



Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
AGENDA**

**Wednesday, March 13, 2019
7:00 P.M.**

**South Berkeley Senior Center
2939 Ellis Street, Berkeley**

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

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

- 4. APPROVAL OF MINUTES**
Regular Meeting of February 27, 2019

- 5. CHAIR'S REPORT**

- 6. PRC OFFICER'S REPORT**
Status of complaints, other items.

- 7. CHIEF OF POLICE'S REPORT**
Crime, budget, staffing, training updates, and other items.

- 8. SUBCOMMITTEE REPORTS (discussion & action)**

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

- a. Prioritizing Safety for Sex Workers Subcommittee – met on March 13
- b. Lexipol Policies Subcommittee
- c. MOU Compendium Subcommittee – met on March 6 and March 13.

9. OLD BUSINESS (discussion & action)

[Numbers in brackets following each item show rank resulting from Commission's Dec. 2018 prioritization of items.]

- a. Update on SB 1421: responding to Public Records Act requests; status of litigation and other actions statewide.
From: PRC Officer
- b. Commissioner training [#6]
 - i) Follow-up to PRC's January 23, 2019 request to PRC Officer regarding nature of training to be presented.
 - ii) Clarification of Commission's response to City Council's October 2, 2018 referral regarding commissioner training requirements.

10. NEW BUSINESS (discussion & action)

- a. Lexipol Policies for review and approval. [#7]
From: Lexipol Subcommittee

Lexipol #	G.O. (if any)	Title
501	T-16	Motor Vehicle Collision Investigations
506	T-18	Disabled Vehicles
605		Brady Material Disclosure
702		Vehicle Maintenance
705		Personal Protective Equipment
902		Prison Rape Elimination
1000		Recruitment and Selection
1004		Anti-Retaliation
1005		Reporting of Employee Convictions
1012		Body Armor
1014	P-21	Commendations
1020	P-20	Outside Employment
1024		Police Aides
1025		Nepotism and Conflicting Relationships
1027		Temporary Modified-Duty Assignments
1033	P-17	Employee Absences (No change from G.O.)

(See separate packet.)

- b. Whether the "clear and convincing" standard is the appropriate standard to be used in PRC Boards of Inquiry.
From: Commissioner Ramsey
- c. Present revised confidentiality agreement to be signed by Commissioners and answer any questions.
From: PRC Officer

11. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

Attached

12. PUBLIC COMMENT

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

13. ADJOURNMENT

Communications Disclaimer

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



Communication Access Information (A.R.1.12)

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

SB 343 Disclaimer

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the Police Review Commission, located at 1947 Center Street, 1st floor, during regular business hours.

Contact the Police Review Commission at (510) 981-4950 or prc@cityofberkeley.info.

PRC REGULAR MEETING ATTACHMENTS

March 13, 2019

MINUTES

February 27, 2019 Regular Meeting *Draft* Minutes Page 7

AGENDA-RELATED

Item 8. – PRC Subcommittee List updated 2-28-19. Page 13

Item 9.a. – Senate Bill 1421. Page 15

Item 9.a. – Letter dated Feb. 22, 2019 from Deputy City Attorney Christopher Jensen to Emilie Raguso, from Berkeleyside, re Your Public Records Act Request Dated January 2, 2019 (As Amended on January 14, 2019). Page 23

Item 9.a. – Letter dated Mar. 1, 2019 from Deputy City Attorney Christopher Jensen to Sophia Brown-Heidenreich, City News Editor, re Your Public Records Act Request Dated February 19, 2019. Page 24

Item 9.b. – October 2, 2018 referral from City Council regarding the creation of training requirements for Police Review Commissioners. Page 25

Item 9.b.i. – Commissioner Orientation Outline. Page 27

Item 9.b.ii. – Consent Calendar Memo from former councilmember Kriss Worthington, dated Oct. 2, 2018: Refer the Police Review Commission to create training requirements for Police Review Commissioners. Page 31

Item 10.b. – Memo dated March 26, 2018 from the City Attorney to the City Manager: Legal analysis of City Council's November 14, 2017 Proposals related to the Police Review Commission. Page 33

Item 10.b. – Memo dated March 5, 2018 from former PRC Chairperson Sahana Matthews to the City Manager: Request to include topics during negotiations with the Berkeley Police Association. Page 43

Item 10.b. – Memo dated June 14, 2016 from former PRC Chair George Perezvelez to the Mayor and Councilmembers: Suggestions for Ballot Measure to Amend Current Enabling Ordinance Establishing the Police Review Commission (Response to Item #52 on the Council's June 14, 2016 agenda.) Page 45

Item 10.b. – Memorandum dated January 7, 2016 from former commissioner Alison Bernstein to the members of the Police Review Commission: Standard of Proof in BOI Hearings (Regulations Sec. VIII.C.) Page 47

Item 10.c. – Revised Confidentiality Agreement – clean. Page 53

Item 10.c. – Redlined Confidentiality Agreement. Page 55

COMMUNICATION(S)

Letter to the City Attorney dated 3-4-19 from the PRC Chair re Inquiry from PRC Regarding Documents and other Records Held by BPD that the PRC is Entitled to Obtain. Page 57

Guiding Principles, Adopted by the Police Review Commission on February 27, 2019. Page 59

Email dated 3-1-19 from Christine Schwartz re Video: Alameda County Board of Supervisors February 26, 2019 hearing regarding Ad Hoc Recommendations re UASI. Page 61

Article from the DailyCal dated Mar. 5, 2019 re: Documents reveal judge declared Police Review Commission's finding in death of Kayla Moore 'unfounded,' siding with Berkeley police. Page 63



DRAFT

**POLICE REVIEW COMMISSION
REGULAR MEETING
MINUTES
(draft)**

Wednesday, February 27, 2019
7:00 P.M.

South Berkeley Senior Center
2939 Ellis Street, Berkeley

1. CALL TO ORDER & ROLL CALL BY CHAIR PEREZVELEZ AT 7:10 P.M.

- Present: Commissioner George Perezvelez (Chair)
Commissioner Gwen Allamby (Vice-Chair)
Commissioner Sahana Matthews
Commissioner Elisa Mikiten
Commissioner Ismail Ramsey
Commissioner Terry Roberts
Commissioner Mary Kay Lacey (*temporary*)
Commissioner George Lippman Lacey (*temporary*)
- Absent: Commissioners Kitty Calavita, Andrea Prichett, Ari Yampolsky
- PRC Staff: Katherine J. Lee, PRC Officer
- BPD Staff: Chief Andy Greenwood (left 8:15 p.m.), Sgt. Cesar Melero

2. APPROVAL OF AGENDA

The agenda was approved by general consent.

3. PUBLIC COMMENT

There was 1 speaker.

4. APPROVAL OF MINUTES

Motion to approve Regular Meeting Minutes of February 13, 2019

Moved/Seconded (Mikiten/Allamby) **Motion Carried**

Ayes: Allamby, Matthews, Mikiten, Perezvelez, Ramsey, Lacey

Noes: None Abstain: Lippman, Roberts Absent: Calavita, Prichett,
Yampolsky

5. CHAIR'S REPORT

No report.

6. PRC OFFICER'S REPORT

-- 2 Boards of Inquiry coming up. Thank you to Commissioners who agreed to serve.

-- Chief will present Annual Crime Report to Council March 19; would Commission like a presentation as well? (Yes.)

-- Attention drawn to materials handed out: 1) Several documents related to request to City Attorney for information from BPD; 2) Updated Standing Rules; 3) Research on other agencies BWC policies on cessation or recording.

7. CHIEF OF POLICE'S REPORT

Chief Greenwood reported:

-- Currently at 165 sworn. Ofc. Marin and Lt. Hawk retiring. Promotions: Sgt. Ryan Andersen was provisional, now permanent; Ofc. Joe Ledoux to Sgt.; Sgt. Katie Smith to Lt.

-- SB 1421: continuing with work to respond to these requests.

Chief Greenwood answered questions from Commissioners.

8. SUBCOMMITTEE REPORTS (discussion & action)

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

- a. Prioritizing Safety for Sex Workers Subcommittee – scheduling next meeting.
- b. Lexipol Policies Subcommittee – need to schedule next meeting.
- c. MOU Compendium Subcommittee – Chair Perezvelez appointed Commissioners Mikiten, Allamby, and himself to this Subcommittee.

9. OLD BUSINESS (discussion & action)

- a. Review all recommendations made regarding Lexipol Policy 425, Body-Worn Cameras.

Motion to send to the Chief all recommendations on the Body-Worn Camera Policy compiled in the PRC Officer's memorandum, except that in Section 425.13, in the phrase "recording devices other than the body-worn camera," the words "other than" be replaced by "in lieu of."

Moved/Seconded (Mikiten/Lippman) Motion Carried

Ayes: Matthews, Mikiten, Perezvelez, Ramsey, Roberts, Lacey, and Lippman.

Noes: None Abstain: Allamby Absent: Galavita, Prichett, Yampolsky

- b. Consider whether to adopt Guiding Principles.
Motion to adopt the version of the Guiding Principles shown on p. 27 of the packet.

Moved/Seconded (Mikiten/Matthews)

Friendly amendment: In the last bullet point, replace "Support" with "Collaborate with."

Moved by Perezvelez; Accepted by Mikiten and Matthews

Motion, as amended, carried

Ayes: Allamby, Matthews, Mikiten, Perezvelez, Roberts, Lacey, and Lippman.

Noes: None Abstain: Ramsey Absent: Calavita, Prichett, Yampolsky

- c. Review PRC Officer's draft letter from Commission to the City Attorney asking what documents the PRC is entitled to obtain from the BPD

Motion revise the letter by deleting the entire second sentence and the beginning of the third sentence up to the word "denial," and change "have" to "has" in the third sentence.

Moved/Seconded (Perezvelez/Ramsey) **Motion Carried**

Ayes: Allamby, Matthews, Mikiten, Perezvelez, Ramsey, Roberts, Lacey, and Lippman.

Noes: None Abstain: None Absent: Calavita, Prichett, Yampolsky

10. NEW BUSINESS (discussion & action)

- a. Lexipol Policies for review and approval.

Motion to move acceptance of the policies listed below except 303, 319, 208, and 429.

Moved/Seconded (Mikiten/Allamby) **Motion Carried**

Ayes: Allamby, Matthews, Mikiten, Perezvelez, Ramsey, and Lacey.

Noes: None Abstain: Lippman, Roberts Absent: Calavita, Prichett, Yampolsky

Lexipol #	G.O. (if any)	Title
207	C-03	License to Carry a Firearm
[303	F-02	Control Devices and Techniques]
308	Council Res.No. 51,408-N.S.	Canines
[319	H-04	Hate Crimes]
326	R-33	Reserve Officers
328	D-21, M-6	Registered Offender Information
330	E-09, O-1	Death Investigation
331		Identity Theft

332	T-19	Communications with Persons with Disabilities
335		Limited English Proficiency Services
339		Community Relations
800	C-04	Crime Analysis
340		Child and Dependent Adult Safety
400		Patrol Function
402		Briefing Training
405	T&IB 128	Ride Along Program
406	T-16 (sec. 35 onward)	Hazardous Material Response
423		Watch Commanders
431		Civil Disputes

No change from General Order

Lexipol #	G.O.	Title
[208]	R-18	BPD Forms]
338	C-45	Chaplains
346	H-01	Honor Guard
348	J-18	Youth Services Detail
350	P-16	Public Appearances
[429]	C-64	First Amendment Assemblies]
430	C-01	Intelligence Procedures for First Amendment Assemblies
436	N-18	Situational Awareness Group

- b. Empower the Chair to work with the PRC Officer to write a letter to the Mayor and City Council to inquire how the PRC can facilitate or participate in placing a Charter amendment on the ballot in 2020.

Motion to empower the Chair to work with the PRC Officer to write a letter to the Mayor and City Council to inquire about the status of the meet-and-confer on the Charter amendment in regards to the 2020 ballot, and expressing that the PRC would like to be engaged in this process.

Moved/Seconded (Matthews/Lippman) Motion Carried

Ayes: Allamby, Matthews, Perezvelez, Ramsey, Roberts, Lacey, and Lippman.
Noes: Mikiten **Abstain:** None **Absent:** Calavita, Prichett, Yampolsky

- c. Update on SB 1421: responding to Public Records Act requests; status of litigation and other actions statewide.
(Item postponed to the next meeting.)

11. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

Attached

12. PUBLIC COMMENT

There was 1 speaker.

13. ADJOURNMENT

By general consent, the meeting was adjourned at 10:05 p.m.

**POLICE REVIEW COMMISSION
SUBCOMMITTEES LIST
Updated 2-28-19**

Subcommittee	Commissioners	Chair	BPD Reps / Others
Lexipol Policies Formed 5-23-18	Perezvelez Ramsey Yampolsky	Perezvelez	Sgt. Samantha Speelman Capt. Rico Rolleri
Prioritizing Safety for Sex Workers Formed 9-12-18	Matthews Ramsey Calavita Julie Leftwich (public)	Ramsey	Lt. Dan Montgomery
MOU Compendium Formed 2-13-19	Allamby Mikiten Perezvelez		

2018 Cal. Legis. Serv. Ch. 988 (S.B. 1421) (WEST)

CALIFORNIA 2018 LEGISLATIVE SERVICE

2018 Portion of 2017-2018 Regular Session

Additions are indicated by **Text**; deletions by

Vetoed are indicated by ~~Text~~;

stricken material by ~~Text~~.

CHAPTER 988

S.B. No. 1421

RECORDS AND RECORDATION—LAW ENFORCEMENT OFFICERS

AN ACT to amend Sections 832.7 and 832.8 of the Penal Code, relating to peace officer records.

[Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1421, Skinner. Peace officers: release of records.

The California Public Records Act requires a state or local agency, as defined, to make public records available for inspection, subject to certain exceptions. Existing law requires any peace officer or custodial officer personnel records, as defined, and any records maintained by any state or local agency relating to complaints against peace officers and custodial officers, or any information obtained from these records, to be confidential and prohibits the disclosure of those records in any criminal or civil proceeding, except by discovery. Existing law describes exceptions to this requirement for investigations or proceedings concerning the conduct of peace officers or custodial officers, and for an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

This bill would require, notwithstanding any other law, certain peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers to be made available for public inspection pursuant to the California Public Records Act. The bill would define the scope of disclosable records. The bill would require records disclosed pursuant to this provision to be redacted only to remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace officers and custodial officers, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by

peace officers and custodial officers, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others. Additionally the bill would authorize redaction where, on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure. The bill would allow the delay of disclosure, as specified, for records relating to an open investigation or court proceeding, subject to certain limitations.

The California Constitution requires local agencies, for the purpose of ensuring public access to the meetings of public bodies and the writings of public officials and agencies, to comply with a statutory enactment that amends or enacts laws relating to public records or open meetings and contains findings demonstrating that the enactment furthers the constitutional requirements relating to this purpose.

This bill would make legislative findings to that effect.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority—the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

(b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

SEC. 2. Section 832.7 of the Penal Code is amended to read:

<< CA PENAL § 832.7 >>

832.7.(a) *** Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections

1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

(b) (1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

(A) A record relating to the report, investigation, or findings of any of the following:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(B) (i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

(ii) As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

(iii) As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for

review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A)(i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would

impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

(c) Notwithstanding subdivisions (a) and (b), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

(d) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

(e) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

(f) (1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before

an arbitrator, court, or judge of this state or the United States.

*******(g) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

(h) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59.

SEC. 3. Section 832.8 of the Penal Code is amended to read:

<< CA PENAL § 832.8 >>

832.8. As used in Section 832.7, the following words or phrases have the following meanings:

*******(a) "Personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

(1) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

(2) Medical history.

(3) Election of employee benefits.

(4) Employee advancement, appraisal, or discipline.

(5) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

(6) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

(b) "Sustained" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304

and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.

(c) “Unfounded” means that an investigation clearly establishes that the allegation is not true.

SEC. 4. The Legislature finds and declares that Section 2 of this act, which amends Section 832.7 of the Penal Code, furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies. Pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:

The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district under this act would result from a legislative mandate that is within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution.

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Office of the City Attorney

February 22, 2019

Via E-mail at emilie@berkeleyside.com

Emilie Raguso
Berkeleyside
2120 University Avenue
Berkeley, CA 94704

RE: Your Public Records Act Request Dated January 2, 2019 (As Amended on January 14, 2019)

Dear Ms. Raguso:

The City of Berkeley has reviewed your Public Records Act request and determined that certain records related to the death of Kayla Moore on or about February 12, 2019 are responsive to your request and disclosable under Penal Code section 832.7(b). We have determined that these records are disclosable under section 832.7(b)(1)(A)(ii), notwithstanding the fact that the U.S. District Court for the Northern District of California has determined as a matter of law that the officers' use of force in this incident was reasonable and lawful.

Copies of responsive documents maintained in the files of the City's Police Review Commission can be downloaded at the following link: <https://www.dropbox.com/s/5uem4wyu7291fkv/2019-02-22%20PRA%20Response.pdf?dl=0>. Pursuant to Penal Code section 832.7(b)(5), certain records have been redacted to remove personal data or information, to preserve the confidentiality of complainants and witnesses, and/or to protect confidential medical information.

The City's review of records related to Ms. Moore's death as well as other potentially responsive records is ongoing, and the City anticipates producing additional records in response to your request. We will provide an update on the status of our review in approximately two weeks.

Please do not hesitate to contact me at (510) 981-6997 if you have any questions about the City's response to your request.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Jensen".

Christopher D. Jensen
Deputy City Attorney

cc: Captain Jennifer Louis, Berkeley Police Department
Michael Risher, Esq.

2180 Milvia Street, Berkeley, CA 94704 Tel: 510.981.6998 TDD: 510.981.6903 Fax: 510.981.6960
E-mail: attorney@cityofberkeley.info



Office of the City Attorney

March 1, 2019

Via E-mail at sbrownheidenreich@dailycal.org

Sophia Brown-Heidenreich
City News Editor
The Daily Californian
2483 Hearst Avenue
Berkeley, CA 94709

RE: Your Public Records Act Request Dated February 19, 2019

Dear Ms. Brown-Heidenreich:

I write in response to your February 19, 2019 Public Records Act request seeking "all documents requested and received by Berkeleyside (requested January 2, 2019) and the American Civil Liberties Union of Northern California ["ACLU"] (requested January 1, 2019) in their California Public Records Act requests, regarding records made accessible under Senate Bill 1421."

On February 22, 2019, the City produced records maintained in the files of the City's Police Review Commission related to the death of Kayla Moore on or about February 12, 2013 in response to the Berkeleyside and ACLU Public Records Act requests. Those documents can be downloaded at the following link: <https://www.dropbox.com/s/5uem4wvyu7291fkv/2019-02-22%20PRA%20Response.pdf?dl=0>. Pursuant to Penal Code section 832.7(b)(5), certain records have been redacted to remove personal data or information, to preserve the confidentiality of complainants and witnesses, and/or to protect confidential medical information. The City's review of records related to Ms. Moore's death as well as other potentially responsive records is ongoing, and the City anticipates producing additional records in response to the Berkeleyside and ACLU requests.

Please do not hesitate to contact me at (510) 981-6997 if you have any questions about the City's response to your request.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Jensen".

Christopher D. Jensen
Deputy City Attorney

cc: Captain Jennifer Louis, Berkeley Police Department

9. OLD BUSINESS (discussion & action)

...

- c. October 2, 2018 referral from City Council regarding the creation of training requirements for Police Review Commissioners.
(Heard following Item #10.d.)

Motion to have PRC staff prepare a memo that describes the commissioner orientation and do a one-hour review of that presentation each year; to have BPA do one orientation for commissioners per year; to have each commissioner do a ride-along; to include these requirements in the Commissioner's Manual; and to undergo additional training at Chair's discretion.

Moved/Seconded (Mikiten/Perezvelez) Motion Carried

Ayes: Allamby, Matthews, Mikiten, Perezvelez, Roberts, and Yampolsky.

Noes: None

Abstain: Prichett

Absent: Calavita, Ramsey



Police Review Commission (PRC)

COMMISSIONER ORIENTATION OUTLINE

1. Overview
 - a. Enabling Ordinance [* Ord. No. 4644-N.S.; B.M.C. Ch. 3.32]
 - b. Mission
 - i Increase public confidence in police
 - ii Improve police training and policies
 - iii Allow for community input in setting policies and procedures
 - iv Conduct fair, objective and neutral investigations
 - c. Main roles [* Overview of PRC Authority & Commissioner's Duties]
 - i Make policy recommendations on police practices; procedures
 - ii Conduct investigations into complaints of police misconduct
 - d. Annual Work Plan *
 - i Commission adopts at the beginning of each fiscal year (July) and submits to Council as an information item.

2. Structure
 - a. 9 Commission members appointed by Mayor and Council [* Commission Roster]
 - i Chair & Vice-Chair elected beginning each calendar year
 - b. 3 staff: Officer, Investigator, admin. support (roles)
 - i Part of CMO
 - ii Independent from BPD
 - iii PRC Officer's role / report to DCM
 - c. Subcommittees [* List of Subcommittees and members]
 - i Chair appoints members
 - ii Meeting frequency as needed
 - d. Relation to Council, CM, Chief
 - e. Individual Commissioners cannot speak for Commission

3. Full Commission meetings
(Suggest reading agendas and minutes from prior six months)
 - a. Full Commission meetings usually 2X/month [* PRC Meeting Schedule and Calendar]
 - i Meeting schedule approved each December for next calendar year
 - b. Special Meetings – called by Chair or majority of Commissioners
 - c. Attendance
 - i Leave of absence – request from Councilmember (Please cc us)
 - ii Termination if 3 consecutive unexcused absences

* Written materials in orientation binder

- d. Brown Act [* Checklist for Brown Act Compliance]
 - i. *A quorum of the members of a legislative body should not, directly or through others, develop a collective concurrence of action to be taken on any matter within the jurisdiction of the body. Includes in person, by phone, or email.*
Purpose: transparency. Members of the public are entitled to notice of what decision-makers are going to do; and the decisions and deliberations leading to them must take place in public. Applies to full Commission and Subcommittees also.
 - ii. Serial meetings prohibited
 - A. "Daisy chain" and "hub and spoke" type of serial "meetings"
 - B. Brown Act can be violated via email, so PRC Officer will send emails to full Commission via bcc to avoid starting an online discussion.
 - iii. Agenda requirements (see Standing Rules)
 - A. Commissioners may place items on agenda by notifying PRC Officer by noon the week before the meeting (usually Wednesday)
 - B. Chairperson determines the order of the agenda only; any Commissioner may ask for an item to be agendized, if they do not have pending items on agenda
 - C. Should not respond to public comment at meetings, but may ask for topic to be agendized
 - e. Parliamentary Procedure [* The a-b-c's of Parliamentary Procedure]
 - f. Standing Rules *
 - g. Stipends [* Forms]
4. Complaints: Two types -- Individual or Policy
- a. PRC Regulations for Handling Complaints Against Members of the Police Dept. *
 - b. Individual complaints against BPD sworn officers.
 - i. Investigation or mediation* option.
 - ii. No authority over dispatchers, jailers, PEOs or clerical staff.
 - iii. Internal Affairs (IA) conducts parallel investigation
 - c. Policy complaints or review can concern any police policy, procedures or practice (more details later)
5. Individual Complaint process *
- a. Complaint Form *
 - b. Allegations [* Allegation Categories and Subcategories]
 - c. Investigation
6. Boards of Inquiry
- a. Selection of Commissioners
 - b. BOI Packet – contents
 - c. Hearing (PRC Officer & Investigator attend) [* Sample BOI agenda]
 - i. Chair of BOI elected

- d. Findings
 - i. Categories
 - ii. Standard – clear & convincing
 - iii. Findings Report [* Sample]
 - e. Request for rehearing
 - f. *Caloca* appeal
7. Cases closed without BOI
8. Confidentiality – basis for, and importance
- a. Important statutes and cases *
 - b. Public Safety Officers Procedural Bill of Rights Act *
 - c. Penal Code
 - d. Breach in Moore case
 - e. Confidentiality Agreement *
 - f. NACOLE Code of Ethics *
9. Policy Complaints & Policy Reviews [* Policy complaint form]
- a. Policy review can be initiated by a member of the public, a Commissioner, or at the request of the Council, City Manager, or BPD.
 - b. Procedures in Standing Rules
10. Contact Chief Greenwood
- a. Would like to meet you and introduce you to command staff.
 - b. Will give you contact person to arrange for a ride-along [* Handout]
11. NACOLE
- a. Staff involvement
 - b. Annual Conference and regional gatherings
 - c. Resource for staff and commissioners: www.nacole.org
12. Handouts (in additional to orientation materials)
- Latest Annual Report
 - "Civilian Oversight of Law Enforcement: A Review of the Strengths and Weaknesses of Various Models" by OJP/NACOLE
 - "Toward Fairness & Impartiality" by PRC (Nov. 2017)
 - Center for Policing Equity Report on BPD (May 2018)

* Written materials in orientation binder



Kriss Worthington

Councilmember, City of Berkeley, District 7
 2180 Milvia Street, 5th Floor, Berkeley, CA 94704
 PHONE 510-981-7170, FAX 510-981-7177,
 EMAIL kworthington@cityofberkeley.info

CONSENT CALENDAR

October 2, 2018

To: Honorable Mayor and Members of the City Council
 From: Councilmember Kriss Worthington
 Subject: Refer the Police Review Commission to create training requirements for Police Review Commissioners

RECOMMENDATION:

Request that the Police Review Commission establishes mandatory training requirements for Police Review Commissioners, with input from the Police Review Commission Officer and Chief of Police.

BACKGROUND:

Currently, there are no mandatory training requirements for Berkeley Police Review Commissioners. This is a significant loophole in City law, considering that the Police Review Commission (PRC) provides a quasi-judicial function in reviewing police personnel and policy complaints. To effectively carry out a responsibility of such magnitude, the PRC ought to be provided substantial training on efficiently performing these tasks, with appropriate input from experts such as the PRC Officer and Police Chief.

According to the Citizen Oversight Model established by the BART Police Citizen Review Board (BPCRB), the staff of BPCRB maintains and upholds the "Provision of training including a curriculum designed for newly-appointed BPCRB members," as well as the "Provision and maintenance of an ongoing in-service training program" for these new members.¹ The enabling legislation for Berkeley's PRC does not, but should, contain this kind of specific training provision for its Commissioners.

Under the recently proposed Charter amendment to reform the PRC, mandatory training requirements would have been imposed on all Police Review Commissioners. However, since the August 10th, 2018 deadline for submitting ballot measures has passed, the Council should take action through this proposal to prevent the abandonment of simple, common sense reform that is necessary for Commissioners to efficiently perform their quasi-judicial functions.

¹ <http://www.bart.gov/About/CommunityEngagement/PoliceCitizenReviewBoard/Pages/About.aspx>; <http://www.bart.gov/About/CommunityEngagement/PoliceCitizenReviewBoard/Pages/FAQ.aspx> (pp. 11-12)

FINANCIAL IMPLICATIONS:

Unknown

ENVIRONMENTAL IMPLICATIONS:

No Negative Impact.

CONTACT PERSONS:

Councilmember Kriss Worthington

510-981-7170

ATTACHMENTS:

1. 2018 Commission Training Tracker for Oakland Police Commissioners
2. Sections of BART Citizen Oversight Model which pertain to Commissioner training

From Annotated Agenda:

8. **Refer the Police Review Commission to create training requirements for Police Review Commissioners**
From: Councilmember Worthington
Recommendation: Request that the Police Review Commission establishes mandatory training requirements for Police Review Commissioners, with input from the Police Review Commission Officer and Chief of Police.
Financial Implications: Unknown
Contact: Kriss Worthington, Councilmember, District 7, 981-7170
Action: Councilmembers Davila and Harrison and Mayor Arreguin added as co-sponsors. Approved recommendation amended to request that the commission consult with the City Manager regarding the training.



Office of the City Attorney

Date: March 26, 2018

To: Dee Williams-Ridley, City Manager

From: Farimah Brown, City Attorney
By: Kristy van Herick, Assistant City Attorney *KVH*

Re: **Legal analysis of City Council's November 14, 2017 Proposals related to the Police Review Commission**

Background

At its November 14, 2017 meeting, City Council voted to refer to the Police Review Commission (PRC) and to the City Manager a ballot measure proposal to present to Berkeley voters seeking to reform the PRC structure. The item included a referral for the PRC:

"to review the existing enabling legislation, rules, and regulations for the PRC, and to consider all options, including charter amendments, ballot measures, and any other amendments to strengthen the authority of the PRC to consider and act on citizen complaints, and other possible structural, policy and procedural reforms."

The Council referral also sought to have "the City Manager, through the City Attorney, provide legal analysis regarding which proposals can be completed legislatively and which require amendments to the City Charter", and provided some initial recommendations for the PRC's and City Manager's consideration, as follows:

"Changes the City Manager and PRC should consider, but not be limited to, include the following:

- 1. Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.*
- 2. Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.*
- 3. Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.*

As part of the review of proposed improvements to the PRC process, the PRC should analyze police review policies and structures in other jurisdictions (e.g. San Francisco, BART, etc.), all PRC models and engage relevant stakeholders, including the Berkeley Police Association and community organizations, in developing proposals.

Full analysis by the PRC and City Manager must be reported to the City Council by May 2018."

The following is a legal review of the three initial proposals provided in the City Council's November 2017 referral. The PRC has not yet issued its response to the November 2017 referral, although this office is informed the PRC has created a subcommittee to work on the referral. Should the PRC provide additional proposals, this office will provide a supplemental response.

Issues/Conclusions

Issue: As to each of the three proposed PRC reforms listed below, what legal steps are required in order to implement the reform? Which proposals can be completed legislatively and which require amendments to the City Charter?

Proposal #1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.

Conclusion: Changing the current standard of proof would require a simple majority vote of the PRC to amend the PRC Regulations. This proposed change also has impacts on Berkeley Police Association (BPA) members, therefore, it requires meet and confer with the Berkeley Police Association. No Charter Amendment is necessary to implement this change.

Proposal #2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.

Conclusion: This proposal would require a change to the Memorandum of Understanding between the BPA and the City. Such a change can only be made through meet and confer and a formal amendment to the Memorandum of Understanding.

Proposal #3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.

Conclusion: Depending on the type of evidence the PRC is seeking, this proposal may require a Charter Amendment. A governing-body-sponsored ballot measure as proposed by the referral would trigger meet and confer, which must be completed *before* the ballot measure goes to the voters.

Discussion/Analysis

General legal background on the PRC

Berkeley voters adopted Ordinance 4644-N.S creating the Police Review Commission on April 17, 1973. (See Berkeley Municipal Code (B.M.C.), Chapter 3.32.) The purpose of the PRC was to, "provide for community participation in setting and reviewing Police Department policies, practices and procedures and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department." (B.M.C. § 3.32.010.)

A "Board of Inquiry" is the confidential hearing process used by the PRC to review specific complaints against officers. Three Commissioners are impaneled to hear and render findings on a complaint, and Commissioners are required to sign a confidentiality and nondisclosure agreement. (PRC Regulations, I.A and I.B.4 [eff. March 28, 2016].) After the hearing, a summary of the PRC's findings are provided to the City Manager and the Chief of Police. (PRC Regulations, I.B.10.)

A case decided shortly after the PRC's creation invalidated certain provisions of Ordinance 4644-N.S. that would have "(1) given the PRC the power to recommend specific disciplinary actions against individual police officers, (2) prohibited the Berkeley Police Department from conducting its own internal investigations and disciplinary proceedings, and (3) given the PRC the right to demand and receive information from the police department or other city departments." (*Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 390, citing *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 233–235 (*Brown*).)

In *Brown*, the Court found that the invalidated provisions in the Ordinance were in conflict with "the charter grant of powers to the city manager." (*Brown v. City of Berkeley, supra*, 57 Cal.App.3d at p. 233.) It is long established that, to be valid, an ordinance must harmonize with the charter. (See *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 315, 321.) "An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution." (*Brown v. City of Berkeley, supra*, 57 Cal.App.3d at p. 231.) Therefore, the powers specified in the Charter take precedence over the language in City ordinances, even those passed by voter initiative.

Article VII, section 27, of the Charter reads: "The Council shall appoint an officer, who shall be known as the City Manager, who shall be the administrative head of the Municipal Government and who shall be responsible for the efficient administration of all departments." Further, Article VII, Section 28, states, in relevant part:

"...The City Manager shall have the following powers and duties:

... (b) *Except as otherwise provided in this Charter, to appoint, discipline or remove all officers and employees of the City, subject to the Civil Service provisions of this Charter. ... Except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager, and neither the Council nor any member thereof shall give orders to any of the subordinates of the City Manager, either publicly or privately.*

(c) *To exercise control over all departments, divisions and bureaus of the City Government and over all the appointive officers and employees thereof....*

(f) *To make investigations into the affairs of the City, or any department or division thereof, or any contract, or the proper performance of any obligation running to the City.*

(g) *To prepare and submit to the Council for its consideration the proposed annual budget."*

Under the City Charter, Article VII, sections 28(b), (c) and (f), the City Manager has the authority to oversee all performance issues of City staff, to oversee the administration of the police department, and to direct the activity of the Chief of Police and his staff. Any shift in these key roles from the City Manager to an appointed or elected police commission would therefore require a Charter amendment.

Referral No. 1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.

The first proposal referenced in the Council resolution involves changing the standard of proof used for all PRC Board of Inquiry decisions from "clear and convincing evidence" to "preponderance of the evidence". As discussed below, this proposed change would not require a Charter Amendment or ballot measure. However, this proposal requires two steps: (1) amending the PRC Regulations for Handling Complaints Against Members of the Police Department, which can be accomplished through a simple Commission action, and (2) completion of a meet and confer process with the BPA prior to implementation.

The PRC's enabling ordinance specifically empowers the PRC to "adopt rules and regulations and develop such procedures for its own activities and investigations as may be necessary." (B.M.C. § 3.32.090.E.) The PRC Regulations currently specify a "clear and convincing" evidence standard:

"Standard of Proof. No complaint shall be sustained unless it is proven by clear and convincing evidence presented at the hearing or otherwise contained in the record. "Clear and convincing" is more than a preponderance of evidence, but less than beyond a reasonable doubt."

(PRC Regulations, VIII.C.)

As background, under California law, "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code § 115.)

The PRC has utilized the "clear and convincing evidence" standard in its BOI hearings for more than 30 years. The PRC in 2014 proposed changing the standard of proof as part of a package of regulation amendments. After engaging in meet and confer as required under the Meyers-Milias-Brown Act (MMBA) (Govt. Code § 3500, et seq.) concluded, this proposed amendment was not implemented.

The MMBA "has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." (*Seal Beach Police Officers Assoc. v. City of Seal Beach* (Seal Beach) (1984) 36 Cal.3d 591, 597; see Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara* (2010) 181 Cal.App.4th 236, 254.) To achieve these purposes, "the MMBA requires governing bodies of local agencies to 'meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of employment' and to 'consider fully' such presentations made by the employee organizations." (*Seal Beach, supra*, 36 Cal.3d at p. 596 (quoting Govt. Code § 3505).) Section 3505 of the Government Code defines "meet and confer in good faith" as both parties having "the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation...."

As to the PRC's Regulations, the City is obligated, consistent with MMBA, to meet and confer with representatives of the Berkeley Police Association and endeavor to reach agreement on the practical consequences "**of any changes** in wages, hours and **other terms and conditions** of employees represented by the Association." Meet and confer continues until management and labor either reach an agreement or reach impasse. "Impasse" means that the City and the BPA have a dispute over matters within the scope of representation and have reached a point in meeting and negotiating over the dispute at which their differences in positions are **so substantial or prolonged** that future meetings would be futile.

Impasse is only reached after multiple meetings and extensive effort on both sides to reach an agreement. Before imposing a regulation, the parties typically would be required to participate in fact finding before a neutral party. After this process is completed, if the union does not agree to implement the change, the City Council can

unilaterally impose the change. However, such imposition can result in legal action, particularly if there is any question as to whether the parties were truly at impasse and whether the parties were participating in good faith.

Referral No. 2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.

To be effective, this referral would involve a change to language in the current Memorandum of Understanding ("MOU" or "Understanding") between the City and the Berkeley Police Association. The current MOU states in relevant part:

37.4 120 Day Limit on Imposition of Discipline

The City agrees that no disciplinary action against an employee covered by this Understanding, which action involves a loss or reduction of pay or discharge, shall be imposed unless such action is taken within one hundred twenty (120) calendar days after the date of the incident giving rise to the disciplinary action or within one hundred twenty (120) calendar days of the date the City has knowledge of the incident giving rise to the disciplinary action.

If a letter of advice or written reprimand is issued by the Department, neither the document nor any testimony offered by the Department or the City in an appeal process shall reference any time restrictions set forth in this section, nor reference any other discipline that may have been considered, recommended or imposed, but for the time restrictions set forth herein.

Any change to the MOU requires the mutual consent of the parties and ratification by the City Council.

"This Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein [...] This Understanding cannot be modified except in writing upon the mutual consent of the parties and ratification by the City Council."

(BPA –COB MOU Section 9.1.)

For a modification to the MOU to be discussed in the *current* negotiation process, it would have needed to be shared with the BPA in May of 2017. Therefore, to make this change without violating state law, any change to the 120 calendar day provision must be done through a separate meet and confer process reaching mutual consent and ratification by Council.

Any attempt to implement a change to the MOU without mutual agreement is considered a "unilateral change". A unilateral change in violation of the MMBA occurs when an employer takes any action to change the status quo on a matter within the scope of representation without having given the employee organization proper notice

and an opportunity to bargain. "The rule in California is well settled: a city's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.)

Referral No. 3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.

For the reasons set forth below, this third proposal would require a Charter Amendment. The *Brown* case, referenced above, examined and invalidated a number of provisions in the original 1973 voter initiative creating the PRC as conflicting with the City Charter. One of the invalidated provisions is substantially similar to the Council's third referred proposal.

Specifically, Section 10(c) of the original voter adopted ordinance had provided the PRC with the power:

"to request and receive promptly such written and unwritten information, documents and materials and assistance as it may deem necessary in carrying out any of its responsibilities under this ordinance from any office or officer or department of the city government, including but not limited to the Police Department, the City Manager, the Finance Department, the Public Works Department, and the City Attorney, each and all of which are hereby directed as part of their duties to cooperate with and assist the Commission in the carrying out of its responsibilities; ..."

This section was found to violate the charter mandate that everything pertaining to administrative services go solely through the City Manager. (*Brown, supra*, 57 Cal.App.3d at p. 233–235.) In order for the PRC to have "full discretion and access to evidence" under the current proposal, the City Charter would need to be amended to shift some of the City Manager's authority to the PRC.

Depending on the level of discretion and access envisioned, state laws protecting the confidentiality of peace officer personnel records could also be implicated. Any language to change the Charter or PRC Ordinance also needs to be consistent with Penal Code sections 832.5 and 832.7¹ as well as Evidence Code 1043 to 1046, which specifies that *peace officer personnel records are confidential pursuant to the California Penal Code*.

¹ Penal Code section 832.7(a), provides, in part, that "[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." The Evidence Code provides that in order for personnel records of a peace officer to be disclosed for possible use in a civil proceeding, the agency must pursue a discovery motion (commonly referred to as a *Pitchess* motion.)

In addition to requiring amendment to the City Charter, the proposal triggers a requirement to meet and confer with the BPA and possibly with other City unions to the extent the changes impact other represented employees. Meet and confer must be conducted with all impacted unions **before** the City Council puts such an amendment before the voters.

According to the MMBA,

*"[e]xcept in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation **proposed to be adopted** by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions."*

(Govt Code § 3504.5 [*emphasis added*].)

The language "proposed to be adopted" indicates that the meet and confer needs to happen before the ordinance or other legal change can take effect.

In *Seal Beach*, impacted employee associations sued the City of Seal Beach after voters passed a ballot initiative that amended the city's charter to require the immediate firing of any city employee who participated in a strike. (*Seal Beach, supra*, 36 Cal.3d at p. 595.) The City of Seal Beach had not engaged in meet and confer with the impacted unions before placing the charter amendments before the voters. (*Ibid.*) The California Supreme Court found that a charter city must comply with the meet-and-confer requirements of the MMBA **before** placing an initiative measure on the ballot, holding: "[T]he city council was required to meet and confer ... before it proposed charter amendments which affect matters within the scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments." (*Id.* at p. 602.)

It is less clear whether there the City must meet and confer on a citizen-sponsored initiative which does not *directly* involve a proposal by the governing body. Last year, a California Court of Appeal decision annulled a decision of the Public Employment Relations Board (PERB) that the 'pre-ballot' meet-and-confer requirement for a governing-body-sponsored ballot proposal also applied to a citizen-sponsored initiative. (*Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853, *reh'g denied* (May 1, 2017), *rev. granted*, California Supreme Court (July 26, 2017).) In *Boling*, the voters of City of San Diego approved a citizen-sponsored initiative, the Citizens Pension Reform Initiative ("CPRI"), which adopted a charter amendment mandating changes in the pension plan for certain employees of City of San Diego. However, the mayor of San Diego (a City with a strong mayoral form of government) had provided support to

Memo to City Manager

March 26, 2018

Page 9 Re: Council Referral on PRC Reforms

the proponents of the citizen-sponsored initiative to develop and campaign for the CPRI. (*Boling, supra*, 10 Cal.App.5th at p. 856.) The underlying PERB Decision found that the initiative could not be deemed purely a citizen action because of the public official's support.

The California appellate court ruled that: "[b]ecause a governing body lacks authority to make any changes to a duly qualified citizen's initiative (Elec. Code, § 9032), and instead must simply place it on the ballot without change, imposing a meet-and-confer obligation on the governing body before it could place a duly qualified citizen's initiative on the ballot would require an idle act by the governing body." (*Boling, supra*, 10 Cal.App.5th at p. 875.) However, as noted, the California Supreme Court has taken this case up for review, to consider among other matters, whether under the circumstances the voter initiative addressing a matter that falls within the MMBA was subject to meet and confer before the matter went to the voters.

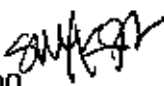
Regardless of what the Supreme Court decides in *Boling*, pursuant to the language of the MMBA and the *Seal Beach* case, it is well established that governing-body-sponsored ballot proposals must go through the meet and confer process before going to the voters.

cc: Mark Numainville, City Clerk
Opn. Index: I.E; II.G.3.c



Police Review Commission (PRC)

March 5, 2018

To: Dee Williams-Ridley, City Manager
From: Sahana Matthews, Chairperson, Police Review Commission 
Re: Request to include topics during negotiations with the Berkeley Police Association

As you know, the City Council has asked the Police Review Commission to review various options for strengthening the authority of the PRC to consider and act on citizen complaints. The PRC has commenced its consideration of various options, including a revisiting of the suggestions it made to the Council when it was contemplating changes to the PRC's enabling ordinance in 2016. (See attached letter of June 14, 2016, from the PRC to the Council.)

While the PRC has not completed its current discussion of possible ways to enhance its authority, the Commission wishes to make two recommendations now, due to their significance and time-sensitive nature. Specifically, the Commission would like to extend the current the 120-day time limit on discipline to one year, and to change the standard of proof used in Board of Inquiry hearings to the "preponderance of the evidence."

Regarding the 120-day time limit, it is the Commission's understanding that this time frame is quite short for the amount of investigative work that a typical complaint to the PRC requires. Moreover, the 120 days is an anomaly among the civilian oversight agencies in the Bay Area, which use the one year limit, consistent with the maximum set forth in the Public Safety Officers Bill of Rights Act.

Similarly, the "clear and convincing" standard currently used for making findings in a PRC Board of Inquiry is far less common than "preponderance of the evidence" used by other civilian oversight agencies.

The PRC is aware that these two changes do not require an amendment to the enabling ordinance or to the City Charter, but are subject to meet-and-confer with the Berkeley Police Association. As you are currently in contract negotiations with union, the PRC asks that the 120-day limitation and the standard of proof be included in your discussions.

Thank you for your consideration of this request.

Dee Williams-Ridley, City Manager
Request to include topics during negotiations with the BPA
March 5, 2018
P. 2 of 2

Attachment

cc: Mayor and City Councilmembers
Andrew Greenwood, Chief of Police
Christian Stines, President, Berkeley Police Association
Jovan Grogan, Deputy City Manager



Police Review Commission (PRC)

June 14, 2016

To: Honorable Mayor and Members of the City Council
From: George Perezvelez, Chair, Police Review Commission *GP/1/16*
Re: Suggestions for Ballot Measure to Amend Current Enabling Ordinance
Establishing the Police Review Commission (Response to Item #52 on
the Council's June 14, 2016 agenda.)

The Berkeley Police Review Commission (PRC) was created with the general purpose of providing for community participation in setting and reviewing police department policies, practices, and procedures, and to provide a means for prompt, impartial, and fair investigation of complaints brought by individuals against the Berkeley Police Department. (B.M.C. section 3.32.010.)

In the interest of creating a more robust and effective avenue for citizen oversight of the Berkeley Police Department (BPD), the members of the PRC suggest the following changes to the PRC ordinance, to be either approved by the City Council or submitted to the voters in November. We believe these proposed changes will greatly enhance the effectiveness of the PRC, and assure that we are able to fully able to provide meaningful oversight to BPD.

- 1) The PRC shall use the "preponderance of the evidence" as the standard of proof for all decisions.
- 2) The current 120-day limit on the imposition of discipline shall be extended to one year, consistent with existing California law.
- 3) The PRC shall have full discretion to review complaints as to alleged officer misconduct from any person with personal knowledge of the alleged misconduct. Additionally, the PRC shall have the discretion to accept complaints from anonymous sources professing first-hand knowledge of alleged police misconduct, so long as the complainant requests anonymity based upon a credible belief that the complainant will face prosecution or harassment. The determination of whether the request for anonymity is based upon a credible belief shall be made by the a 2/3 vote of the full commission, acting in closed session.
- 4) The Commission shall have the same access to all BPD files and records, in addition to all files and records of other City departments and agencies, as the BPD's Internal Affairs Division. The BPD and other City departments and

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e-mail: prc@cityofberkeley.info website: www.cityofberkeley.info/prc/

agencies shall make every reasonable effort to respond to the Commissioner's requests for files and records within ten (10) days.

5) Upon a sustained finding of misconduct, the Board of Inquiry shall have the authority to suggest appropriate discipline to the Chief and/or City manager.

6) In addition to the training required of all Berkeley City Commissioners, all members of the PRC shall be required to complete training in the following areas: use of force; criminal procedure; Fourth Amendment; BPD general orders and standard operating procedures. This training shall include law, policy and best practices. The training shall be organized annually by the PRC Officer, in consultation with the City Attorney's office, the BPD, the BPA, and other community organizations.

7) Expand the jurisdiction of the PRC to include non-sworn employees of the BPD.

8) Review the Mayor's proposed budget to determine whether budgetary allocations for the Department are aligned with the Commission's approved policies, procedures, customs, and General Orders. The Commission shall conduct at least one public hearing on the Department budget per budget cycle and shall forward to the City Council any recommendations for change.

The members of the PRC voted at its June 8, 2016 meeting to send this communication to you by the following vote: Ayes – Bernstein, Lippman, Murphy (temporary appointment), Perezvelez, Roberts, Sherman, Smith, and Yampolsky; Noes – None; Abstain – None; Absent – Javier, Waldman.

cc: Dee Williams-Ridley, City Manager
Michael Meehan, Chief of Police
Zach Cowan, City Manager
Christian Stines, BPA
PRC Commissioners

MEMORANDUM

TO: Members, Police Review Commission
FROM: Commissioner Alison Bernstein
RE: Standard of Proof in BOI Hearings (Regulations Sec. VIII.C.)
DATE: January 7, 2016

Since the inception of the PRC, the standard of proof used in Board of Inquiry hearings has been clear and convincing evidence. This high standard is not found in the enabling legislation, but was obtained by agreement brokered between the City of Berkeley and the Berkeley Police Association after the passage of the PRC's enabling legislation. Careful consideration of the use of the clear and convincing standard, and exploration of the other settings in which this standard is used, makes clear that it is an inappropriate standard for employee discipline because it places that burden and the risks on the parties in a way that is inconsistent with general public policy, and creates an inherent contradiction in the disciplinary process of our City government.

The standard of proof used in a proceeding reflects a societal determination of the appropriate distribution of risk, both under generally agreed upon norms and due process. The United States Supreme Court has explained that the function of standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas* (1979) 441 U.S. 418, 423.

There are generally three standards, or levels of proof, applied in adjudicative proceedings. At one end of the spectrum is "preponderance of the evidence," which is the conventional standard used in civil litigation. Under the preponderance standard the risk of error is shared between the parties; that is, it is not weighted toward one interest or another.

At the other end, in criminal cases, the standard is "beyond a reasonable doubt." We have found that our concepts of due process require that the liberty interests of the accused be protected, so we apply a high standard of proof to exclude, as nearly as possible, the likelihood of erroneous judgment. The risk of error in criminal cases is weighted toward the government, as its burden is higher.

"Clear and convincing evidence" is one of the intermediate standards. This standard is used in civil settings in which policy makers believe the interests of the accused are more substantial, and deserving of more protection, than in the typical civil action. The use of this standard reduces the risk to the accused by increasing the plaintiff's burden of proof substantially. Examples of the types of interests which courts or legislative bodies have found appropriate for the use of the clear and convincing standard are: deportation and denaturalization proceedings, civil commitment proceedings, termination of life support, and termination of parental rights.

Examination of the types of interests which are adjudicated in PRC proceedings, and the role of the PRC in our governmental process as defined by the California courts makes clear that the use of the clear and convincing standard is bad public policy. First, the current system allows for two processes which the California courts have defined as parallel, the Internal Affairs of the Berkeley Police Department, and the Board of Inquiry by the PRC, to investigate the same allegations which are reported to the same final arbiters but use two different standards of proof. Second, and more importantly, in applying the clear and convincing standard, the city is weighting the interests of the police officers in the civilian review process more highly than those of any other civil service employee in disciplinary proceedings anywhere in our City, and is circumventing standard practice in employee disciplinary proceedings and civil litigation.

In 2008, the Court of Appeal held that the PRC process was governed by the provisions of Penal Code sec. 832.5 et. seq. because the PRC had a role in disciplinary matters. *Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 402. The Court

specifically held that the parallel procedures of IA and the PRC were equally covered under the applicable statutes, as the findings of either could be relied upon in a determination to impose discipline. As a de facto part of the Department's disciplinary process, the PRC falls within the rubric of the so-called *Skelly* hearing process. In 1975 the California Supreme Court established that permanent civil service employees have a vested property interest in the continuation of their employment and that due process requires certain procedural protections be met before the state can take action against this interest. *Skelly v. State Personnel Board*, 15 Cal.3d 194, 206-207. The Court reasoned that because such employment constitutes a legitimate claim of entitlement to a government benefit, "the state must comply with procedural due process requirements before it may deprive its permanent employees of this property interest by punitive action." Specifically, before imposing discipline, a government employee is entitled to notice and a hearing, at which they may bring an attorney and confront the evidence against them. The standard of proof at such a hearing is preponderance of the evidence. *Skelly v. State Personnel Board*, 15 Cal.3d 194, at 204, fn. 19. The Public Safety Officers Procedural Bill of Rights Act (Gov't Code sec. 3300 et seq., "PBRA") adds specific protections for police officers to the *Skelly* process, but does not alter the standard of proof to be applied in these hearings.

The Court in *BPA v. City of Berkeley* found that the PRC's Board of Inquiry process is parallel to the Internal Affairs process, and is thus governed by PBRA, and by extension the reasoning of *Skelly*. However, under our current system, the same arbiter (the Chief of Police or the City Manager) may be asked to review fact findings in the same incident, but which have been reached applying different standards of proof. Without a clearly articulated policy reason, it is simply bad public policy to have such rampant inconsistencies presented to a single arbiter who is trying to determine what, if any, remediation is necessary for a city employee.

General policy considerations also support the use of the preponderance of the evidence standard. The clear and convincing standard is generally not used in the

employment context. In 1989, the Supreme Court addressed the use of the clear and convincing standard in lawsuits alleging workplace discrimination in violation of Title VII of the Civil Right Act. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228. Under prior law, once evidence of discriminatory motive was proven, an employer had to prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. The Supreme Court rejected the clear and convincing standard, reasoning that an exception to the conventional rules of civil litigation should only apply when “the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual.” *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 253-54. The High Court then went on to note the kinds of interests which have been found to justify the use of the clear and convincing standard: termination of parental rights; involuntary commitment; deportation; and denaturalization.

These same general rules hold true in California, and California courts have generally held that while the preponderance of the evidence standard is to be applied in employee disciplinary proceedings, the clear and convincing standard would apply only in license revocation proceedings. In *Ettinger v. Board of Medical Quality Assurance*, the court reasoned that although employee discipline cases are civil in nature and that “generally proof in civil cases is required by a preponderance of the evidence,” the question of the standard of proof to be used in determining whether or not to suspend a medical license involves different policy considerations and a higher standard of proof. “It seems only logical to require a higher standard of proof when dealing with revocation or discipline of a professional licensee as opposed to mere termination of state employment. The former affects one’s right to a specific professional employment, while the latter involves only the right to be employed by a specific employer. It is the totality of professional employment opportunity involving vested interest rights which requires the higher standard.” *Ettinger v. Board of Medical Quality Assurance*, 135 Cal.App.3d 853, 855 (1982).

Both state and federal courts have stated a clear policy that employee discipline proceedings are essentially civil proceedings, and as such the interests of the parties are to be weighted evenly and the preponderance of the evidence standard should apply. It is only when some greater liberty interest is involved - parentage, citizenship, civil commitments, cessation of life support, or the revocation of access to an entire class of employment -- that the clear and convincing standard should be applied.

Adoption of the preponderance of the evidence standard in our BOI hearings would bring the PRC process in line with the general standards used in civil service personnel hearings, including the parallel IA proceedings. Moreover, applying the preponderance of the evidence standard would be consistent with public policy, which clearly articulates that in employee discipline matters, the interests of the parties should be evenly weighted by using the preponderance of the evidence standard.



Police Review Commission (PRC)

CONFIDENTIALITY AGREEMENT

This agreement must be signed by each Commissioner permanently or temporarily appointed to the Police Review Commission as soon after appointment as practicable. Until a Commissioner has signed this agreement, he or she is prohibited from participating in a Board of Inquiry or a closed session of the PRC involving a complaint, and from receiving confidential materials relating to Berkeley Police Department personnel.

In their capacity as PRC Commissioners, each Commissioner will have access to confidential data or information related to Berkeley Police Department personnel. The confidentiality of this information is governed by the Public Safety Officers Procedural Bill of Rights Act (Gov't. Code sections 3300-3319), Penal Code sections 832.5 and 832.7, and case law.

Confidential information may be provided in the form of documents, electronic transmissions, audio recordings, video recordings, or live testimony. Regardless of how the confidential information is communicated, it must not be disclosed to any unauthorized person or organization, and must not be reproduced or recorded. It is the responsibility of each PRC Commissioner to protect confidential information from unauthorized disclosure. Following a Board of Inquiry or any other closed session involving a complaint, all related materials must be returned to PRC staff, and any electronic copies or transmissions must be permanently deleted from email accounts, computers, and other personal devices.

It is vitally important to the integrity of the Berkeley Police Review Commission individual complaint process, including the Board of Inquiry process, that all parties involved, including Commissioners, 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.

I have read and understand the above. I will keep confidential and will not disclose to any unauthorized person or organization, orally or in writing, the nature of any individual complaints against police officers that come before the PRC, and all records relating to the complaints, including, but not limited to, the identity of the officers and the substance of any investigative report. I will not reproduce or record any confidential information, and will return or delete all confidential materials provided to me.

Print name

Signature

Date

Confidentiality Agreement March 2019.docx



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Confidential information may be provided through witness testimony or through in the form of documents, electronic or hard-copy transmission transmissions, audio recordings, video recordings, or live testimony. Regardless of how the confidential information is communicated, it must not be disclosed to any unauthorized person or organization, and it must not be reproduced or recorded. It is the responsibility of each PRC Commissioner to protect confidential information from unauthorized disclosure. Following a Board of Inquiry or any other closed session involving a complaint, all related materials must be returned to PRC staff, and any electronic copies or transmissions must be permanently deleted from email accounts, computers, and other personal devices.

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Email: prc@cityofberkeley.info Website: www.cityofberkeley.info/prc/

Print name

Signature

Date

[Confidentiality Agreement March 2019.docx](#)



Police Review Commission (PRC)

March 4, 2019

To: Farimah Brown, City Attorney
From: George Perezvelez, Chairperson, Police Review Commission
Re: Inquiry from PRC Regarding Documents and other Records Held by BPD that the PRC is Entitled to Obtain.

The Police Review Commission, in performing its oversight of the Berkeley Police Department as described in its enabling Ordinance (Ord. No. 4644-N.S.), often needs access to information from the BPD. The denial of requests for documents from the BPD has resulted in a lack of clarity over what the PRC may obtain from the BPD in fulfilling its mandated oversight function.

Therefore, the Commission unanimously voted at its February 13, 2019 meeting to ask that you identify all BPD documents and other records the PRC is entitled to receive, by ordinance, statute, or otherwise. A non-exclusive list of such documents and records would include, for example:

1. Internal documents and memoranda relating to the formulation of General Orders and Lexipol policies.
2. Data and internal documentation relating to police equity and racial discrepancies in police stops and arrests.
3. Data and internal documentation relating to the BPD response to the CPE report of May, 2018 and to the PRC report and recommendations in "To Achieve Fairness and Impartiality" from November 2017.
4. Source documents and other information supporting statements contained in After-Action reports.
5. Internal documentation and data used to develop the department's biennial budget proposal, the mid-biennial update, and any other requested adjustments to the budget; by line item and fund.

We are aware that General Order R-23 ("Release of Public Records and Information") addresses what certain types of police records may be disclosed to the public and to the PRC. However, the PRC, unlike the general public, is tasked with oversight of BPD policies and procedures, and there is little concrete

guidance as to what we can expect access to in the performance of that unique function.

Please note that the impetus for this request is not the newly disclosable records under SB 1421, nor is the Commission asking what the BPD must disclose to the PRC in the course of the PRC's investigation of complaints against individual members of the police department.

Thank you in advance for clarification of these issues, the satisfactory resolution of which is critical to the performance of the PRC mandate.

cc: Mayor and City Councilmembers
Dee Williams Ridley, City Manager



Police Review Commission (PRC)

GUIDING PRINCIPLES

Adopted by the Police Review Commission on February 27, 2019

In order to strengthen the relationship between the Berkeley Police Department, Berkeley Police Association, and Police Review Commission, the Commissioners will make every possible effort:

- To ask for Department and Union input during discussions on items that affect Department policies and practices.
- Attend community and Department events sponsored by the BPD.
- Participate in ride-alongs or Department tours on a yearly basis
- Continue to adhere to NACOLE Code of Ethics in all interactions with the Department and Union.
- Collaborate with the Department, within the oversight mission, in interactions with City Council and City Manager in all matters related to staffing, equipment and community outreach.

NACOLE Code of Ethics

Preamble

Civilian oversight practitioners have a unique role as public servants overseeing law enforcement agencies. The community, government, and law enforcement have entrusted them to conduct their work in a professional, fair and impartial manner. They earn this trust through a firm commitment to the public good, the mission of their agency, and to the ethical and professional standards described herein.

The standards in the Code are intended to be of general application. It is recognized, however, that the practice of civilian oversight varies among jurisdictions and agencies, and additional standards may be necessary. The spirit of these ethical and professional standards should guide the civilian oversight practitioner in adapting to individual circumstances, and in promoting public trust, integrity and transparency.

Personal Integrity

Demonstrate the highest standards of personal integrity, commitment, truthfulness, and fortitude in order to inspire trust among your stakeholders, and to set an example for others. Avoid conflicts of interest.

Conduct yourself in a fair and impartial manner and recuse yourself or personnel within your agency when significant conflict of interest arises. Do not accept gifts, gratuities or favors that could compromise your impartiality and independence.

Independent and Thorough Oversight

Conduct investigations, audits, evaluations and reviews with diligence, an open and questioning mind, integrity, objectivity and fairness, in a timely manner. Rigorously test the accuracy and reliability of information from all sources. Present the facts and findings without regard to personal beliefs or concern for personal, professional or political consequences.

Transparency and Confidentiality

Conduct oversight activities openly and transparently providing regular reports and analysis of your activities, and explanations of your procedures and practices to as wide an audience as possible. Maintain the confidentiality of information that cannot be disclosed and protect the security of confidential records.

Respectful and Unbiased Treatment

Treat all individuals with dignity and respect, and without preference or discrimination including but not limited to the following protected classes: age, ethnicity, culture, race, disability, gender, religion, sexual orientation, socioeconomic status or political beliefs.

Outreach and Relationships with Stakeholders

Disseminate information and conduct outreach activity in the communities that you serve. Pursue open, candid, and non-defensive dialog with your stakeholders. Educate and learn from the community.

Agency Self-examination and Commitment to Policy Review

Seek continuous improvement in the effectiveness of your oversight agency, the law enforcement agency it works with, and their relations with the communities they serve. Gauge your effectiveness through evaluation and analysis of your work product. Emphasize policy review aimed at substantive organizational reforms that advance law enforcement accountability and performance.

Professional Excellence

Seek professional development to ensure competence. Acquire the necessary knowledge and understanding of the policies, procedures, and practices of the law enforcement agency you oversee. Keep informed of current legal, professional and social issues that affect the community, the law enforcement agency, and your oversight agency.

Primary Obligation to the Community

At all times, place your obligation to the community, duty to uphold the law and to the goals and objectives of your agency above your personal self-interest.

Lee, Katherine

From: Christine Schwartz <cschwartz29@yahoo.com>
Sent: Friday, March 01, 2019 12:50 PM
To: Christine Schwartz
Subject: Video: Alameda County Board of Supervisors February 26, 2019 hearing regarding Ad Hoc Recommendations re UASI
Attachments: Ad Hoc Committee on Urban Area Security Initiative_2019 DOC.docx

March 1, 2019

Good afternoon,

Please see the link below in case you are interested in seeing and hearing what occurred for the first few hours at the above hearing.

Also for your review, if you do not have it already in doc form, is the Ad Hoc recommendations.

All my best,

Christine Schwartz

https://youtu.be/_mpmPEUIwFw

TUESDAY, MARCH 5, 2019

Documents reveal judge declared Police Review Commission's findings in death of Kayla Moore 'unfounded,' siding with Berkeley police

BY BRANDON YUNG | STAFF

Editor's note: The ruling from Administrative Law Judge Perry O. Johnson refers to Kayla Moore by masculine pronouns, but The Daily Californian refers to Moore by feminine pronouns, which was how she identified.

Content warning: Violence and offensive language

In 2014, Berkeley's Police Review Commission found that one officer involved in the 2013 in-custody death of Kayla Moore exercised improper police procedure. But documents recently obtained by The Daily Californian through a Public Records Act request show that a judge disagreed with the commission's findings months later, calling its logic "fallacious."

Moore, a 41-year-old Black transgender woman with a history of mental illness, died while in police custody after officers responded to a disturbance call in Downtown Berkeley on Feb. 12, 2013. A coroner's report later clarified that drug intoxication, morbid obesity and an enlarged heart were contributing factors to her death.

Although the Berkeley Police Department's internal investigation concluded that none of the officers present that night were at fault for Moore's death, the incident generated controversy from many community members, leading to citywide protests and allegations of transphobia and racism. Moore's father, Arthur Moore, also filed a wrongful death lawsuit against the city, alleging that officers "unlawfully seized, restrained, arrested and battered" his daughter. A U.S. District Court judge threw out the suit last year.

Despite the department's internal investigation, the PRC concluded that the lead officer, Gwendolyn Brown, violated procedure during the arrest by not monitoring Moore's vital signs, according to confidential documents that were leaked to the Daily Cal in 2014.

Brown appealed the commission's findings, and the case was heard before Administrative Law Judge Perry O. Johnson on Dec. 4, 2014 to "determine the appropriate disposition for any allegation of misconduct."

Johnson ultimately concluded that the commission's allegation was "unfounded," siding with Brown.

"The PRC's decision ... springs from fallacious inferences that are grounded in ill-defined nuance and unconvincing subtlety in the interpretation of various police officers' accounts of the effects of a violent altercation with a mentally-ill, drug-impaired very large and angry man where the fight spanned a very brief period of time," Johnson said in his legal conclusion.

Johnson said in his conclusion that the commission's decisions "include adverse notions" regarding Brown's reliability as a credible witness. He added that the commission fails to acknowledge the "frailties of 'memory,'" considering the fact that Brown's account of the incident at the proceeding occurred several months after Moore's death.

BPD could not be reached for comment as of press time.

Maria Moore, Kayla Moore's sister, has repeatedly expressed frustration with similar decisions regarding her sister's death. She previously told the Daily Cal that she was upset when the judge threw out her father's lawsuit last year.

"You cannot criminalize someone for being mentally ill. She couldn't control being schizophrenic — that's just who she was," Maria Moore said. "She couldn't control being transgender. ... That's just who she was."

Katherine Lee, the current commission secretary and a former commissioner who represented the PRC in the administrative hearing, said that even if the judge had upheld the commission's findings, disciplinary action against Brown would have been unlikely.

A memorandum in the city's agreement with the Berkeley Police Association prevents an officer from experiencing disciplinary action or loss of pay once 120 days has elapsed after an incident, according to Lee.

"It's kind of like a statute of limitations, in effect," Lee said. "This whole process would never happen in 120 days. ... There would be no way that any case would be investigated, go to the hearing, be appealed and then actually heard in that appeal process before 120 days."

In response to a request by Berkeley's assistant attorney, who was seeking a legal opinion after the commission's confidential documents were leaked to the Daily Cal in 2014, Alameda County District Attorney Nancy O'Malley clarified that PRC commissioners could not be charged with a crime for leaking information, as they are not city employees.

"In the end, the PRC function appears to be purely advisory. The citizen-appointees that make up the PRC are not part of the City government, nor delegates any of its powers," O'Malley said in her letter. "They are not so much 'public officers' as the actual public."

Brandon Yung is the lead city government reporter. Contact him at byung@dailycal.org and follow him on Twitter at [@brandonyung1](https://twitter.com/brandonyung1).

