21 July 2017

Portland Auditor, Commissioners, Mayor, IPR Director ~

I write with regard to Portland Police Bureau (PPB) Directive 1010.10, 'Deadly Force and In-Custody Death Reporting and Investigation Procedures' (not available on the City website) and a March 2017 Executive Summary Memorandum by the Multnomah District Attorney (DA). I have – through two Portland Police Association (PPA) contracts – sought to incorporate best practices locally, for timely fact-finding following critical police incidents. Justice advocates are well aware that PPB Officer Scott McCollister only provided detectives a narrative of his 2003 homicide of Kendra James *after* meeting with involved-Officer Kenneth Reynolds at a Lake Oswego Applebee's restaurant. The killer was provided this opportunity by a 48-hour 'waiting period,' for which the City of Portland, Oregon and PPA repeatedly bargained.

The City has a duty under the United States Constitution to exercise adequate supervision over its police officers. I participated in the 2012 Federal investigation of the City, which proved failure in that responsibility. I was present for the U.S. Department of Justice, Civil Rights Division (DoJ), delivery of Findings that five years ago included: "PPB should also clearly set forth in policy that, though [Internal Affairs (IA)] may use criminal investigation material in appropriate circumstances, all administrative interviews compelling statements, if any, of the subject officer and all information flowing from those interviews must be bifurcated from the criminal investigation in order to avoid contamination of the evidentiary record in the criminal case." (pg. 31, Findings) "Provided the DA is not bound by the City's contract and its 48-hour waiting provision, the DA may consider questioning the officer, subject to his or her ability to exercise rights to counsel and remain silent, as soon as the DA sees fit. This should expedite the accurate resolution of the criminal investigation."

Imagine my surprise that our DA, in the above memorandum and – like the Mayor – silent on the issue throughout negotiation of the current PPA contract, now counters that law enforcement cannot be relied on, to "wall off" criminal from administrative investigation. (Policy 3, in the above Directive: "all personnel involved in the administrative review shall keep information garnered from the [Professional Standards Division] interview strictly confidential, not permitting disclosure of any such information or its fruits to the criminal investigation.") Inherent in the DA's contention is that the Bureau and his office are too corrupt to demonstrate professional hygiene. (See 'leakage,' pg. 3 below.) This is not an assumption held nationally. Tragically, it dovetails into the County's historic pattern of serial unwillingness to prosecute killer cops; to expose police narratives to a trial of fact … in an adversarial setting.

"This 48-hour waiting period has enabled officers to refuse to timely provide [Force Data Collection Reports] and public safety statements," said Assistant U.S. Attorney General Tom Perez in 2012; noting downstream, veracity consequences in a community grown weary with lack of transparency by public 'servants' and those assuring their lawfulness. The DA's proposed delay stratagem represents obstruction of justice, is contrary to best practices for crime detection, and inhibits honest public disclosure.

These failings *can* be overcome.

Four years later, in their DoJ 2016 Status Conference Report, investigators informed the City of its "ongoing obligation," with regard to Item 124 (pg. 24) in its 2012 plea deal: "Current professional standards require that, absent incapacitation, involved officers provide on-scene public safety statements limited to pre-defined questions tailored to exigent safety needs, and that this is distinct from a full administrative interview. If a compelled interview is necessary, the administrative interviews should be separate from criminal investigators; however, administrative investigators may be present for non-compelled criminal interviews." (pg. 100) The DoJ in 2016 also offered technical assistance as Council sought to prematurely renegotiate an unexpired collective bargaining agreement with PPA: they provided legal guidance on this issue. Specifically, they suggested the bureau "should carefully administer bifurcated criminal and administrative

investigations," and that officer-involved shooting statements "should not be treated as compelled under *Garrity*." (pgs. 5-7, of that offered guidance.)

Council vowed to implement the Settlement Agreement, in USA v. City of Portland. They would now, I expect, respond in good faith to the DA's refusal to implement that vision of reform. If we are to assess for intended outcome, it would be dishonest to think Directive 1010.10 will feed into anything but a system designed to delay fact-finding, greater permit tainted official report, and stymie prompt public disclosure.

The City employed Michael Gennaco and his OIR Group to document PPB deficiency following civilian deaths. He reported in January 2016, "As we have stated repeatedly, beginning with our initial report to the City in May 2012 (pp. 67-69), the inability of PPB to obtain a statement from the involved officers the night of an incident is inconsistent with best investigative practices." (pg. 115 in 2016 OIR report) "Any leads or further investigative guidance that might be derived from the involved officers' version of events are hindered and perhaps lost because of the delayed acquisition of officers' statements." Gennaco failed to cite OIR's 2014 report: "It is less than ideal that the criminal investigation and review does not obtain voluntary testimony from the officers until the grand jury proceedings. First, because the detectives cannot question the officers about their observations and actions; they cannot follow any leads based on those observations." Citing a specific case, City consultants observed "the investigation submitted by the detectives to the DA has a huge investigative hole, namely, the observations, thought processes, and actions of those central to the incident. And while eventually the DA does obtain the officers' voluntary testimony at the Grand Jury, that testimony does not have the wide-ranging depth of an investigative interview that we have seen conducted by PPB detectives, but is more limited to the mind set and actions of the officers immediately prior to the shooting and, practically speaking, precludes its use for follow-up investigation." (pg. 65) On the following page: "As we have advocated in prior reports, it is past time for that restriction to be eliminated so that the Bureau can timely learn what its officers observed and did when they decided to use deadly force."

On 28 January 2016, Council received Gennaco's oral estimony: "As you're likely aware, the DoJ in its Settlement Agreement pointed to the delay, or the length of time in investigations, as one of the issues it's requesting, or demanding, I guess, that the bureau address." And, "There continues to be one investigative issue that we're going to continue to hammer home as long as we're doing this work. That is the unfortunate situation that prohibits PPB from obtaining a statement from its members the night of the incident. As a result of an agreement reached between PPA [sic], the bureau is not allowed to receive any information or any account from its officers about what they did that night, why they decided to use deadly force, until at least two days after the event. We find that that one condition in and of itself makes it difficult for us to say that the investigation is entirely comporting with best investigative standards. We understand that the agreement is up for renewal next year, and we are hopeful that this issue be revisited in the negotiations leading up to the new agreement with your association." (pg. 88)

In his "I feel like this is like Groundhog Day," interrogation (pg. 93), Commissioner Fish modeled past behavior and muddied up the waters by calling on *perpetrators* of unconstitutional policing to describe "the different rights" Council has bargained for police. Fish testified "If I'm confused I'm guessing the public is going to be confuse. The key is whatever we do, whatever we change, we must be very clear with the public about what they can expect differently. If we say that -- if there's a lot of -- if we make a big deal about some change like this and in practice it doesn't lead to changes in the way investigations occur then of course we have a credibility problem." Perhaps this has to do with which sources are cultivated for accurate information.

Likely by pre-arrangement with Council, PPB Chief O'Dea had "my investigations expert, Commander Burke here," to obfuscate resolution of the issue. Finally, Mayor Hales called on the purportedly disinterested party, Genacco, for further testimony: "It is absolutely true, that if a compelled statement is obtained from an officer, that that statement could not be used for purposes of any criminal prosecution. That is the law. However, the concern about the risk, that somehow the obtaining of that compelled statement could then

jeopardize a criminal investigation in this context, *has never happened in the history of mankind, with regard to officer-involved shootings."* (pg. 99, italics mine) "Officer-involved, shooting-compelled statements are taken in an interview room. In jurisdictions that do this, that information is walled off and protected from any piece of the detective investigation; so that, in the investigation, the detective investigation, that statement will never be presented to them. There's no risk of contaminating the DA's investigation with that compelled statement."

Genacco continued (pg. 100): "I'm confident that, in the officer-involved shooting context, if the protocols are complied with, and there's no leakage of information to the DA, or the detectives conducting the criminal investigation, if you do create robust processes to prevent that from happening, that you're not going to risk any eventual criminal prosecution." Portland's intransigent Council refused to design a 'robust process.'

I will note that neither the DA, nor DoJ investigators were invited to testify before Council in January 2016. Assistant U.S. Attorney Jared Hager *was* present however, and nobly requested permission to clarify that the plea deal "requires a use-of-force report before the end of the shift because that is a routine report that officers currently fill out for any use of force except deadly force. The Settlement Agreement that we have with the City of Portland requires that use-of-force report to also be required for deadly force." (pg. 106) When Commissioner Fritz sought to discern how long Council might delay taking action, Hager vowed, "We're not going away until the settlement agreement is complied with." I'd add that community expectations for constitutional policing are likely to remain insistent for another generation. Demands for public involvement are not problems Council can effectively arrest its way out of … or ward off by legislating from within cloistered, off-limits meetings.

On compelled testimony, Hager declared "The case law, as we understand it, says something is compelled only when you face the threat of a job loss, not necessarily just discipline. So, there is a question of whether [and] at what point are you actually compelling a response." He tackled the risk of immunity for routine reports. "There are cases from all over the country, Federal court, where they have held that routine reporting as part of a public employee's job duty – for example, a use-of-force report or a police report at the end of your shift – is not something that is subject to immunity." (pg. 105) He went on to aver that "The last thing we want to do is jeopardize a criminal prosecution," by insisting the 48-hour rule be set aside. "We feel the law is on the side of at least allowing some limited, routine reporting." "Part of the daily job duties is to fill out a use-of-force report when force is used. So you're not bringing them before some, you know, special proceeding and compelling them at the threat of losing their job to answer questions. You are just requiring them to do their job. If they don't do their job, you can discipline. I think the case law is pretty clear on that."

Fish testified, regarding Hager's legal opinion: "It is amazing to have you here testifying. It almost feels like a Woody Allen movie." (pg. 106)

In his June memo, Independent Review Division Director Severe referenced the Police Assessment Resource Center (PARC). In 2003, after the Kendra James homicide, these OIR Group predecessors declared, "It is beyond dispute that witnesses should be interviewed as soon as possible. Best practice likewise dictates that officers involved in a shooting or in-custody death incident be interviewed no later than several hours after the incident. Contemporaneous interviews enhance the integrity of the process by reducing the likelihood that the officers' account of events will be deliberately contaminated (e.g., by efforts to "get officers' stories straight") …" (pg. 56, 2003 PARC Report)

From the following page: "Police officers should be treated in the same fashion as similarly-traumatized civilians, such as those who have been the victims of violent crime. As a general rule, homicide investigators interview civilians involved in, or witnessing, a shooting or in-custody death incident as soon as possible, regardless of their emotional state. Often, these civilians are taken from the scene of an incident to PPB headquarters and persuaded to stay — often for many hours — until Homicide has an opportunity to fully

interview them." Badges do not grant special rights. 'Community policing' will remain an illusion for as long as the City maintains tiered status in evidence acquisition.

Fourteen years ago, PARC gave Council recommendations 4.3, 4.4 & 4.5 (pg. 60). They found no other major police agency "exhibiting this reluctance to interview officers promptly after an officer-involved shooting or in-custody death incident" and pointed specifically to Phoenix PD practices. All those officers "regardless of whether they provided a statement to Homicide, are ordered to submit to a full, tape-recorded interview by IA investigators before being relieved from their work shift. Because compelled statements (and their fruits) are inadmissible in criminal proceedings against the officer, IA does not share these taped statements (or their fruits) with the criminal investigators (Homicide) or the DA's office. Instead, the officer's compelled interview with IA is used exclusively for the Department's administrative and tactical review." Council never introduced lessons learned from Phoenix. The body remained steadfastly incurious about best practices to discern deception. Portland Copwatch records more than sixty police shootings in the interim. More than thirty use-of-force incidents resulted in lethal outcome for constituents.

Subsequent PARC reports reiterate cautions, against Council's practice of allowing PPB to forever exonerate officers by flawed self-investigation. See Recommendation 2006.5 (pg. 63 of PARC's 2006 Report). "PPB policy should require that IA, as part of its administrative investigation of deadly force incidents, interview the involved officers, unless Homicide's investigation has covered all appropriate issues relating to policy, training, and tactics." This proposal was to address PARC findings that "IA allowed PPA to play an active role — in some respects usurping management's role —" during officer interviews. "It was apparent that officers had influenced each other greatly. Similar phrases, descriptions and conclusions extended throughout their interviews." (pg. 61) I find duplicative phrasing in reports made during the cover-up of the Keaton Otis lynching four years later. I do not have it to hand for this communication, but investigators external to PPB recently determined officers in use-of-force interviews are so thoroughly coached, and then offered sufficiently leading questions, that it's impossible to tell what belief officers held; or whether they were merely affirming a PPB interrogator's belief.

Recommendation 2008.8 (pg. 71 of PARC's 2009 Report) arose in attempt to resolve "ongoing concerns that IA is relying too much on the Homicide investigation to get at the facts. The factual information needed by Homicide and IA is not congruent. Although duplication of effort is undesirable, it is possible to conduct parallel IA and Homicide investigations and to share results both ways, with the notable exception of testimony from the shooter or others which raises Fifth Amendment issues." Council – studiously inactive – declined to resolve those issues; preferring in the interim to twice bargain for cops' 48-hour waiting period.

The lead DoJ Trial Attorney in 2014 stated the Federally mandated Community Oversight Advisory Board (COAB) "came about specifically from a suggestion by one of the community members here today from Hardesty Consulting," when it was actually a work product of both partners. (pg. 37, Oral Testimony, Federal Fairness Hearing, USA v City of Portland) City obstructionists never funded COAB to convene Town Halls as envisioned, where subject matter experts could counter the Woody Allen script and advise on pathways to implementation of SA 124; thereby eliminating killer cops' story-concocting 'waiting period' … and deliver equal application of law.

All avenues of civic participation, relating to the City's plea deal obligations, are now closed. Status Conferences in Federal, judicial oversight; mandated COAB convenings; and cops' Police Community Relations Committee: all have been rendered ineffective by Council and PPB collusion in obstructionism. The City was, in October 2016, declared by the DoJ, my own written testimony, and by broader community, to be formally 'non-compliant' with community engagement provisions of their plea deal. DoJ investigators noted that, in April 2016, "COAB voted to recommend the City end the '48-hour rule' for officers who are involved in a deadly use of force. And the COAB drafted a well-reasoned paper supporting this recommendation." (pg. 123, DoJ 2016 Annual Status Conference Report) Never did Council entertain COAB Recommendation 042816-1, let alone

hold public hearings on the matter. It continued flaunting community engagement protocol, bargaining with police in camera. For all we know, the DA was present … offering plan to short circuit intended fact-finding.

One of the signal failures of DoJ investigation into Portland policing is that it confined itself jurisdictionally. (Mental health remedies are delivered by the County, for instance.) I realize the 2014 Federal plea deal cannot compel our County DA to do anything. His March opinion – that prompt, after-action report by law enforcement confederates can only result in their immunity – actually helps break the exoneration nexus. I propose a community engagement process be adopted, to attain multi-jurisdictional remedy. I'd not be surprised if public participation inspires solution along the lines of an institutionally independent agency, purpose-built to bring criminal prosecutions and terminate The City of Portland's history of illegal use of force. It seems quite likely that – in leapfrogging the DA's intransigence – The People will need to partner with Oregon's Attorney General, and perhaps the state legislature.

In addition to Portland Copwatch and a full range of community partners constituting the Albina Ministerial Alliance Coalition for Police Reform, credible resources exist within our community to formulate a work-around to the DA's unwillingness to incorporate prompt witness testimony by killer cops. I recommend COAB be fully staffed and funded. That they be specifically tasked with connecting justice advocates to subject matter experts, and return proposals to a City Charter Review Committee for adoption.

Ultimately, it is The People's responsibility to insure that the Constitution is in force. You should know that more responsive local authorities have isolated civilian complaint from policing. I believe Newark, NJ dedicated a building for safe-space intake and to house insulated investigators. Local governments are establishing civilian authority over policing; granting subpoena power to community-based agencies outside traditional law-enforcement collusion (as between DAs and local police). Citizen-anchored boards have been granted authority to impose discipline on officers who do not comply with investigation. Unlike provincial Portland, these municipalities have applied the American innovation of checks and balances to illegal use of force. Continued reliance on suppression of public involvement is unlikely to lead Council from its 'credibility problem.' Of swapping the 48-hour rule for a "de facto 40-day rule" (pg. 4, Severe memo) that is, technically, now imagined as an open-ended 'waiting period,' subject to the Medical Examiner and DA's discretion.

Should Council wish to emerge from its history of inaction, followed by obstruction, and form a task force to address multijurisdictional failings, I recommend JoAnn Hardesty help design it. She offered Senate Bill 779 to the Oregon legislature in 2013. Anticipating the DA's cronyism with local policing, she advocated law requiring the State Attorney General to appoint an attorney from outside the suspect jurisdiction to lead investigation when a peace officer uses deadly physical force. A former member of the Oregon House Judiciary Committee, with sustained and firm commitment to equal application of the law, she has capacity to pierce complexity that's historically been thrown up around this issue.

One final note: following OIR's 2016 report, Auditor Caballero proposed to open competitive bidding for obtaining professional perspective on local police homicides. As with search for a PPB Chief from beyond our deficient police culture, I suggest one selection criteria be "Demonstrated history of deconstructing police self-exoneration schemes."

Best,

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n.b. I created 'Filed Away,' an archive to help COAB new-member orientation. It offers links to PARC and OIR reports. And more.