



To: Mayor Ted Wheeler,  
Commissioner of Police  
  
Chief Michael Marshman,  
Portland Police Bureau

From: Constantin Severe,  
Director, Independent Police Review

Re: Recent Officer-Involved Shootings

Date: June 9, 2017

The Multnomah County District Attorney's Office has notified the City that if Internal Affairs compels an officer interview during an administrative investigation, prior to the completion of the criminal investigation, the District Attorney's Office will not be able to pursue criminal charges against an officer due to transactional immunity. This has led the Police Bureau to delay the administrative interviews of several officers in the most recent officer-involved shootings. If this issue is not resolved soon, it will have a significant negative effect on the City's ability to conduct timely administrative investigations of officer-involved shootings and erode the public's confidence.

IPR has served as a monitor of all Police Bureau officer-involved shootings and in-custody deaths since 2011. After a critical incident occurs, an IPR supervisor reports to the scene, attends informational briefings, has the ability to participate in interviews of community members, witnesses, and involved officers; and must approve the completed investigation and findings. IPR is also tasked by City Code to hire outside experts to review closed Police Bureau officer-involved shooting and in-custody death investigations. Since 2003, there have been nine outside reviews of Police Bureau closed officer - involved shootings and in-custody death investigations.

### **Timely Investigations**

Allowing the administrative investigation to be delayed due to the needs of a criminal investigation represents a significant backward step for the City. Historically, the Police Bureau only conducted a criminal investigation in officer-involved shootings, with an administrative investigation being pursued on an "as needed basis."<sup>1</sup> Following the Police Assessment Resource Center (PARC) report in 2003 recommending concurrent criminal and administrative investigations, the Police Bureau moved to the two track investigative approach it used until recently. Much of the Police Bureau's framework for how it conducts administrative investigations came as the result of the PARC recommendations. That recommendation is also reflected in the City's settlement agreement with the Department of Justice.

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<sup>1</sup> Police Assessment Resource Center Report: Office Involved Shootings and In-custody deaths Report (2003).

During its review of several closed investigations, PARC found the administrative investigators were often overly reliant on the homicide investigation. As a result of the gap in time between the incident date and the start of the administrative investigation, the administrative investigations would not be completed for up to 22 months in some cases.

Paragraph 121 of the City's settlement agreement with the U.S. Department of Justice requires the City to complete an administrative investigation of officer misconduct within 180 days. Paragraph 122 of the settlement agreement requires the City to conduct an administrative investigation concurrently with the criminal investigation.

In the five years that IPR has served as a monitor of critical incidents, there have been continual improvements in both the quality and timeliness of the Police Bureau's administrative investigations of officer-involved shootings and in-custody deaths. In 2011, it took Internal Affairs a median of 308 days to complete an officer-involved shooting investigation; in 2016, it took 58 days. In recent years, completed investigations and recommended findings have been reviewed by the Police Review Board in under 155 days, a process that took 496 days in 2011.

On February 9, prior to the shift of position in the District Attorney's office, there were two officer-involved shootings on the same day. Despite the significant logistical hurdles, Internal Affairs was able to interview all involved members within 48 hours. There have been two incidents since the new DA policy was communicated to the City, on May 9 and May 28. To date, no involved member has been interviewed in either shooting by Internal Affairs for the administrative investigation.

In the May 28 shooting, there were two instances where officers fired their weapons at a person. The first shooting involved one officer and one person who was the subject of the use of force. There were no civilian or officer witnesses to that incident. There is currently a criminal investigation into the actions of the subject of the use of force, and the District Attorney has requested that the involved officers not be interviewed by Internal Affairs. Due to the inability to interview the involved members, there are critical pieces of what occurred that day that the City is still missing.

The City's acquiescence to the District Attorney's request to delay the administrative interviews is counter to good investigative practices and the recommendation it has received from the outside experts who review closed officer-involved shootings. In a recent report, the OIR Group said:

... the internal review process in an officer-involved shooting should not be held up by criminal charges pending against the person at whom officers shot.<sup>2</sup>

A return to delayed interviews of Police Bureau members in officer-involved shootings is untenable from the standpoint of community expectations and investigative best practice.

### **Transactional Immunity**

The District Attorney's Office cites the issue of transactional immunity for its position that administrative and criminal investigations cannot be pursued simultaneously. Transactional immunity from prosecution bars any subsequent action against the immunized person once they provide testimony that relates to a

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<sup>2</sup> OIR Group: Report to the City of Portland on Police Bureau Officer-Involved Shootings and In-Custody Deaths. (2016).

matter. The District Attorney believes if officers participate in administrative interviews, it is possible they could not be subject to criminal prosecution for doing so.

A review of Oregon case law shows that transactional immunity is not applicable to administrative investigations of Portland officers because such immunity has not been created by the legislature. The City's collective bargaining agreement with its police unions also does not grant immunity from criminal prosecution in exchange for compelled statements.

In Oregon, the seminal case discussing transactional immunity is *State v. Soriano*,<sup>3</sup> where the defendants refused to testify at a Klamath County grand jury unless they were given transactional immunity. The trial court offered the defendants a lesser form of immunity, which they refused and then were found in contempt. The *Soriano* court found that Article I, Section 12 of the Oregon Constitution, which protects against self-incrimination, requires transactional immunity to be given if there is a statutory constructed means of compelling witness testimony.

In *State v. Bueghli*,<sup>4</sup> an Oregon State Police senior trooper became the subject an administrative investigation after being accused of on-duty sexual misconduct with several women. The trooper was questioned as part of an administrative investigation and required to turn in a written report describing his contact with the women. A criminal investigation was later initiated and the Oregon State Police allowed the criminal investigator to review the defendant's personnel file and review the tort claim notices filed by the women. The criminal investigator was also given the contact information of two additional women who stated the defendant had improperly searched them.

The court found that the defendant was not entitled to transactional immunity because the Oregon legislature had not created a right to it when the legislature created the mechanism for public employees to collectively bargain. Additionally, the court found no contractual basis for the defendant's claim because the applicable collective bargaining agreement did not implicitly or explicitly grant transactional immunity. The court notes that if there is no legislative grant of transactional immunity, then the presumptive remedy for unconstitutionally compelled testimony is suppression of evidence.

When reviewing how the City conducts administrative investigations, there are more similarities with the facts in *Bueghli* than *Soriano*. Like in *Bueghli*, the collective bargaining statutes do not grant represented public employees transactional immunity. Similar to the facts in *Bueghli*, nothing in the City's current collective bargaining agreements with the Portland Police Association and Portland Police Commanding Officers Association promises transactional immunity to covered employees in exchange for their statements being compelled during an administrative investigation. The criminal and administrative investigations are separate, and no information gained during the administrative investigation is shared with personnel working on the criminal investigation.

Even if one were to accept the District Attorney's position that transactional immunity applies to administrative investigations of officers, that in itself does not require the termination of the criminal investigation before the City can conduct an administrative investigation of its employees' actions. The *Soriano* court noted the problems around immunized evidence could be avoided if there was a wall constructed around the "immunized evidence so that the prosecutors and [criminal] investigators will

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<sup>3</sup> 68 OR. App. 642 (1984).

<sup>4</sup> 126 OR. App. 290 (1994).

remain unaware of it.”<sup>5</sup> The solution that the *Soriano* courts suggests has been current Police Bureau policy until the District Attorney’s Office recently objected.

### **End of the 48-hour Rule**

On October 12, 2016, City Council approved a new labor agreement between the City and the Portland Police Association that removed a contract provision that required officers be given 48-hours notice prior to being compelled for an administrative interview. The 48-hour rule became a source of contention among many in the community. The OIR Group in its reports about officer-involved shootings made repeated recommendations that the City remove the 48-hour rule, because it prevented the City from being able to obtain contemporaneous statements from officers involved in shootings.

The new four-year Portland Police Association contract was incredibly divisive. Many in the community expressed concern that the City was acting prematurely as the previous contract had roughly nine months remaining before it expired and the process around the drafting of the agreement had not been transparent. Demonstrators attempted to engage in a sit-in at City Hall, which resulted in at least 50 demonstrators being physically expelled from the building by the Police Bureau.

The City sacrificed credibility and trust with the community in approving the new labor agreement. One of the main responses from City representatives to the criticism was the new contract allowed the City to conduct administrative interviews of officers involved in shootings in a more expedient fashion. If the City abides by the District Attorney’s desire to delay administrative interviews, it may be in a position of not having a 48-hour rule, but a de facto 40-day rule.<sup>6</sup>

### **Recommendations**

- 1. The Police Commissioner should ask for a written opinion from the City Attorney’s Office regarding the soundness of the District Attorney’s position.**

Discussions have been held between members of District Attorney’s Office, U.S. Department of Justice, and the City regarding transactional immunity and the City’s ability to conduct timely administrative investigations into officer-involved shootings and in-custody deaths. Those closed door conversations have led to a creeping acceptance of the District Attorney’s view on transactional immunity. Any acceptance by the City that transactional immunity forestalls its ability to conduct timely administrative investigations into officer-involved shootings and in-custody deaths will create a precedent that the City, if past experience is any guide, would have difficulty altering once the practice takes hold. The City so far has not sufficiently conducted its own due diligence into the legal theories that undergird the District Attorney’s position.

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<sup>5</sup> *Soriano* at 664.

<sup>6</sup> The grand jury reviewing the February 9, 2017, officer-involved shootings of Quanice Hayes and Don Perkins rendered a decision in 40 days and 35 days.

- 2. The City and District Attorney's Office should engage in discussions to determine whether the criminal and administrative investigations that the City conducts can be revised to ameliorate concerns about risks to prosecution.**

To IPR's knowledge there has been little to no discussion regarding intermediate steps that could be taken to resolve the District Attorney's concerns without undermining the City's ability to conduct concurrent administrative and criminal investigations.

- 3. The City should work with state and possibly regional partners to have an outside jurisdiction lead and conduct the criminal investigation of officer-involved shootings and in-custody deaths.**

Should the City fail in its attempt to reach a mutually agreeable resolution to this issue with the District Attorney's Office, the City should look to an outside jurisdiction to lead and conduct the criminal investigation of officer-involved shootings and in-custody deaths involving Portland Police Bureau officers and any possible prosecutions. Given the need for the lead agency to have both the expertise to conduct a homicide investigation and have public credibility, the Oregon Department of Justice with the assistance of the Oregon State Police would be one possibility. Oregon law currently allows the Attorney General at the Governor's request to take "full charge" of an investigation or prosecution.<sup>7</sup> Additional legislative authority may be required to allow the Oregon Attorney General to conduct such investigations on an ongoing basis and provide it with adequate funding. Since 2013, the Wisconsin Department of Justice has been tasked with conducting criminal investigations of "officer-involved deaths" in that state.

- 4. The City should be transparent in communicating with the public regarding the District Attorney's concerns regarding transactional immunity and how they will change investigative procedures if the City acquiesces to them.**

Irrespective of the choice the City makes, it is important that the City engage the community in a transparent manner regarding how it conducts officer-involved shooting investigations. The public has received little to no communication from the City regarding the changes to when officers are interviewed after a shooting. Given the turmoil over the latest union contract and the public's understanding that the 48-hour rule no longer applies, it is unfair to not apprise the public that even longer delays are occurring because of the District Attorney's position.

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<sup>7</sup> ORS 180.070, 180.080, and 180.090.