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**Subject:** COAB Recommendations on Directive 1010.10

**Date:** August 14, 2015 at 8:14 AM

**To:** Geissler, Jonas (CRT) jonas.geissler@usdoj.gov, Brown, Adrian (USAEO) Adrian.Brown@usdoj.gov, Buehler, Brian (CRT) Brian.Buehler@usdoj.gov

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DR

Jonas, Adrien, and Brian,

As you know, we created a process by which the COAB would provide feedback on key policies and other matters relevant to the Settlement Agreement. We asked the Data Systems, Use of Force, and Compliance subcommittee (DSUFCS) to review directives 416.00 and 1010.10.

The Use of Force Working group of the DSUFCS submitted recommendations on 1010.10. Both the DSUFCS and the Executive committee of the COAB had previously reviewed and approved these recommendations. On 9.13.15, the full COAB voted to approve the attached recommendations regarding 1010.10.

The COCL will not commend on these recommendations at this time, but will simply forward them to you. As you know, some of the issues are complex and we encourage you to listen to the discussion at last night meeting (or receive a debrief from Adrian). Also, the COCL has already submitted written comments to the United States on 1010.10 and has participated in a conference call with you on this matter.

If you need additional thoughts on the issues of trauma, human memory and recall, stress or organizational behavior, I would be happy to offer my thoughts as a psychologist and police researcher. On matters of criminal law and criminal procedure, we trust that the United States has more than enough expertise.

Dennis Rosenbaum  
Amy Watson  
Kathleen Saadat  
COCL



7/19 Memo re: proposed Directives 416.00 and 1010.10  
From: Use of Force Work Group (Tom Steenson, Rochelle Silver and Philip Wolfe)  
To: DSUFCS

416.00, Post Officer Involved Deadly Force/Temporary Altered Duty

No recommendations.

1010.10, Post Deadly Force Procedures

1. Independent, outside investigations:

Recommendation:

A well-trained law enforcement agency other than the PPB should conduct criminal investigations and the Independent Police Review Division (“IPR”) should conduct the administrative (internal) investigations of in-custody deaths and the use of deadly force by PPB officers.

Reasons for proposed recommendation:

Currently, only the PPB’s detectives usually conduct the criminal investigation<sup>1</sup> and only PPB Internal Affairs Division (“IAD”) investigators conduct the administrative (internal) investigations of in-custody deaths and the use of deadly force by PPB members.<sup>2</sup> This recommendation is consistent with one of Portland Copwatch's recent comments and would ensure thorough, impartial, and timely investigations. See attached summary of Portland Copwatch’s comments. The recommendation would also address the long-standing concern of the community that the PPB's own investigations are biased and therefore never result in criminal charges or discipline of the PPB members involved with the in-custody deaths or use of deadly force. See also, Recommendation No. 2 in Section 3, below, along with the supporting reasons therein.

This recommendation is supported by a very broad group of community members, both groups and individuals, created by a March 2010 enabling ordinance of the Portland City Council

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<sup>1</sup> According to Portland Copwatch, sometimes the East County Major Crimes team is called in to help, but that has been criticized by outside consultants because the members of that team do not receive enough training to do a good job.

<sup>2</sup> The term “administrative” investigation is used here to draw a distinction from the criminal investigation which would seek to determine if a crime has been committed. An administrative investigation would, for example, evaluate whether the officer acted in a manner that is consistent with PPB policy and training or evaluate whether a review of policy or training practices is warranted.

that established the Stakeholder Committee.<sup>3</sup> In the City of Portland, Oregon Police Oversight Stakeholder Committee’s Final Report, dated September 21, 2010, on page 5, one of the recommendation states:

“B. Ensure that IPR investigations include specified more serious complaints (Ballot survey item 3). When IPR conducts administrative\* investigations they should be of use-of force complaints, particularly those including shootings, deaths in custody, and physical injury requiring hospitalization. IPR should monitor any associated criminal investigation as well. IPR should conduct other investigations involving allegations of racial profiling, illegal searches, conflicts of interest, or other “high emotion in the community” issues. (Background: This recommendation is intended to be consistent with the findings of the Luna-Firebaugh report which includes various statements in support of IPR using its investigative authority in particular cases. For example, page 12 of the report indicates, ‘The Office of Independent Police Review should exercise their authority under the ordinance to conduct independent investigations where the complaint is one of public import...’)<sup>4,5</sup>

Another recommendation of the Stakeholder Committee, on pages 5-6, states:

“C. Ensure that IPR has, and exercises, the power to conduct or participate in investigations (from time zero) of specified serious incidents (Ballot survey item 4), including police shootings, deaths in custody, and other serious injury incidents consistent with the intent of the recommendations of the PARC report on the subject. (Background: Chapter 4 of the August 2003 PARC report<sup>4</sup> recommends that “The PPB should replace its Homicide-only investigative model with one that takes a multidisciplinary approach to deadly force and in-custody death cases. We

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<sup>3</sup> “A stakeholder committee consisting of one member each from the Albina Ministerial Alliance, the IPR Citizen Review Committee, Oregon Action, the Portland Police Bureau, the Human Rights Commission, the Office of Independent Police Review, the National Alliance on Mental Illness, the National Lawyers Guild, the League of Women Voters, ACLU of Oregon, Copwatch, the Office of the Commissioner in Charge of Police, one representative from the Latino Network Center for Intercultural Organizing and one Native American representative, the City Attorney’s Office, and a representative of each Council member’s office shall convene to recommend additional improvements to the City’s oversight of the Portland Police Bureau. Grant Commissioner Leonard the administrative authority to make sure that the community is well represented as a whole, including sexual minorities.”

<sup>4</sup> Ballot recommendation. Of those who participated in the voting, 16 voted in favor, 1 opposed, and 1 abstained. Voting in favor: A.M.A. Coalition, ACLU of Oregon, Basic Rights Oregon, Jo Ann Bowman, TJ Browning, Dorothy Elmore, (I’m) Everyday People, James Kahan, League of Women Voters of Portland, NAMI Multnomah, Native American Youth and Family, Oregon Action, Portland Copwatch, Portland National Lawyers Guild, Sisters Of The Road, Damon Isiah Turner. Voters who opposed: Michael Bigham. Voters who abstained: Pat Walsh.

<sup>5</sup> This recommendation by the Stakeholder Committee was agreed with by the Portland City Auditor LaVonne Griffin-Valade. See November 8, 2010 memorandum responding to Final Report, attached to email distributing this memorandum.

believe either the IA Overlay model as enhanced by the LASD, or the enhanced Specialist Team model used in Washington, D.C., would work well in Portland.” The approaches discussed are designed to accomplish the goal of more timely investigation without unnecessary conflicts during any initial time period when both criminal and administrative investigations are being conducted.)”<sup>6, 7</sup>

## 2. Purpose of investigations:

Recommendation:

1010.10, Definitions, No. 3, should be changed to state that the responsibility of PPB members to assist in investigations of in-custody deaths and the use of deadly force by PPB members is for the purpose of determining: (a) whether the member's actions were justified under the criminal law, (b) whether the member's action were justified under PPB policy, and (c) to identify any PPB training deficiencies.

Reasons for proposed recommendation:

This recommendation is consistent with one of Portland Copwatch's comments and would clarify the proposed directive which is not clear about the purpose of the investigations.

## 3. Compelled statements to the Independent Police Review Division within 48-hours of incident:

Recommendation No. 1:

Eliminate the "48-hour" rule, located in the Collective Bargaining Agreement ("CBA") between the Portland Police Association (“PPA”) and the City of Portland which allows an officer to receive two days advance notice before the officer is required to participate in interviews or submit written reports.

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<sup>6</sup> Ballot recommendation. Of those who participated in the voting, 17 voted in favor, none opposed, and 1 chose not to vote. Voting in favor: A.M.A. Coalition, ACLU of Oregon, Basic Rights Oregon, Michael Bigham, Jo Ann Bowman, Dorothy Elmore, (I’m) Everyday People, James Kahan, League of Women Voters of Portland, NAMI Multnomah, Native American Youth and Family, Oregon Action, Portland Copwatch, Portland National Lawyers Guild, Sisters Of The Road, Damon Isiah Turner, Pat Walsh. Voters who chose not to vote: TJ Browning.

<sup>7</sup> This recommendation by the Stakeholder Committee was agreed with by the Portland City Auditor LaVonne Griffin-Valade. See November 8, 2010 memorandum.

Recommendation No. 2:

Amend the CBA and the Portland City Code regarding the Independent Police Review Division ("IPR") to grant the IPR the authority to compel officer testimony, including investigations into in-custody deaths, the use of deadly force, and the use of force resulting in injury to a citizen.

Reasons for recommendations:

The Settlement Agreement between the DOJ and the City of Portland provides:

“124. Within 90 days of the Effective Date, the City and PPB shall review its protocols for compelled statements to PSD and revise as appropriate so that it complies with applicable law and current professional standards, pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967). The City will submit the revised protocol to DOJ for review and approval. Within 45 days of obtaining DOJ’s approval, PPB shall ensure that all officers are advised on the revised protocol.”

A police officer’s constitutional right against self-incrimination is protected in certain situations, as explained by the Supreme Court in *Garrity v. New Jersey*. Under *Garrity*, an incriminating statement made by an officer to an internal affairs or IPR investigator is inadmissible against the officer in a criminal trial if the officer invoked the right to remain silent and was compelled to make the statement under the threat of job termination.” *Id.* at 500.

“The protections provided by *Garrity* are substantial -- as a former Law Professor from Cornell Law School and current Chief of the Criminal Division of the States Attorney’s Office in the Northern District of New York put it: ‘courts place more stringent restrictions on prosecutors’ use of compelled statements that internal affairs investigators take from police officers in noncustodial, noncoercive settings than on their use of confessions that police extract from in-custody suspects by use of illegal physical force or psychological coercion.’” For this reason, it is important that *Garrity* warnings are administered with care and limitation. The Department of Justice recommends administering *Garrity* warnings only when necessary -- not when seeking routine police reports, and not in every situation where an officer is interviewed concerning his or her conduct. Rather, *Garrity*'s protection applies only when an officer reasonably believes that a Truthful statement will be self-incriminating in a criminal prosecution and he faces the threat of termination for refusing to answer.”

See attached Dec. 6, 2013 National Lawyers Guild Portland, Oregon Chapter letter to Mayor of Portland.

Most relevant to the issues raised by Paragraph 124 the Settlement Agreement, proposed Directive 1010.10, provides:

"3.1.1. Members will immediately notify the on-scene supervisor and advise them of the member's role in the incident (e.g.. witness member, involved members, assisted at the scene), as soon as it is safe to do so.

3.1.2. This notification shall be to identify those members involved. This notification is intended to identify those members which detectives must attempt to interview in conjunction with their investigation of the incident.

3.1.3. This notification is not intended to compel any statements or the production of any evidence by any involved member.

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3.2.6. The involved member will be asked, but not required, to provide a voluntary interview at the scene to discuss the incident with detectives in order to ensure the prompt and accurate processing of the scene."

The CBA addresses the issue of "compelled statements" and provides:

"61.2.1 Advance Notice. Prior to being interviewed regarding an IAD or EEO investigation for any reason which could lead to disciplinary action, an officer shall be:

61.2.1.1 Informed of the nature of the investigation and whether the officer is a witness or a suspect, if and when known; informed of other information necessary to reasonably apprise the officer of the nature of the allegations of the complaint. Such information shall be provided in a reasonable period of time following its receipt by the City.

61.2.1.2 Afforded an opportunity and facilities to contact and consult privately with an attorney of the officer's choosing and/or a representative of the Association.

61.2.1.3 Whenever delay in conducting the interview will not jeopardize the successful accomplishment of the investigation or when criminal culpability is not at issue, advance notice shall be given the officer not less than forty-eight (48) hours before the initial interview commences or written reports are required from the officer. The advance notice shall include whether the officer is a witness or a suspect, the location, date and time of the incident, the complainant's name, and the nature of the allegation against the officer."

The Portland City Code, ch. 3.21.120(C)(2)(b) ("City Code") provides in most relevant part:

"IPR investigations shall be conducted in conformance with legal and collective bargaining provisions."

The Stakeholder Committee made a recommendation on page 6 of its September 2010 Final Report as follows:

“D. Ensure that IPR has the authority to compel officer testimony and directly interview police officers in administrative investigations (Ballot survey item 6).”<sup>8,9</sup>

On December 6, 2013, the National Lawyers Guild ("NLG") with the endorsement of the League of Women Voters of Portland wrote Portland Mayor Hales and sought the necessary changes under the current City Code and the CBA to allow officers to be compelled to give an interview or submit a written report to the IPR prior to 48-hours after the incident. Currently, the IPR has no authority to interview any officers, regardless of the nature of the alleged misconduct. See attached NLG letter (arguing that eliminating the 48-hour rule and amending the City Code, to allow the IPR to interview officers would not violate applicable labor laws or the constitutional rights of officers).

“Granting IPR authority to compel testimony and institute investigation sooner than 48 hours after an incident of alleged police misconduct would be a huge step toward truly independent police oversight. The current framework unnecessarily deprives IPR of the authority required to conduct adequate independent investigation.”

NLG letter, page 3.

As the Oregon Employment Relations Board has explained, the “purpose of [an internal investigatory interview] is to obtain the employee’s own candid, spontaneous, and unvarnished rendition of the events under investigation. The employee has no legitimate interest in providing anything else.” *AOEC v. State of Or. Dep’t of Corr.*, 14 PECBR 832, 870 (1993).

I and I know many community members believe the current "48-hour rule" is an impediment to getting to the truth during investigations of in-custody deaths and the use of deadly force and believe it should be eliminated and the IPR’s authority to investigate potential misconduct in those situations should be expanded.

4. Information to the media or public about the subjects of in-custody deaths or deadly force:

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<sup>8</sup> Ballot recommendation. Of those who participated in the voting, 16 voted in favor, 1 opposed, and 1 abstained. Voting in favor: A.M.A. Coalition, ACLU of Oregon, Michael Bigham, Jo Ann Bowman, TJ Browning, Dorothy Elmore, (I’m) Everyday People, James Kahan, League of Women Voters of Portland, NAMI Multnomah, Native American Youth and Family, Oregon Action, Portland Copwatch, Portland National Lawyers Guild, Sisters Of The Road, Damon Isiah Turner. Voters who opposed: Pat Walsh. Voters who abstained: Basic Rights Oregon.

<sup>9</sup> In response to this recommendation by the Stakeholder Committee, Portland City Auditor LaVonne Griffin-Valade stated: “I do not disagree, but this matter is up to Council and subject to collective bargaining.” See November 8, 2010 memorandum.

Recommendation:

The PPB should not release information to the media or the public about the criminal history, if there is one, of a subject of an in-custody death or deadly force.

Recommendation:

The PPB should not release to the media or the public the “mug shot,” if there is one, of a subject of an in-custody death or deadly force.

Reasons for proposed recommendations:

After in-custody deaths and the use of deadly force, the PPB's Public Information Officer almost always releases information to the media and the public about the subject's criminal history, if any, and the subject's “mug shot,” if there is one. See Directive 1010.10, Sections 1.1 and 1.7.5. As Portland Copwatch's comments state, such criminal history and a mug shot can bias people trying to evaluate the incident from an objective standpoint (especially if the involved officer(s) did not know the criminal history at the time of the incident). In addition, it seems fundamentally unfair to release such criminal history and a mug shot when there is no release of the involved officer(s)' history of violence or the use of deadly force with members of the public (especially if the history included prior discipline against the officer(s)). See Directive 1010.10, Sections 1.7.1.-1.7.4.