the implementation of the Task Force recommendations. Implementation of the FIP Task Force recommendations remains a priority of the Berkeley Police Department. The Professional Standards Division is responsible for managing the project of implementing the recommendations.

Implementation of the recommendations has necessitated the amendment of departmental policies and establishment of new protocols. As part of the process, members of BPD have met on several occasions with Council and Mayor representatives, Police Review Commission and now Police Accountability Board members, FIP Task Force members, and the Police Accountability Board Subcommittee on FIP recommendation implementation. During these meetings, the substance and progress on the implementation of the recommendations were discussed and BPD has been provided feedback and background on the various intentions with each respective recommendation.

The following outlines the specific Task Force recommendations and the respective progress:

Implement a New Evidence-Based Traffic Enforcement Model

Task Force Recommendations:

- **Focusing the basis for traffic stops on safety**

Implementation:

Officers have been provided data regarding primary collision factors and have been directed to enforce those violations wherever they are observed. In addition to focusing on enforcement of primary collision factor violations, sworn personnel are also expected to make investigative stops related to criminal intelligence and information brought forth by the community or our investigations. BPD has implemented and conducted departmental training on a three-prong approach that focuses on primary collision factors, community member reports of dangerous driving or safety issues and community caretaking. Community caretaking considers safety violations that aren't always noted as the primary collision factor but can be a significant contributing factor in serious collisions.

Status:

Recommendation implementation complete and evaluation and transparency efforts are ongoing. Training for all sworn personnel has concluded. The Traffic Division and the National Highway Traffic Safety Administration continuously collect and provide the Berkeley Police Department with data on primary collision factors and statistics on violations that impact public safety. This data provides officers with current information on what to educate the community on and what violations to focus enforcement towards. The department will continue to review and evaluate data on traffic offenses that affect community safety. This will drive the primary focus on ongoing enforcement and education efforts. Information related to this recommendation will also be shared in the near future with the public via BPD's Transparency Hub. Additionally, the focus of traffic enforcement will be formalized as a departmental directive via relevant policy updates.

Task Force Recommendation:

- **Use a clear, evidence-based definition for stops of criminal suspects**

Implementation:

The Police Department is establishing a precision based policing model that considers data and public safety. This model aims to reduce the number of stops that studies have shown had minimal impact on public safety.

Data driven-tools that enable close to real-time dashboard tracking of calls for service demands have been provided to the Community Services Bureau and Patrol Watch Commanders to help guide officers in their enforcement focus.

During this reporting period, the Department implemented a system that employs a feedback loop with information flowing both ways. The system provides the tracking of calls for service with the goal of call analysis for patrol deployment strategies and also allows officers in the field to communicate their observations to the Community Service Bureau. This feedback loop provides information back to the Community Services Bureau and creates an accountability measure so strategies can be evaluated.

Status:

Recommendation implementation complete and ongoing efforts include the development of data-driven tools to enhance a precision-based policing model and approach to enforcement stops. The goal is to have data-driven approaches to violence prevention programs and real time crime and call analysis for patrol deployment strategies. Ensuring that we implement approaches that identify and work to reduce racial disparities will be a cornerstone to our evidence-based approaches. The Berkeley Police Department will continue to only use race and ethnicity as determining factors in stops only when paired with clear, evidence-based criteria. The Transparency Hub streamlines the collection and dissemination of police data. This system allows for exploration of different evidence-based approaches.

Task Force Recommendation:

- **Reaffirming and clarifying that the Berkeley Police Department will only use race and ethnicity as determining factors in stops only when paired with clear, evidence-based criteria.**

Implementation:

Penal code 13519.4 is existing California law that prohibits racial profiling. BPD Policy 401 (Fair and Impartial Policing) also prohibits racial profiling. Section 401.2 explicitly states, "Officers shall not consider race, ethnicity, national origin, gender, age, religion, sexual orientation/identity or socio-economic status in establishing either reasonable suspicion or probable cause, or when carrying out other law enforcement activities..."

The above policies were reviewed in light of the task force recommendations and found to affirm and clarify police officer responsibilities in stops.

Status:

Recommendation implementation complete and ongoing efforts include: BPD will continue to conduct ongoing training in topics such as implicit bias, racial profiling, and procedural justice concepts. BPD will hold all members to Departmental Policies, especially those strictly and clearly prohibiting racial profiling. Further, stops will be information and evidence based. The BPD Data

Analyst Team will continue to develop tools to focus internal efforts using evidence and information and share data publicly about enforcement and related results.

Implement Procedural Justice Reforms

Task Force Recommendation:

- **Refer amendments to existing BPD policy and the creation of an Early Intervention System (EIS) related to traffic, bike and pedestrian stops.**

Implementation:

The current Early Warning System was originally issued in 2004 and revised in 2008. The system mandates the monitoring of officer's behavior and performance to include, but not limited to attendance, complaints, use of force incidents, and other factors. The Early Warning System serves as a program that identifies and address behavior or training issues before they become a disciplinary matter. Amendments have been made to the Department's Early Warning System policy (Policy 1041) to include the monitoring of stop data for individual officers.

Status:

Implementation complete via issuance of updated policy reflecting recommendations. Pursuant to the FIP recommendation and after meeting with the FIP task Force stakeholders, language was added to the current Early Warning System policy to include data around traffic, bicycle, and pedestrian stops as a category that supervisors will consider for early intervention if merited. Ongoing efforts include implementing new systems for the monitoring of officer's individual stop data by their respective supervisors. The Audits and Inspections Sergeant will also conduct separate and random quarterly audits of officer's stop data, complaints, uses of force incidents and other factors and report the findings to the Chief of Police. The first of these audits is slated to occur this Fall and the results will be provided to the Police Accountability Board.

Task Force Recommendation:

- **Adopt a policy to require written consent for all vehicle and residence searches and update the consent search form in alignment with best practice and community feedback.**

Implementation:

A revised written consent form has been created and amendments have been made to our existing search and seizure policy to require written consent for all consent searches. The Department implemented a redesigned Consent Search Form incorporating the collaborative feedback from multiple discussions with the Police Accountability Board.

Status:

Implementation completed via issuance of updated form reflecting recommendations.

Task Force Recommendation:

- **Limit warrantless searches of individuals on supervised release status such as Post Release Community Supervision (PRCS), probation, or parole.**

Implementation:

On February 10, 2021, updates were completed on Policy 311. Sections 311.5 and 311.6 were modified to reflect the above limitations to warrantless searches. The above policies were reviewed and modified in line with the task force recommendations and departmental goals to build trust and collaborate with the community to address crime and safety concerns.

Status:

Recommendation implemented. The update to Policy 311 limits the searches conducted on individuals on supervised release status. On April 18, 2022, the Public Safety Committee made a recommendation for a policy change to this recommendation. On July 26th, 2022 the City Council approved Policy 311 and on August 2nd, 2022 the policy was updated and released. The Department has trained on these updates and will continue to assess and review the impacts of these searches in consideration and support of the tenets of FIP.

Task Force Recommendation:

- **Address Profiling by Proxy (PAB Policy Development, Dispatcher Training).**

Implementation:

The Communications Center Operation Manual has been amended to address handling cases involving profiling by proxy. All dispatchers have reviewed the amended manual and are instructed to be cognizant and screen for profiling by proxy calls.

Status:

Recommendation implemented. Berkeley Police Department will continue to educate and train dispatchers on how to identify and address biased based reporting. Officers and supervisors are also expected to screen profiling by proxy calls. The Department as a whole will continue to seek out and train on anti-bias, implicit bias, and profiling by proxy topics to strengthen our ability to identify and address biased based reporting.

Task Force Recommendation:

- **Fire racist police officers identified through social media and other media screens.**

Implementation:

The following existing policies dictate procedures for investigating employees in this area; these policies adhere to due process and Government Section 3300:

Policy 1029 (Employee Speech, Expression and Social Networking) provides accountability to employee personal social media posts. Section 1029.4(b) states "Speech or expression that, while not made pursuant to an official duty, is significantly link to, or related to, the Berkeley Police Department and tends to compromise or damage the mission, function, or reputation of professionalism of the Berkeley police Department or its employee.

PR 232 (Controversial Discussion), PR 235 (Acts –Statements-By employees), PR 238 (Organizational Membership), and PR 250 (enforcement of Law, Impartiality) are also policies that provide accountability for any racist behaviors.

The above policies were reviewed in light of the task force recommendations and found to provide necessary authority to investigate allegations of racism. Departmental policy clearly identifies discrimination based upon a person's race as misconduct, and requires reporting and prompt investigating of any allegation of racism. Any employee who becomes aware of or observes any discrimination on the basis of a protected class is required to notify a supervisor by the end of their shift or within 24 hours if they are off duty.

Status:

Recommendation implemented, however the Berkeley Police Department is committed to continuing to explore additional lawful methods to identify and address potentially racist behaviors or actions by our members. If at any time the police department becomes aware of any issues related to these concerns, the matter would be thoroughly investigated and employees will be held accountable.

Task Force Recommendation:

- **Require regular analysis of BPD stop, search, and use of force data;**

Implementation:

The Open Data Portal (ODP) is a public facing website that gives the public access to police data and is accessible through the City's website. This allows for open and independent analysis and review to foster police accountability and transparency.

The Department will not only collect and report on stop, search and use of force data, but will regularly analyze the data via the Data Analyst Team. That analysis will at a minimum help direct policy, training, and resource allocation.

Status:

Implementation of recommendation complete and the Department will continue ongoing evaluation and data sharing. BPD is committed to transparency and is continuously exploring different ways to provide the public with access to more police data. The Data and Policy Analysis Team developed a Transparency Hub that will facilitate independent review and analysis of police data. This hub was launched after several community and internal stakeholder groups had an opportunity to view and collaborate on design. The Transparency Hub hosts BPD's Open Data Portal along with tools to help the public visualize and analyze the department's data, including interactive dashboards summarizing stop and search data, calls for service, and use of force data. The Transparency Hub updates in near-real time and gives the public access to datasets reaching further back in time than had been available. In the next phase of implementation there will be a 'Crime Mapper' page on the Transparency Hub that will include additional data on cases.

Task Force Recommendations:

- **Make resources on police-civilian encounters more publicly available such as through RAHEEM.org;**
- **For any individual detained, BPD officers shall provide a business card with information on the commendation and complaint process with the Police Accountability Board and the Berkeley Police Department, Internal Affairs Bureau.**

Implementation:

BPD Officers provide business cards to all detained individuals with information, a QR code and links to the BPD website which provide community members with information on making a commendation or complaint about an interaction with BPD. In addition to the information on how to make a complaint, a link is provided to the ACLU webpage containing information on police-civilian encounters.

Status:

Recommendation implemented. All business cards will continue to be printed with the above information. These resources ensure police accountability as well as provide ways the community can comment on the service BPD has provided.

Refer the following recommendations summarized below to the Reimagine Public Safety process

Task Force Recommendations:

- **Create a formalized feedback system to gauge community response to ongoing reforms and ensure this constructive input system is institutionalized with the Police Review Commission or its successor and includes a basic report card and quarterly neighborhood check-ins; Conduct a baseline community survey**

Implementation:

BPD actively supported and participated in the work of the Reimagine Public Safety Task Force by providing data and information, answering questions, providing hands-on experience and discussing opportunities, impacts and effects of recommendations. Several community surveys were conducted by consultants as part of the overall Reimagine Public Safety process.

Status:

Initial implementation complete. To support feedback systems, the Berkeley Police Department will be seeking ongoing community input and feedback around reform efforts via the Transparency Hub.

Acknowledge and reaffirm the following recommendations summarized below that are already underway

Task Force Recommendation:

- **BPD released stop, arrest, calls for service and use of force data from 2012 to present to the Working Group;**

Implementation:

The police department released the requested historical data in December of 2020. BPD stop, arrest, and calls for service data are regularly updated in the Open Data Portal and will be updated in near real time on the Transparency Hub.

Status:

Recommendation implemented.

Task Force Recommendation:

- **Fund and implement a specialized care unit for mental health crises;**

Implementation:

The City has contracted with a consulting firm, RDA Consulting, to conduct a feasibility study for a specialized care unit. The study has concluded; refer to below supporting materials for link to the final report from RDA Consulting.

Status:

Implementation in progress and being managed by the Health, Housing and Community Services (HHCS) Department. While the work to create a Specialized Care Unit continues, three community-based contracts managed by HHCS have been initiated to provide interim services.

Task Force Recommendation:

- **Conduct a Capacity Study of police calls and responses and use of officer time outside of case work.**

Implementation:

The City's Auditor's report was released which analyzed Computer Aided Dispatch data. Recommendations from this analysis were provided to the Police Department and findings were referred to the Reimagine Public Safety Task Force.

Status:

Implementation in progress. An assessment of overall staffing levels as well as patrol beat specific analysis has been referred to the budget process via the Council's direction on Reimagining Public Safety. Internally the Data Analysts Team has been directed to continue their work to refine the way and type of data that is collected, and analyze call response time to support the likely upcoming consultant work.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no identifiable environmental effects or opportunities associated with the subject of this report.

POSSIBLE FUTURE ACTION

The Police Department will continue to work toward the full implementation of the Task Force recommendations.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Staff time and additional training time to be determined at a later date.

CONTACT PERSON

Jennifer Louis, Interim Chief of Police, (510) 981-5700

Supporting Materials:

1: Berkeley Police Policy and Training Materials

<https://cityofberkeley.info/safety-health/police/policy-training-materials>

2: California Legislative Information

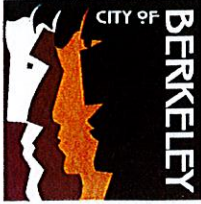
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=13519.4.&nodeTreePath=7.5.1.2&lawCode=PEN

3. Reimagine Task Force and National Institute for Criminal Justice Reform (NICJR) Survey

<https://berkeley-rps.org/wp-content/uploads/2021/10/Berkeley-Community-Engagement-Report-v7.pdf>

4. RDA Consulting Final Report on Specialize Care Unit

https://www.cityofberkeley.info/uploadedFiles/Clerk/Level 3 - Commissions/Berkeley-MH-SCU_Final-Recommendations_FINAL.pdf



Police Accountability Board Office of the Director of Police Accountability 2021-2022 Report

Overview

This report by ODPa staff covers the first 13 months of the operations of the Police Accountability Board (PAB; Board) and the Office of the Director of Police Accountability (ODPA), from July 1, 2021, through July 31, 2022, coinciding with the tenure of the Interim Director of Police Accountability. The two entities were established by an amendment to the City Charter passed by the voters in November 2020 as Measure II.

Staff of the ODPa, carried over from Police Review Commission (PRC) staff, began preparing for the transition from the former PRC to the new Board and ODPa soon after Measure II was approved. Formerly, the PRC was a division of the City Manager's Office with its head (PRC Officer) appointed by the City Manager. Katherine Lee, former head of the PRC, was appointed Interim Director of Police Accountability (Director) by the Mayor and City Council in late June 2021. Investigator Byron Norris and administrative support staff Maritza Martinez continued on in their respective roles.

Members of the Board were nominated and confirmed by the Mayor and City Council in late June 2021, and convened their first meeting on July 7, 2021. They are:

Kitty Calavita
Michael Chang
Regina Harris
Julie Leftwich
Deborah Levine
Nathan Mizell
John Moore III
Cheryl Owens
Ismail Ramsey

Board members Ramsey and Chang were elected Chair and Vice-Chair of the Board, respectively, to serve from July 2021 to January 2022; Board members Chang and Mizell were elected to those roles for full-year terms starting in January 2022

ODPA staff, now working for a newly independent agency within the City, revised its internal administrative procedures, and communicated and coordinated with other departments, including Human Resources, Finance, Information Technology, and the City Clerk's Office regarding its new role. Proper interpretation of the Charter amendment, particularly with respect to the modified process for hearing and deciding complaints of alleged police misconduct, required frequent reliance on the advice of the City Attorney's Office. Last but not least, coming to a mutual understanding of the enhanced authority of the Board and the ODPa, especially about the complaint process and access to records,

required extensive communication with the Police Department, including with the Chief of Police.

The Board began its work by developing rules for their operations, getting oriented regarding their new roles and relationships, receiving Charter-mandated training, and delving into their duties to review Police Department policies, practices, and procedures, and to hear and make findings on allegations of police officer misconduct. Development of Interim Regulations for handling complaints against individual police officers immediately raised issues regarding the Board's authority in relation to the City's obligation to meet-and-confer with the police union; and about the Director's relationship with, and responsibilities to, the Board and the Council.

ODPA staff and the BPD were able to maintain a highly collaborative relationship, and the Board and the BPD's relationship was largely productive. ODPa staff and representatives of the Berkeley Police Association sustained a mutually respectful relationship, despite some unresolved disagreements over interpretations of the Charter and the Interim Regulations. Unfortunately, the Board and the police union were not able to establish a positive working relationship, despite the Board's repeated invitations for feedback and participation; the union's filing of an unfair labor practice charge with the Public Employment Relations Board in March (awaiting action from PERB as of July 31, 2022) signaled the depth of the union's discontent. The relationship of the Board and the City Council was also put to the test on a couple occasions. The Interim Director and the Board enjoyed a solidly cooperative and productive relationship, even through occasional disagreements.

Overall, members of the Board dedicated themselves to their new roles very diligently and had a productive first year. Staff worked quite hard as well. The Interim Director held off on hiring a policy analyst so that the permanent Director, originally anticipated to be hired early in 2022, could do so. Full staffing in the coming fiscal year will help the Board complete more of its policy work and engage in outreach activities.

I. Policy Work

Review of a Police Department policy, practice, or procedure can be initiated by the Board, or be referred by the City Council. ODPa staff can suggest a policy review, and a member of the public can file a "policy complaint"; in either case the Board decides whether to take up the issue. Much of the Board's policy work is performed at the subcommittee level. The Chief of Police generally assigns a BPD representative to participate in subcommittee meetings.

Fair & Impartial Policing Implementation

Status: Ongoing

In February 2021, the City Council referred recommendations from the Mayor's Fair & Impartial Policing Task Force for the Police Department to implement. The Council also charged the Police Review Commission / Police Accountability Board with monitoring the Department's progress in carrying out the recommendations. The Board established the Fair & Impartial Policing Implementation Subcommittee for this purpose.

Among the items reviewed this past year were the revised consent search form, the Early Warning System policy, and the new traffic enforcement model.

Referral on Hate Crimes Reporting and Response

Status: Ongoing

In November 2020, the Council referred an extensive package of recommendations to the City Manager, the Police and other City Departments, and a number of commissions to bolster the City's response to hate crimes and their reporting.

One of the referrals to the Police Review Commission, and taken up by the Police Accountability Board, was to review Police Department Policy 319, Hate Crimes. A Board subcommittee submitted its recommendation for minor revisions of the policy to Board, which approved them in April 2022.

Remaining items will require further coordination with the Police Department, which is the lead for the package of referrals.

Controlled Equipment Impact Statements & Use Policies

Status: Two components completed; last one in progress

In 2022 the Police Department prepared Police Equipment Impact Statements, Use Policies, and an Annual Use Report for the first time, as mandated by the Police Equipment & Community Safety Ordinance (B.M.C. Ch. 2.100). Additionally, Assembly Bill 481 required local law enforcement agencies to develop a Military Equipment Use Policy this year, also for the first time, with many similar requirements to the local law. The local ordinance requires Board review of the BPD's Impact Statements and Use Policies before proceeding to City Council approval and, while the Board's assessment of the Military Equipment Policy is not required, the Board decided to review it as well.

The BPD documents that the Board evaluated cover numerous types of equipment employed by our police; the Impact Statements were voluminous and portions were very technical. Some provisions of the ordinance regarding the process for, and timing of, the BPD's submissions and Board review are not clear. These factors resulted in a hugely challenging undertaking for the Board, both in substance and magnitude.

A Board subcommittee was formed to review the Police Department submittals, and the Board, over several meetings, approved the Subcommittee's recommendations with minor modifications. The Board's evaluation of the Equipment Impact Statements, Use Policies, and the Military Equipment Policy were forwarded to the Council, which gave its final approvals in July. The Board is expected to review the Annual Use Report in September.

In the course of reviewing these materials, the Board determined that it wished to further study whether the use of OC (pepper spray) canisters should be treated similarly to tear gas canisters. This will be agendaized in the coming months.

Body-Worn Camera policy – update

Status: In progress

The Police Department's Body-Worn Camera policy (Policy 425) has not yet been updated to reflect the transition from the PRC to the Board and ODPa, and the new entities' broader access to BWC video. As a matter of practice, the BPD has cooperated with ODPa staff in providing unredacted BWC video requested in connection with complaint investigations. However, the policy should be revised to reflect actual practice, and any outstanding questions about access resolved, and memorialized in the policy.

Inquiry into sedative(?) injected involuntarily into detainee

Status: Not begun

At the request of staff, the Board opened a policy review into an officer's approval of an injection of a substance, possibly a sedative, into a detainee without his permission. Staff has not yet begun its work on this.

Mental Health Response

Status: Subcommittee formed

At the request of a member of the public (complainant), the Board opened a policy review into its response to persons in mental health crisis. This examination was prompted by an incident in which the BPD refused to enter the apartment of the complainant's brother, who was eventually found deceased. The Board formed a Mental Health Response Subcommittee, but it has not yet met due to other Board priorities.

Policy 351, Fixed Surveillance Cameras

Status: Subcommittee formed

In late January 2022, the City Manager proposed Policy 351, Public Safety Fixed Surveillance Cameras, in response to a request of the Council. As the Board had not been consulted regarding this policy, it voted to conduct a review and formed a subcommittee. Due to other priorities, review of the policy has not yet commenced.

Changes to Section 311.6 of Policy 311, warrantless searches of those on supervised release

Status: Completed

Over several months in 2019 – 2020, the PRC and the BPD worked together on Policy 311, Search and Seizure, with particular scrutiny of the sections on asking whether a detainee is on probation or parole, and warrantless searches of those on supervised release. The agreed-upon policy was implemented. In March 2022, the Council began considering changes to 311.6 regarding warrantless searches of persons on supervised release. The Board explained to the Council its opposition to the changes, citing the history of, and rationale for, the provisions of Policy 311 that were developed in conjunction with the BPD. The Council adopted a compromise solution.

Lexipol Policies – continue review of General Orders converted to Lexipol format

Status: Not begun

In 2019 the Police Department began converting its General Orders, Training & Information Bulletins and other policies into the Lexipol format. The PRC started reviewing the conversion of the policies to ensure that Berkeley-specific language was maintained, or to understand the BPD's rationale for changing the language. Since its inception, the Police Accountability Board has desired to continue this review, but has not had time to start this very detail-oriented and time-consuming task

Review BPD policies regarding release of inebriated individuals

Status: Not begun

Late one night in January 2022 a homeless, inebriated man was arrested, brought to the police station, and released due to medical reasons. The man was found early the next morning outside the police station, taken to Alta Bates Hospital, and died shortly thereafter. The Board voted to initiate an investigation into this incident. After the City Attorney's Office raised a question in July 2022 as to whether the Board could initiate complaints, the Board initiated a policy review into the BPD's policies regarding the release of inebriated individuals from police custody.

II. Operational tasks

Regulations for Handling Complaints Against Members of the Police Department

Status: In progress; near completion

These Regulations provide specificity to the procedures outlined in Measure II for handling complaints filed with the Office of the Director, alleging misconduct on the part of sworn police officers.

Interim Regulations. The Interim Director had draft interim regulations ready to submit to the Police Accountability Board as soon as they began meeting, so that staff could continue with its complaint investigations without delay. Following the Board's approval of a revised version, both the Board's and Director's proposals were submitted to the Council. The Council approved a further modified version.

Permanent Regulations. The Board formed a subcommittee to draft proposed permanent regulations. This subcommittee worked diligently the entire year, performing a thorough review of all aspects of the regulations, and seeking the input of the BPD and the City Attorney's Office. The subcommittee is endeavoring to make the process more fair and responsive to complainants; at the same time, any such changes must be consistent with officers' employee rights. A final draft is anticipated to be presented to the full Board within the next two months.

Standing Rules

Status: Completed

The Board's internal rules of procedures are embodied in its Standing Rules. At its first meeting, the Board adopted temporary rules, and then began drafting final rules. As required by the Charter amendment, these rules were presented to the Council for ratification. After the Council proposed modifications that the Board accepted, final Standing Rules were ratified by the Council in December 2021.

Director Search

Status: PAB role completed

The Board established a subcommittee to participate in the search for a permanent Director of Police Accountability. The Subcommittee worked with the recruiting firm to help identify the characteristics of an ideal director and provide input on the recruitment brochure. Subcommittee members served on one of the candidate interview panels.

Budget for FY 2023 & 2024

Status: Completed

The Interim Director presented an initial proposed budget for fiscal years 2023 and 2024 for the ODPa, along with an explanation of the City's budget process, to the Board's Budget Subcommittee. The Subcommittee modified the budget, the full Board approved it, and that budget was presented to the City Council.

III. Other Board responsibilities

Board member training

Status: Ongoing

The Charter requires that each member of the Police Accountability Board receive 40 hours of training in specified topics within 6 months of their appointment. Training was coordinated by the Interim Director and conducted by the Police Department, City Attorney's Office, outside counsel, and the Interim Director. Additionally, the training included ride-alongs with the BPD and self-study through an approved reading list. It

proved difficult to achieve the 40 hours within even the first year, however. The bulk of the training concerned BPD policy and operations, and the BPD devoted a fair amount of time and resources to preparing these training sessions.

Commendations of BPD employees

Status: Ongoing

Another Charter requirement is that the Board establish a regular means of recognizing sworn officers for instances of outstanding service to the public, the community at large, or the department. The Board established a commendation process, which is found in its Standing Rules.

The Board issues a commendation if it determines a BPD employee or group of employees performed an extraordinary service or performed in an extraordinary manner that meets one or more of these criteria: exceptional valor, bravery, or heroism; superior handling of a difficult situation; acts above and beyond typical duties; or extraordinary compassion, empathy, or kindness. The Board's selections are communicated to the involved officer or other BPD employee, the Chief of Police, and the City Council.

Extraordinary acts may come to the Board's attention via the BPD, the media, or other publicity. Additionally, twice yearly, the BPD sends to the ODPA letters and emails from members of the public and BPD supervisors thanking and praising BPD sworn officers and other employees for noteworthy police work in a wide variety of situations. The Board reviews those communications and commends the employees whom they believe merit special recognition.

The PAB conducted its review of commendations from BPD covering calendar year 2021, and will soon be reviewing those for the first half of 2022.

Outreach (also staff task)

Status: Not begun

"Outreach" encompasses a variety of activities, including publicizing the functions and services of the Board and the ODPA to the general public; tailoring communications about the Board and ODPA to specific segments of the community; and providing a space to hear the community's questions and concerns about the work of the Board and ODPA, and about policing in this city. These important activities, to be undertaken by both the Board and ODPA staff, require significant time and resources, and are thus best implemented following thoughtful planning. The Board has not had time to start this planning process, but has identified outreach as a priority in the coming year.

In addition to supporting the Board's outreach work, the Director has an obligation under the Charter to meet periodically with stakeholders, including employee organizations representing officers, organizations promoting civil rights and civil liberties, and representing communities of color.

Two modest outreach efforts took place this past year: the Interim Director and a Board member participated in National Night Out in August 2021, and the Board staffed a table at the Berkeley Juneteenth festival this past June.

Strategic Planning – consultant-led process

Status: Not begun

The ODPA's budget for FY 2023 includes funds to hire a consultant to lead the Board in a strategic planning process. This will greatly aid the Board in setting goals and priorities for its activities, and provide focus for its work.

IV. Individual Complaint Investigations

Status: Ongoing

See Attachment 1 for the status of all complaint activity from July 1, 2021, through July 31, 2022. This includes two complaints that were filed with the Police Review Commission and still not completed, and 26 complaints filed with the ODPA. Three of the 26 filed were policy complaints; the rest were “individual” complaints (alleging misconduct against a specific officer or officers).

Implementing the new complaint procedure established by the Charter amendment required considerable efforts by ODPA and BPD staff. While the steps in the investigatory stage, an ODPA staff function, are largely the same as that under the PRC, the Charter amendment significantly changed the subsequent procedures. The Director, instead of merely producing the investigative findings for the Board, must now make recommended findings on each allegation of misconduct, and recommend discipline for any sustained findings; in serious cases, the Director must also recommend the level of discipline. Further, the Charter amendment calls for a two-step process whereby the findings and recommendations are presented to the Board, which must then decide whether to hold a confidential personnel hearing. While the Director believed that she and the BPD had a common understanding of how this process would work, that turned out not to be so. A particular sticking point is whether the Board may sustain an allegation against an officer without the officer having the opportunity to appear at a hearing.

Another significant aspect of the new process under the Charter amendment is that the Board’s findings are sent to the Chief of Police; the Chief will also receive the findings of BPD’s Internal Affairs Bureau (who conducts a parallel, independent investigation into any complaint filed with the ODPA). The Chief must then issue a final decision if in agreement with the Director or PAB, or issue a tentative decision if not. If the Chief issues a tentative decision, the Director decides whether to ask the Chief to submit the matter to the City Manager for a final decision. The timelines for that process are fairly short (to ensure that discipline, if warranted is imposed within 240 days of filing). The Director received the full cooperation of Police Chief Jen Louis and City Manager Dee Williams-Ridley in establishing a protocol for this process; the same is true for creating a method for the Director to communicate her exercise of discretion in extending the time limits for various stages of the investigation and hearing processes, as provided by the Charter.

The Board also had to learn and then carry out their responsibilities under the new procedures. Each submittal of findings and recommendations from the Director was thorough and detailed, and required the Board to devote considerable time and thought to reading the submittal and then making decisions. Hearings demanded yet another level of commitment, and Board members comported themselves well in listening to arguments with an open mind and in deliberating with due care.

V. Other Staff responsibilities

Hiring staff

Status: In progress

Investigator. The recruitment for a permanent investigator opened in late July, with the intent of having a pool of candidates ready for the permanent Director of Police Accountability to interview. (Current Investigator Beneba Thomas was hired on a temporary basis in April 2022, in anticipation of the May 2022 retirement of Investigator Byron Norris.)

Policy Analyst. There are two vacant analyst positions; one was converted from the former Police Review Commission Officer position, and the second was added during the FY 2023 & 2024 budget process. The permanent DPA will need to complete the job description for these positions and then begin the recruitment process. One thought regarding the duties of the analysts is to dedicate one to supporting the Board's policy work, and the other to focusing on data analysis.

Application process for public members of policy subcommittees

Status: Not begun

The Charter amendment allows for members of the public to serve on the Board's policy subcommittees. The Board's Standing Rules establish a process for widespread public outreach regarding the opportunities to serve, and creation of a pool of applicants from which the Board Chairperson appoints public subcommittee members, with the consent of the Board. The permanent Director will need to start the application process by preparing an application form and then publicizing the opportunity to the public.

Website

Status: In progress

Staff created web pages for the PAB and the ODPa, and the Interim Director oversaw the conversion of those pages when the City launched its new website. These pages are fairly basic, and providing additional resources would be a great service to the public. Examples of such resources are: more in-depth information about filing a complaint and the complaint process; descriptions of the Board policy subcommittees and their purpose; links to the various efforts to reimagine public safety; and links to resources about police oversight generally.

###

ATTACHMENT 1

STATUS OF ALL DPA COMPLAINTS 2021 – 2022 As of 7/28/2022

Case#	Filed Date	F&R to PAB	PAB Hearing	F&R to Chief	Chief's Tentative or Final Decision	DPA Contest to CM	CM Final Decision	240-day Deadline	Status
2483	Mar 2, 2021							TBD	active criminal tolling until 8/2/22 dismissal hearing
2488	Jun 8							Sep 2	awaiting release of juvenile / BPD records
1	Jul 7	Dec 8	n/a	Jan 12	Jan 19	Jan 28	Feb 25	Mar 4	closed
2	Jul 7	Dec 8	n/a	Dec 17	Dec 27	Jan 6	Feb 7	Mar 4	closed
3	Jul 19	Jan 5	Jan 31	Feb 10	Feb 16	Feb 25	Mar 15	Mar 16	closed
4	Jul 23	Nov 10	n/a	Nov 19	Dec 17	Dec 27	Jan 21	Mar 20	closed
5	Jul 23	Jan 12 (2 officers)	Feb 4	Feb 15	Mar 10	n/a	n/a	Mar 20	closed
5	Jul 23	Jan 12 (1 officer)							Hearing Panel t/b scheduled when 3 rd officer returns
6	Jul 16	Feb 23	n/a	Mar 7	Feb 25	n/a	n/a	Mar 13	closed
7	Sep 13								PAB subcommittee
8	Sep 17								closed
9	Sep 21								closed
10	Oct 22								closed
11	Nov 2								closed
12	Nov 12								closed
13	Nov 17								rejected
14	Nov 23								rejected
15	Dec 3								rejected
16	Dec 21								closed
17	Jan 5							Sep 2	awaiting release of BPD records
18	Jan 27								rejected

STATUS OF ALL DPA COMPLAINTS 2021 – 2022
As of 7/28/2022

19	Jan 12								Due to 88 days of tolling 12/04/22	Submit to PAB on 9/14/22
20	4-13-22								12/09/22	Submit to PAB on 9/14/22
21	5-06-22								12/30/22	Active investigation
22	5-16-22									closed
23	5-17-22								1/12/23	Complainant has requested closure
24	6-03-22									Complainant has requested closure
25	7-07-22								03/03/23	Active investigation
26	7-18-22								03/15/23	Active investigation

NOTES: 1) White: open complaints; Green: closed complaints
2) Complaints 11 through 15 were submitted by the same individual.

2022 Annual Commission Attendance Report

Reporting Period: September 1, 2021 through August 31, 2022

Vacant seats: 0
(as of August 31, 2022)

Commission: Police Accountability Board

Commission Secretary: No Commission Secretary as of 8-31-2022

Scheduled Meeting Date	Cancelled? If Yes, Provide Reason	Commissioners Present	Public Present	Public Speakers	Meeting Length
9/8/2021		9 of 9	27	10	3.6 hrs
9/22/2021		9 of 9	18	7	1.8 hrs
9/29/2021		9 of 9	21	9	3.1 hrs
10/13/2021		8 of 9	17	3	3.7 hrs
10/27/2021		9 of 9	14	4	3.1 hrs
11/10/2021		8 of 9	16	7	3.3 hrs
11/17/2021		9 of 9	10	1	3.4 hrs
12/8/2021		8 of 9	16	9	3.9 hrs
12/7/2021		8 of 9	10	0	2.6 hrs
1/5/2022		8 of 9	6	1	2.6 hrs
1/12/2022		9 of 9	30	14	3.4 hrs
1/26/2022		9 of 9	30	5	2.8 hrs
2/9/2022		9 of 9	30	7	3.4 hrs
2/23/2022		8 of 9	0	0	1.2 hrs
2/23/2022		9 of 9	21	7	2.9 hrs
3/9/2022		9 of 9	20	7	4.1 hrs
3/23/2022		8 of 9	9	4	2.8 hrs
3/30/2022		8 of 9	10	5	2.5 hrs
4/13/2022		9 of 9	16	9	3.9 hrs
4/26/2022	*Yes				
4/27/2022		8 of 9	13	8	2.6 hrs
5/11/2022		9 of 9	17	5	4.1 hrs
5/25/2022		8 of 9	15	8	3.9 hrs
6/8/2022		9 of 9	17	8	4 hrs
6/22/2022		8 of 9	10	8	2.9 hrs
6/29/2022		8 of 9	1	1	3.9 hrs
7/13/2022		8 of 9	12	9	3.8 hrs
7/20/2022		8 of 9	12	4	3.5 hrs

Internal

2022 Annual Commission Attendance Report

Reporting Period: September 1, 2021 through August 31, 2022

7/27/2022		8 of 9	20	7	3.2 hrs
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*The 4-26-2022 regular meeting was cancelled, because there was something coming before Council that night that PAB wanted to comment or present on.

The dates that are highlighted were special meetings.