

Public



OFFICE OF THE DIRECTOR  
OF POLICE ACCOUNTABILITY

**POLICE ACCOUNTABILITY BOARD**  
REGULAR MEETING

**Wednesday, November 9, 2022**  
**7:00 P.M.**

**Reorganized Materials for Agenda  
Item 9.a.**

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**1. Draft of Permanent Regulations From the 06-29-2022 Regular Meeting**

**Pages:** 1 - 24

**Description:** *Included as reference, this is the latest draft of the Permanent Regulations as of the 06-29-2022 PAB regular meeting. This version includes the comments made during that session.*

**2. Comments and Observations on Behalf of Director Aguilar Regarding Permanent Regulations**

**Pages:** 25 - 28

**Description:** *Comments and observations from Director Aguilar on the drafted Police Accountability Board and Office of the Director of Police Accountability Regulations for Handling Investigations and Complaints.*

**3. List of Items Proposed And/or Still to Be Considered as to the Drafting of Permanent Regulations**

**Pages:** 29 - 30

**Description:** *A list of items that have been proposed and/or still in need of further consideration and/or discussion as to the permanent regulations. This list follows the numbering of the version of the permanent regulation draft included in item 4.*

**4. Draft of the Permanent Regulations From 06-29-2022 With Edits and Suggestions by Board Member Calavita Based off the Last PAB Discussion**

**Pages:** 31 - 54

**Description:** *The latest draft of the Permanent Regulations with edits made to reflect the comments agreed upon by the PAB at the 06-29-2022 regular meeting. This version also includes comments and suggestions by Board member Calavita for the PAB's suggestion. This is the draft that item 3 of this list references.*

**5. Explanation by Board Member Calavita as to Why Section IV, "Informal Complaints" Is an Important Topic of Discussion.**

**Pages:** 55 - 57

**Description:** *Comments and suggestions by Board member Calavita as to Section IV, "Informal Complaints" and reasons why this is an important topic for discussion.*

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### **Draft of Permanent Regulations From the 06-29-2022 Regular Meeting**

Description: *Included as a reference, this is the latest draft of the Permanent Regulations as of the 06-29-2022 PAB regular meeting. This version includes the comments last made during that session.*

**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).

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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

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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.

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- 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.



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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?

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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 Act<sup>1</sup> ("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.

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<sup>1</sup> Government Code Sec. 3300 et seq.

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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

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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 (ether 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 BWC 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.

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

**Commented [KL9]:** 3-22-22: Very complicated issue that should be discussed at full Board.

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.

**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."

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.

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

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 [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 agendize 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](mailto: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.

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.

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

**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.

## Section II.I.

- 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

## Section II.I.

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.

Section II.J.

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.

Section II.K.

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.

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.

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.

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,

**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.

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

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

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

## Section II.M.

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.

Section III.B.

- 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 ~~six~~ five Board members.

**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

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



Section IV.

~~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.

Section V.

- 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.

**VIII. 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.

Public

**Comments and Recommendations on Behalf of Director Aguilar Regarding Permanent Regulations**

Description: *Comments and observations from Director Aguilar on the drafted Police Accountability Board and Office of the Director of Police Accountability Regulations for Handling Investigations and Complaints.*



Office of the Director of Police Accountability (ODPA)

## MEMORANDUM

DATE: November 3, 2022  
TO: Police Accountability Board  
FROM: Hansel Aguilar, Director of Police Accountability  
RE: Comments and Observations on drafted Police Accountability Board and Office of the Director of Police Accountability Regulations for Handling Investigations and Complaints

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The purpose of this memorandum is to provide comments and observations on the current draft of the **Police Accountability Board and Office of the Director of Police Accountability Regulations for Handling Investigations and Complaints (hereafter ‘Regulations’)**.

### PART I

In the *Definitions* section, the Board may wish to consider the following:

- Review request or complaint to “Contest” (i.e. Charter sec. 19 (e): The Charter contemplates an IAB review request or BPD investigation contestation. Although the process is articulated in section III of the current draft, this word is missing from the definition section. Consider including defining this here.

In *Section (J)*, the Board may wish to consider the following:

- Decision to exercise subpoena power<sup>1</sup>: In the current draft of the Regulations, the subpoena process is not completely fleshed out. How does the Board

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<sup>1</sup> See Long Beach (Sec. VI.G.9) for language to consider: [supporting-information \(longbeach.gov\)](https://www.longbeach.gov/supporting-information/longbeach.gov)  
1947 Center Street, 5<sup>th</sup> Floor, Berkeley, CA 94704 TEL: 510-981-4950 TDD: 510-981-6903 FAX: 510-981-4955  
Website: <https://berkeleyca.gov/safety-health/police-accountability> | Email: [dpa@cityofberkeley.info](mailto:dpa@cityofberkeley.info)

decide a subpoena is necessary? May any individual member request it or will there be a majority vote? 2/3 vote?

- Good faith effort: In other models of oversight, there is also a good faith effort clause<sup>2</sup> included in the subpoena process (i.e. "if after making a good faith effort to obtain the voluntary attendance of witnesses and the production of books, papers, and other evidence necessary to perform its duties, the Board is unable to obtain such attendance or production..").

Possible language for good faith effort clause:

*If, after making good faith efforts, the Director and the Board are unable to obtain the voluntary production of books, papers, and documents, and the attendance of persons to take testimony, as needed to carry out their duties and functions, the Director and the Board may issue a subpoena.*

*Subpoenas from the ODPA will be issued directly from the ODPA. Subpoenas issued on behalf of the Board will be delegated to the ODPA.*

- Subpoena service<sup>3</sup>: The current draft does not specify how the ODPA or PAB will serve the subpoenas. Is this left to the discretion of the DPA?

## **PART II**

In Section (K)(4), the current draft conflates the Director's "investigative findings" with that of the Board's "hearing findings". Is this the intended spirit of this procedure as written in the Charter? There is a benefit of having two separate reports: (1) the Director's investigative findings and (2) the Board's hearing findings (which affirm, modify or reject). In a model where two reports are produced, both entities preserve their Charter-provided independence and autonomy and further codify the division of labor. Whereas a fusion of the findings may not provide a complete written record and interaction between these entities. Additionally, if these reports (or a version of them) are allowed to be made public, it may provide a more transparent transcript of the process. If two reports are produced, the Board should consider assigning a

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<sup>2</sup> See Virginia oversight law: [§ 9.1-601. Law-enforcement civilian oversight bodies \(virginia.gov\)](#) and South Carolina oversight bill: [2021-2022 Bill 3668 Text of Previous Version \(Jan. 14, 2021\) - South Carolina Legislature Online \(scstatehouse.gov\)](#)

<sup>3</sup> Some language to consider:

Long Beach: <https://www.longbeach.gov/citymanager/cpcc/supporting-information/#charter>

NYC CCRB: [Title38-A 20210526.pdf \(nyc.gov\)](#)

Chicago COPA: [Microsoft Word - COPA Draft Rules and Regulations - Public Comment \(chicagocopa.org\)](#)

Member or committee to draft the “hearing findings” report to further empower Board authorship.

### **PART III**

The Board may wish to consider articulating some factors the DPA should consider in utilizing their discretion under this power. Suggested language could include:

*In utilizing the discretion to accept the objection or dismiss it, the Director of Police Accountability may consider the following factors:*

- *Whether there is sufficient evidence in the case file to establish a prima facie case that the BPD (1) failed to proceed in a manner required by state and federal law, or (2) the Chief of Police’s decision is not supported by the evidence in the record*
- *Complexity of the investigation (i.e. number of allegations, number of officers involved, the seriousness of the allegations at hand, etc.)*
- *Public interest in the case at hand*
- *Timeliness assessment (i.e. whether the review of the investigation can be completed in the time frame contemplated by the Charter and in a manner that does not cause undue burden for the execution of the other duties of the PAB or the ODPA)*
- *Fiscal impact- based on the availability of funds in the operating budget at the time the contest is received*

Public

**List of Items Proposed And/or Still to Be Considered as to the Drafting of Permanent Regulations**

*Description: A list of items that have been proposed and/or still in need of further consideration and/or discussion as to the permanent regulations. This list follows the numbering of the version of the permanent regulation draft included in item 4.*

Items proposed and/or still to be considered on draft Regulations

- p. 1. Section I(A)(8). “Complainant”
- p. 2. Section I (A)(14) “Formal complaint”
- p. 2. Section I. (A) (16) “Informal complaint”
- p. 2. Section I (A)(17) “Investigator”
- p. 2. Section I (A)(18) “Investigation”
- p. 3. Section I (B)(3) “Closed hearings”
- p. 4. Section II (A) (1) “Complaint form”
- p. 4. Section II (A)(2) “Who may file”
- p. 6. Section II. (C)(2) “Notice of complaint”
- p. 6. Section II. (C)(5) “Production, subpoena...”
- p. 8. Section II. (D)(1)(a)(v) “Failure of the complainant to cooperate...”
- p. 10. Section II (F) “Hearing packet”
- p. 14. Section II. (I) (1 and 3) “Who may or must be present”; and “Party’s failure to appear”
- p. 18. Section II. (J) (3)(g) “If either party requests...”
- p. 19. Section II. K (4)(b) “If the hearing panel modifies...”
- p. 22. Section IV. “Informal complaints”



Public

**Draft of the Permanent Regulations From 06-29-2022 With Edits and Suggestions by Board Member Calavita Based off the Last PAB Discussion**

Description: *The latest draft of the Permanent Regulations with edits made to reflect the comments agreed upon by the PAB at the 06-29-2022 regular meeting. This version also includes comments and suggestions by Board member Calavita for the PAB's suggestion. This is the draft that item 3 of this list references.*

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

**Style Definition:** List Number 2: Indent: Left: 0.81", No bullets or numbering

**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~~ A member of the public who files a complaint with the Office of the Director of Police Accountability.

**Commented [kc1]:** I edited this to be consistent with the Charter Amendment.

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

Section I.B.

operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).

12. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying 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.

**Commented [kc2]:** Edited to be consistent with Charter Amendment

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.

**Commented [kc3]:** "Informal Complaint" was agreed to at a previous meeting, but only relevant if we agree to some version of Section IV

17. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODPA and to pursue fact-finding inquiries.

**Commented [kc4]:** I propose these changes in wording to #17 and 18 to make it clear that "investigations" include fact-finding inquiries not related to alleged misconduct.

18. Investigation: The fact-finding process engaged in by the ODPA staff in response to a complaint of alleged misconduct by a member of the public, or at the request of the PAB as a policy review or review of a particular incident or incidents.

**Commented [kc5R4]:** To be consistent with Charter

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 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. Complainants shall receive redacted versions of investigative records relating to their case. ~~However, a~~Any public records included in, or attached to, investigative reports shall remain public records.

Commented [kc6]: This was suggested by some members of the Board at our last meeting on the regs.

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.

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 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."

**Commented [kc7]:** Interim Director Lee had flagged this for discussion and question to CA> Not sure what the issue is.

2. Who may file. ~~Any member of the public may file a complaint. 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.~~

**Commented [kc8]:** See my comment above in "definition" of complainant.

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 ODPAA is notified that a complainant or subject officer is represented, then the

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ODPA shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives, as well.

**B. Mediation**

1. Election

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

2. Completion

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

**C. Complaint investigation**

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's discovery 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.

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- b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.N.

~~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.~~

**Commented [KL9]:** 6-29-2022 DPA to combine [former] sections 2 & 3.

~~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 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. Complaints received by the Director of Police Accountability shall be sent in hard copy or electronically to the Chief of Police and the Police Department of Internal Affairs, members of the Police Accountability Board, and each sworn employee of the BPD against whom the complaint is filed.~~

**Commented [kc10]:** I am not sure where this language about 30 days, rejection of closure," etc... comes from. The Charter is much simpler, saying "Complaints accepted by the Director...shall be sent..." (Section 18 g.

**Commented [kc11R10]:** I think we should use the language of the Charter in 18g

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, PAB Members, 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 order to carry out its investigatory and other functions and duties in connection with investigations~~, unless state or federal law forbids the production of those records and information.

**Commented [kc12]:** I propose this tweaking to be consistent with the Charter Amendment, making it clear that the ability to request records etc is not confined to formal investigations.

- a. The Director and/or the PAB may issue subpoenas to compel the attendance of persons and the production of books, papers, and

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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 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 Act<sup>1</sup> ("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 **formal** complaint may be administratively closed include but are not limited to the following:

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<sup>1</sup> Government Code Sec. 3300 et seq.



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- 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.
- 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.

**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.**

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 conditions of #5(a) below are met if the Board requests it by a majority vote.~~ This deadline may be extended as provided under Section II.M.

**Commented [kc13]:** We might want to revisit this, allowing the Board to continue with investigations and possibly a hearing relating to the complaint. Suppose a credible allegation of serious misconduct is made but the complainant decides against pursuing or appearing at a hearing.

**Commented [kc14R13]:** See section below on "Informal Complaints".

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Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.”

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.

Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421 [on January 1, 2019](#), the Director must include a recommendation regarding the level of discipline.

5. Board decision. Upon reviewing the investigative evidence and the Director’s findings and disciplinary recommendations, and viewing any relevant body-worn camera footage, the Board shall proceed as follows:

- 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 may be convened on all allegations in the complaint upon the election of the subject officer. The Board may request that ODP 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.

**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 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**

**Commented [kc15]:** It was confirmed that this is consistent with Charter and state law. I think the Board was in some agreement but I don't think there was a vote.

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by state law. Witness officers and civilian witnesses shall receive a copy of only their interview transcript.

### **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:

- 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.

**Recusal.** Board members who recuse themselves for personal interest must do so as soon as they become aware of it.

**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

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parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing.

#### 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 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](mailto: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

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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.

Replacement of Board members

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

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

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witnesses' names to the ODP 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. ODP staff shall inform the parties and the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODP 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 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 ODP staff. Hearing Panel members may ask these questions if they deem them appropriate and useful.

### I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director, Investigator, and Hearing Panel members may be present during the entirety of the hearing. The complainant and the subject officer must generally 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.

**Commented [kc16]:** But see #3 below, which provides for a subject officer not appearing and the hearing going forward. I would suggest likewise for the complainant.

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.

**Commented [kc17]:** Why not continue the hearing without the complainant? Their testimony and interview are provided. Is it really necessary for them to appear, especially if we are not going to permit questions from officer to complainant. It will perhaps bias the hearing against complainant if they do not appear but why not go forward?

Good cause for failure to appear at complaint hearing.

**Commented [kc18R17]:** See Informal Complaints section below.

- 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

**Commented [kc19R17]:** Why not make this equal for both sides? If either fails to appear it goes forward without their testimony.

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- 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.
  - 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).

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.

Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing.

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



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body worn camera footage in advance of the hearing. Relevant body-worn camera footage may also be shown during the hearing.

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 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,

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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.

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.

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).)

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- 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.

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.

#### 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.

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.

~~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~~

**Commented [LK20]:** 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.

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~~another. The Director shall prepare and submit the findings and recommendations.~~

~~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.~~

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 [LK21]: 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, harmonize their opinions in preparing final findings and recommendations.

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 Board's findings and recommendations

## Section II.M.

, 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.

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.

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.

Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.M.2.

#### **M. Time limits; extensions; tolling.**

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.

Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days.

Tolling. If a subject officer is unavailable for an interview with ODP 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.

Section II.M.

### **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**

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.

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.

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.

If the Director decides that the Board will conduct a review, ODPa staff shall ask the Board to conduct a review of the investigative record at a closed session meeting.

- a. At the meeting, only Board members and ODPa staff will be present. A Duty Command Officer may be present.
- b. The Board shall evaluate the investigative record to determine whether the complainant’s objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief’s decision is not supported by the evidence in the record.
- c. All action of the Board must be by majority vote.

The Board must, within 45 days of the date the Director accepts an objection:

Section III.B.

- a. Dismiss the complainant's objection;
- b. Issue a report agreeing with the Chief's determination; or
- c. Issue a report disagreeing with the Chief's determination if the Board finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.

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.

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.

The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies.

#### IV. INFORMAL COMPLAINTS

**A.** An informal complaint is a communication 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 try to 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 agendaize the informal complaint for closed session at the next PAB meeting with notice to named officer(s). At said meeting, the Board shall determine whether to process the complaint based, in part, on the following considerations:

Commented [kc22]: Formatting is messed up.

Section V.

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

**C.** If the Board decides to process the complaint, ODPa staff shall initiate a complaint investigation, including interviews, body-worn camera footage, etc., as provided in Section II C above. If necessary (following Section II E(5)(a) above), a complaint hearing shall be scheduled. At said hearing, a complainant who requests anonymity or confidentiality shall not be required to testify. Those complainants who choose not to testify may be represented by their Counsel. Complainants who do not testify shall be advised that this is their only opportunity to appear before the Board.

**D.E.** To the extent possible, the identity of an individual who submits an anonymous or confidential informal complaint shall remain anonymous/confidential, if requested.

**E.F.** A complaint filed anonymously on the official ODPa complaint form shall be treated as an informal complaint

#### **IV 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.

#### **V 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.



Public

**Explanation by Board Member Calavita as to Why Section IV, “Informal Complaints” Is an Important Topic of Discussion.**

Description: *Comments and suggestions by Board member Calavita as to Section IV, “Informal Complaints” and reasons why this is an important topic for discussion.*

## INFORMAL COMPLAINTS

The Regulations Subcommittee--together with Interim Director Lee, former Investigator Norris, and Lt. Montgomery--last spring spent a substantial amount of time discussing this section. The Subcommittee agreed that it is important for members of the public to have the ability to register a complaint informally. The version I have included is a slightly edited version of what was discussed at the subcommittee, and the full Board has not discussed this issue.

I feel strongly about including this ability of any member of the public to register an informal complaint for several reasons.

- 1) **There may be reasons why an individual might prefer not to file a formal complaint,** including but not limited to fears of retaliation, embarrassment, criminal liability etc. It is in the interest of fulfilling our police oversight function (“promot[ing] public trust through independent, objective, civilian oversight of the Berkeley Police Department”, Berkeley City Charter, Section 125 (1)), that all legitimate concerns of the public have an avenue for redress, if appropriate.

In its 2021 Report on best practices, The National Association of Civilian Oversight (NACOLE) wrote in its “Complaint Process” section as its Number 1 recommendation: “There should be several alternative modes for filing a complaint and the process should be as easy and accessible as possible.” Further, they wrote, the process should be “barrier-free”: “Unless required by state law, the complaint process should not require individuals to notarize a complaint, sign an affidavit, or issue statements under penalty of perjury...”

- 2) Relatedly, **this informal complaint process is the only way for a complaint to be filed anonymously (identity unknown to all, including staff) or confidentially (identity known only to ODP staff and Board Members).** While allowing for a complainant to make their identity known, the informal complaint process does not require it. Thus, the informal complaint and anonymous/confidential complaints are related but not synonymous.

In its 2021 report (and all previous reports), NACOLE recommended that oversight bodies allow for anonymous complaints: “Unless prohibited by law, the complaint process should allow for the anonymous filing of complaints. Complaint forms and brochures should make clear that complaints can be submitted anonymously and that providing any identifying information is optional. Accepting anonymous complaints is crucial to giving complainants who fear retaliation or retribution or wish to remain private the opportunity to report an incident of alleged misconduct to an oversight agency....Requiring identifying information for complaints to be processed may prevent the civilian oversight agency from learning about an incident of which it should be aware....Accepting anonymous complaints is a fairly common practice in civilian oversight. According to the Civilian Oversight Agency Database

(COAD) survey conducted by NACOLE, 72% of 58 responding oversight agencies reported their jurisdictions permitted anonymous complaints.”

I was able to speak by telephone or zoom teleconference to police oversight staff in San Diego, Oakland, San Francisco, and San Jose. They all allow for anonymous complaints. Furthermore, the concern of some former ODP staff that the office could be swamped if anonymous complaints were allowed is not born up by the experience of other jurisdictions. Those I communicated with in other California jurisdictions told me that they do not receive many anonymous complaints.

Furthermore, the BPD allows for complaints they receive from the public to be anonymous, as they do for whistleblowers or internal complaints from its employees.

The Regulations Subcommittee worked hard on the process for investigating and processing informal and/or anonymous complaints.