

# MADISON POLICE DEPARTMENT POLICY AND PROCEDURE REVIEW

SUPPLEMENT to December 2017  
Report to the City of Madison and the  
Madison Police Department Policy and  
Procedure Review Ad Hoc Committee

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# Introduction

In December 2017, OIR Group issued its report to the City of Madison and the Madison Police Department Policy and Procedure Review Ad Hoc Committee. On January 31, 2018, the Madison Police Department issued its response to the OIR Group Report. On February 15, 2018, the Ad Hoc Committee requested OIR Group's feedback or additional input regarding those issues raised in the Police Department's response.

This document is a response to the Ad Hoc Committee's request. It does not readdress all 146 recommendations, but focuses instead on certain recommendations as prompted by the formal reactions of the MPD, the Office of the City Attorney, or the Madison Police Officers' Association. Our supplemental responses comes in the form of providing requested information and/or sample materials,<sup>1</sup> seeking to correct potential misperceptions, or supplementing the bases for individual recommendations in the interest of clarification. In this supplemental report, OIR Group does not revisit recommendations about which there is no significant disagreement. Should members of the Ad Hoc Committee have further questions, OIR Group also welcomes the opportunity to engage in further conversations about them.

## Providing Clarity on OIR Group Recommendations

RECOMMENDATION 2: MPD should continue its active role in collaborative programs that address systemic inequity, like the "Unpaid Ticket Resolution Days," and set internal goals for accomplishing such events each year.

In its response, MPD recognized that the "Unpaid Ticket Resolution Days" was only one example of several programs that the Department had initiated in efforts to reduce systemic disparities. MPD also echoed OIR Group's noted concern that replicating that

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<sup>1</sup> While we have provided sample materials when requested by MPD, we offer them as examples of other approaches rather than a specific blueprint for the MPD version. To some extent, daily activity logs, performance evaluations, and related documents should be "home grown" to reflect the particular needs and interests of MPD and its community. We also acknowledge that our Recommendations in these areas, if implemented, will place the Department at a higher level than most similarly situated police agencies. Nonetheless, we see such accomplishments as both readily attainable and consistent with MPD's aspirations.

particular program should be done with “caution.” The response of the City Attorney’s Office, however, focuses entirely on whether the Ticket Resolution Days were a “success,” and interprets OIR Group’s recommendation to suggest that such an event be held annually or on a regular basis.<sup>2</sup> To be clear, and as set out in the report, OIR Group’s recommendation is that MPD continue its active role in collaborative programs that address systemic inequity “like” Unpaid Ticket Days such as:

- Responding to President Obama’s Task Force Recommendations
- Workplace cultural exchanges
- MPD taking its own photographs of individuals cited for minor offenses
- Developing a Spanish language enhancement of the second notice paperwork for parking citations
- Municipal Court Diversion program
- Urging business owners to forego civil remedies for retail theft

RECOMMENDATION 5: Should future presentations by Judgment Under the Radar (or any other group) touching on bias be met with strongly negative reactions, MPD leadership should assess the underpinnings of the behavior.

We appreciate MPD’s response that it seeks input/feedback on all training and that it closely examines any training that receives negative feedback or causes a negative reaction. While these aspirational goals are important to state, MPD’s response does not indicate that the feedback from the training specifically referred to was identified, its underpinnings were assessed, or whether remedial action was taken. Our hope and the point of the recommendation is that the aspirational intent of MPD’s response be specifically undertaken whenever there is negative feedback on training.

RECOMMENDATION 7: The CORE Team should take advantage of its centralized role in sponsoring and monitoring MPD outreach, and should work to provide rigorous analysis of individual initiatives as to their relative impact and effectiveness.

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<sup>2</sup> In its response, the City Attorney complains that OIR Group never heard its Office’s concerns about the advisability of continuing the Unpaid Ticket Days. We note in response that we were already aware of those concerns from other sources, respected and considered those concerns, and did not think of the issue as a cornerstone of our recommendation.

We agree with MPD that analysis of the effectiveness of its community policing efforts poses a challenge and police departments nationally struggle with how to quantify and evaluate community outreach efforts. However, simply because such work poses a challenge does not mean that efforts should not be undertaken to meet the challenge. As we state elsewhere in our report, one relatively straightforward way to help gauge success that does not involve complex social science analysis is to solicit feedback from the community on the programs by targeted surveys. Certainly the perception of Madison's communities is a critical component in evaluating the relative success of those programs.

Regarding MPD's request of OIR Group for further technical assistance on measuring community policing efforts, we urge as a first step that the Department consult with Professor Herman Goldstein, a pioneer of community policing, on ways to devise effective metrics. We also refer the Department to Professor Geoffrey P. Alpert's article "Effective Community Policing Performance Measures" and recommend talking with him about his subsequent work identifying community policing performance measures.

**RECOMMENDATION 13:** MPD should conduct town halls and listening sessions after all critical incidents, including officer-involved shootings as follows:

- In the first few days subsequent to an incident, MPD should be empathetic to any resulting death or serious injury, explain the investigative and review process, and listen to any expressions of upset or concern.
- After the conclusion of the investigation, MPD should provide a public debriefing of the incident, highlighting any performance issues that were identified for improvement and reform.

MPD's response focuses on the prominence of an outside agency leading the criminal investigation and how that dynamic prevents it from readily accessing all information in the investigation. MPD also indicates that sharing details of the incident at an early stage can adversely impact the integrity of the criminal investigation. OIR Group's recommendation was crafted in full recognition of these realities, which is why the town halls should be convened to:

- Showing empathy to the injured or the decedent's family and friends and the residents of the neighborhood in which the incident occurred;
- Explaining the investigative and review process; and
- **Listening** to any upset, frustration, or concern.

MPD suggests that because it cannot release “facts” about the incident, it will likely create more community frustration or questions. That has not been our experience, nor the experience of other police agencies that regularly convene town halls precisely as set out in our recommendation. Their public recognizes that facts are being developed and that it may take some time before they are available for release. Moreover, creating an opportunity for communities to be heard provides a way for loss, frustration, and concern to be publicly aired, especially if police and other City officials are there to empathize and hear from them in a non-challenging forum.

The United States Department of Justice Community Relations Service has for years effectively brokered such listening sessions when a controversial police event, such as an officer-involved shooting has occurred. Other police agencies, such as the Anaheim Police Department, have taken that page from CRS’ operating procedures and, as part of its officer-involved shooting protocol, routinely convene community based listening sessions after every deadly force incident resulting in injury or death, to the appreciation of its public.

MPD iterates in its response that at the end of the internal investigation it will continue to release the “results” and “evaluate” whether it is appropriate to discuss those results at a public meeting. No rationale is provided as to why such a meeting would not be appropriate or helpful to advance public dialogue and understanding. In fact, agencies with independent police auditors have those individuals report publicly the results of any internal investigation. If MPD remains reluctant to do so, the dialogue with the public about those results perhaps could and should become the responsibility of the independent police auditor.

**RECOMMENDATION 14:** MPD should seek to engage with its community regarding controversial events, including officer conduct that does not reflect its core values or best performance.

In its response, MPD relies heavily on the disciplinary summaries it publishes regularly as evidence of its engagement with the community on this topic. While we credit MPD in our report for publishing such information, that is not the type of “engagement” that forms the basis for this recommendation. As explained in the report, when there are allegations of misconduct that reach the public consciousness, MPD should not be resistant to speak publicly about what happened, what the investigation revealed, and what remedial action was taken. The legal challenges should not serve as an impediment to discussing what is already being published and/or what would be available through a public records act request. It is only by readily and proactively discussing and

acknowledging episodes in which MPD performance is not at its best that there can be complete trust in the Department's accountability systems.

RECOMMENDATION 16: MPD should devise additional ways to solicit and encourage feedback from all of its communities regarding the performance of the Department.

We are pleased that MPD is in full agreement with this recommendation. In response to MPD's request to provide examples of agencies that do this, MPD itself is aware of the work being done by the Chicago Police Department. MPD could also look to former Chief Couper who developed a protocol whereby people who had been arrested would be contacted by supervisors within a few days of release to discuss their experience. In addition, our collaborator Professor Seth Stoughton has considered alternative ways for police agencies to obtain feedback from their communities and would prove a helpful resource in that regard.

RECOMMENDATION 17: MPD should devise a feedback loop for its criminal justice partners regarding the performance of its officers and the Department as a whole including the District Attorney, Sheriff, Judges, Public Defenders, Juvenile Justice Administrators, Probation Officers, and Social Workers.

MPD responds that implementing this recommendation by formalizing a feedback process would be a challenging effort requiring participation by outside agencies that are generally overworked. This reason could apply to seeking feedback from any individual or group. We disagree with MPD that any effort in this regard would be challenging; a simple email to all criminal justice partners asking a few questions seeking feedback on particular officers or MPD as a whole could readily be sent out and the criminal justice partners could decide whether they were too busy and to what degree to respond. If the requests for feedback result in a paucity of results, at least MPD would have attempted to obtain the information and could then determine whether alternative methods of seeking input might be considered.

RECOMMENDATION 24: MPD should implement the Special Community/Police Task Force Recommendation to conduct random reviews of footage to evaluate officer performance.

MPD responds by supporting this recommendation and requests OIR Group to provide examples of agencies engaging in this practice. Unfortunately, MPD is not alone in underutilizing this source of video evidence to review officer performance. However, the concept is rather straightforward and would simply require random reviews of video

footage from the in-car videos installed in MPD's patrol cars. The Palo Alto Police Department has conducted audits of in-car video and may be a source of reference for MPD.

**RECOMMENDATION 29:** Consistent with this Report, MPD should develop formal mechanisms whereby a broader group of community stakeholders are brought into the selection process for special assignment officers.

**RECOMMENDATION 50:** In selecting EROs, MPD should broaden its selection process to include faculty, juvenile justice partners, and student leaders.

While MPD expresses support for the concept, it cites two issues as challenges to adoption of the recommendations. First, it raises concerns about the efficacy of the community to meaningfully participate in selection of some specialized positions such as traffic crash specialists or criminal intelligence officers. Second, it expresses concerns that the public may not be interested in participating in the process.

To clarify, as set out in the report, the recommendation is intended to focus on community participation in the selection process of specialized officers dedicated to community policing concepts such as Community Policing Teams, Neighborhood Officers, Educational Resource Officers, Mental Health Officers and the CORE Team. The recommendation does not seek the same degree of community involvement in selection of traffic crash specialists or criminal intelligence officers. Second, if MPD cannot identify a member of the Madison public who is able and interested in participating in the process, it is indicative of a greater need to cultivate interest among its community to be involved in those processes. As we noted in our report, one possible resource that other police agencies have successfully used are members of the Police Review Board that we recommend forming or further strengthening as part of our oversight discussion.

While the City Attorney indicates that greater community involvement in these processes may be subject to collective bargaining, it should also be noted that the Police Association's response indicates it has "a long history of agreement with the idea behind this recommendation."

**RECOMMENDATION 30:** Consistent with this Report, MPD should routinely seek input from community stakeholders and professionals regarding the performance of officers assigned to specialized units.



RECOMMENDATION 41: MPD should regularly seek input from City stakeholders and representatives of the community in evaluating the performance of its Neighborhood Officers on at least an annual basis.

RECOMMENDATION 51: MPD should regularly seek input from school stakeholders and juvenile justice partners in evaluating the performance of its ERO's on at least an annual basis.

While MPD indicates it is already accepting feedback regarding performance of its specialized unit officers, the recommendation intends that MPD formally and proactively “solicit” feedback regarding the performance of officers assigned to specialized units. Again, the recommendation is focused on those specialized officers performing community policing functions.

MPD suggests further barriers to implementation of this recommendation. First, it expresses concern that if an officer receives no feedback, MPD might evaluate adversely. However, our recommendation neither suggests nor expects such a consequence.

Second, MPD expresses concern that such an initiative would require contacting “thousands of people” in order to solicit feedback. We disagree that such solicitation would be as onerous as MPD projects. For example, in the school context, such solicitation could be a simple email to the school community and juvenile justice agencies seeking input on the performance of the Educational Resource Officer at annual intervals: “How do you think our Education Resource Officer is doing? Are there suggestions you might have to improve our program?” We encourage the Department to focus on devising various practical and straightforward methodologies to accomplish feedback, and defer concerns about the level of participation or anticipated results.

RECOMMENDATION 31: With input from the community, each specialized MPD unit that has not already done so should devise a mission statement setting out the core objectives of the unit.

RECOMMENDATION 32: With community and City stakeholder input, MPD should devise a media release policy setting out objective parameters regarding when information about arrests of persons will be proactively publicly released.

We are pleased to see that MPD's response indicates an agreement to implement the substance of these recommendations. However, the response does not specify whether those tasks will be accomplished with “community input.” For the reasons articulated in

our report, we reiterate the importance of engaging the community as mission statements and media release policy are devised and reformed.

RECOMMENDATION 33: In publishing information about “shots fired” calls, MPD should include whether the call led to an arrest, revealed corroborating information, or had no further corroboration beyond the initial call.

In its response, MPD states that the report suggests that uncorroborated reports of shots fired have been included in data released by the Department and that such is not the case. However, in the Chief’s crime blog, uncorroborated reports have been included. For example the blog of September 25, 2017 reported the following:

14) SOUTH: Weapons Offense Shots Fired – 11:53 p.m. Officers responded to the 2100 block of Luann Lane for a report of shots fired. Officers checked the area and did not locate any evidence of shots fired.

We are pleased that MPD has provided additional guidance to officers on criteria for when an incident should qualify as a “shots fired” case and that it has been codified into a Standard Operating Procedure. We note that the SOP became effective on January 25, 2018, approximately a month after the issuance of our report.

RECOMMENDATION 34: MPD should consider resource neutral ways to supplement the staffing of their facilities so that they can be open for public access for longer hours.

We are pleased that MPD supports the concept of keeping their police facilities open for longer hours. MPD’s response did not respond to the report’s suggestion of using volunteers to accomplish this goal.

RECOMMENDATION 35: MPD should dialogue with the City and the University of Wisconsin Law School to identify ways that law students can be reintegrated into the Department’s learning and problem-solving functions.

MPD’s response discusses its engagement with University of Wisconsin undergraduates, notes that members of its force are graduates of the law school, and details historical efforts involving Professor Scott but does not directly address the thrust of the recommendation to renew engagement with current University of Wisconsin law students.

RECOMMENDATION 36: In selecting neighborhood officers, MPD should broaden its selection process to include City stakeholders and representatives of the community.

MPD's response to this recommendation is that it already does include "external stakeholders" in the selection process of neighborhood officers and continues its commitment to doing so. To be more specific regarding the "stakeholders" who should be solicited for participation, OIR Group would expect that, at a minimum, alders representing the neighborhoods would be requested to participate or to designate an individual to participate in the process and any advocacy groups with a significant presence in the neighborhood should be likewise requested to participate.

RECOMMENDATION 38: MPD should have its Neighborhood Officers (and all specialized officers) prepare daily activity logs of their performance.

RECOMMENDATION 39: In order to be able to gain an evidenced-based understanding of patrol officers' problem-oriented policing activity, MPD should institute daily activity logs for patrol officers.

RECOMMENDATION 47: MPD should have the CPT officers prepare daily logs of their activity.

RECOMMENDATION 60: MPD should devise methods to fully document the daily activity of MHO's, in part to facilitate a larger internal and external discussion about whether those activities are necessarily or best handled by police officers.

MPD resists these recommendations as too burdensome, unnecessary, unprecedented, and unhelpful. It might be helpful to distill our rationale for the re-implementation of such logs:

1. MPD has long stated its desire that at least 50% of officers' time be engaged in non-traditional policing and has pushed this intention to City policy makers as a reason it needs to have a robust staffing commitment.
2. If MPD has an evidence-based way to prove through data and analysis that the majority of its officers are meeting or surpassing this goal, it should do so and publish that analysis to its public.
3. If MPD has an evidence-based way of distinguishing officers who are achieving this goal and those who are not, it should do so, establish remediation programs

for those who are not, and publishing that analysis (without identifying information) to its public.

4. If MPD cannot perform Tasks 2 and 3 (beyond anecdotal acquisition of information) it should consider the reinstatement of daily activity logs to accomplish this goal consistent with our recommendation.

MPD's complaint that it should not be burdened with capturing this activity because it is difficult should not be the orientation of an agency with a long history of accomplishing difficult tasks. In our view, if MPD truly believes it is critical that its officers spend much of their time engaged in community-based policing, it is similarly critical that it devises data collection methods to learn whether its officers are doing so and remediate those that fall below departmental expectations. A daily log is one way of achieving this critical objective.<sup>3</sup>

While the Police Association's response echoes some of the same concerns about the logs taking time away from officers' other responsibilities, it recognizes that supervision alone "doesn't provide the measurable data that is being sought."

MPD indicates in its response that it is aware of no similarly situated police agencies that have its officers' complete daily activity logs. We are aware of a number of police agencies that do so. We have attached one example of a daily log and supporting information provided to us by the Burbank Police Department, a somewhat smaller agency than MPD that has all of the work burdens and expectations that any modern police agency has. Burbank PD has indicated that the logs are helpful, not unduly burdensome, provide important data to its command staff, and are used to better know and guide what its officers are doing on a day-to-day basis.

In addition, more computer driven data collection companies are providing platforms tailored for law enforcement intended to capture all of the day-to-day operational data points of a police agency. One such company is Benchmark Analytics. According to the Chicago-based Company's literature, its system has the ability to map the spectrum of on-duty actions of officers to "paint a full picture of an officer's patterns, skills, and abilities." MPD and the Ad Hoc Committee may wish to further explore with this company its capabilities and ways it might assist in capturing this information.

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<sup>3</sup> In its response, MPD suggests that it might take eight minutes of an officer's day to complete such logs. In our view, for an officer to spend eight minutes documenting and reflecting on her/his activity during the shift has significant value and is not a wasted use of time.

RECOMMENDATION 40: MPD should develop evaluative metrics consistent with the stated mission of neighborhood officers and prepare at least annual performance evaluations based on those metrics.

In its response, MPD discusses annual reports of neighborhoods prepared by neighborhood officers. Those reports, while valuable for other purposes, are not responsive to the discussion in the report or the above recommendation. To be specific, the recommendation is intended for MPD to develop “metrics” regarding its expectations for a high-functioning neighborhood officer, and to provide those metrics to the officers. That way, each neighborhood officer would better understand what is expected of her/him and the fields of activity under which performance would be evaluated. In addition to the officers being informed of those expectations, the neighborhood would also be aware of them and could contribute ideas for further inclusion and refinement. These expectations are necessarily dependent on the particular interests and challenges of each Madison neighborhood; they should be “home grown” and created in consultation with the neighborhood.

RECOMMENDATION 45: With regard to field assignments MPD should find ways to take full advantage of officers identified as practicing problem-oriented policing, such as having them provide modeling opportunities, be involved in training community policing concepts and otherwise effectively export their policing strategies to other officers.

We fear that MPD may have missed the core point of this recommendation. During our public outreach, the Madison community spoke consistently and admirably about certain officers who had performed in the true sense of community policing as specialized officers (Educational Resource Officers, Neighborhood Officers, homeless liaisons) some of whom had achieved almost iconic status. However, when we learned about their current assignments, each had rotated out of those assignments and none had been subsequently called upon by MPD to serve as models for other officers and transfer their policing strategies. The recommendation is that MPD not lose the opportunity for learning and guidance that uniquely successful officers can provide.

RECOMMENDATION 46: MPD should evaluate the substantive work of its individual Community Policing Teams, and consider changing the name of the team(s) as needed to better reflect their work.

MPD asserts in its response that drug and traffic enforcement constitutes community policing. They do not. MPD's belief that they do suggests a fundamental misconception of community policing philosophy. The recommendation holds. The Department's Community Policing teams should be dedicated to "community policing" in the classic sense, or their names should be changed to reflect the work they are assigned to do.

RECOMMENDATION 56: The City should dialogue with the Police Officers' Association in order to amend the current contractual agreement so that ERO's (and other specialized officers who are focused on community policing such as Neighborhood Officers, Mental Health Officers, and Community Policing Teams) who have established effective working relationships in their specific assignments, as determined by input from Department supervisors, the officers themselves, and stakeholders at the respective campuses can remain beyond five years.

MPD asserts in its response that the "term limits" currently required by contract with its Police Association help ensure that more officers are provided the opportunity to serve in specialized officer community policing positions. In response, we reiterate that the importance of these officers' roles militates in favor of MPD being able to select and retain the best officers for these positions for the longest time it wishes. We note that MPD has full discretion to keep its officers at its Training Academy for as long as it desires since term limits do not apply to those positions, even though it is likely that other officers are clamoring for those assignments and the career advancement opportunities they obviously provide. To be clear, our recommendation is not intended to *require* MPD to keep individual officers in specialized unit assignments, but simply to remove barriers in the current union contract that hamstrings MPD from doing so in the appropriate circumstance.

While this change would be subject to collective bargaining and while the Police Association's response echoes some of the same concerns as MPD, it indicates that it is "open to continuing to dialogue with the Department on this issue."

RECOMMENDATION 59: MPD should consider promoting regular communication to the public about the activities of its Mental Health Team by, among other methods, including a sample narrative of the team's activities in the daily crime blog.

While MPD's response indicates support for providing additional information to its public about the activities of the Mental Health Team, it does not directly respond to the

recommendation that it include information about its activities in the Chief's daily crime blog.

RECOMMENDATION 64: MPD should amend its SOP on Mental Health Incidents/Crises by breaking it into separate policies that would address separate topics, and would specifically include the tactical principles the Department trains and expects its officers to employ in addressing situations involving individuals in mental health crisis.

MPD's response notes that breaking the SOP down seems unnecessary and counter to its objective of logically organizing its SOPs and addressing a wide variety of mental health issues in a single document, to facilitate officers' ease in finding the appropriate SOP. We appreciate the concern about organizational issues and the desire to group related policies together for officers' ease of reference, but nonetheless continue to find the SOP at issue to be somewhat confusing in its scope. Separate policies on the criteria and processes for Emergency Detentions, and the roles of Mental Health Officers and Mental Health Liaison Officers may make it easier for officers to more easily find the appropriate SOP. Nonetheless, we do not find the Department's approach unreasonable or improper.

The SOP on Response to Persons with Altered State of Mind does address the tactical response issues we found lacking in the Mental Health Incidents/Crises SOP. Cross-referencing that SOP may be useful for officers and the public.

RECOMMENDATION 68: MPD should clarify its officer-involved critical incident SOP to ensure that, absent extraordinary circumstances, investigators should obtain a statement from involved and witness officers prior to release from shift.

MPD responds that changing its protocols so that a statement is taken from its officers on the date of the shooting would reduce public confidence in the way officer-involved shootings were investigated in Madison because it would have the unintended consequence of reducing or eliminating the ability to obtain voluntary statements from involved officers. However, MPD has no way to know whether its officers will decline to provide voluntary statements for this reason. As they do currently, officers will determine, based on a myriad of factors, whether to provide voluntary statements to criminal investigators two or three days later. In fact, when police agencies have moved to obtain compelled statements the date of the shooting, many officers have continued to provide voluntary statements as well.

MPD suggests that the most important investigation in an officer-involved shooting is the criminal investigation. The practical reality is that the high bar of proof needed by the prosecutor, and the national paucity of successful criminal prosecutions in these cases, suggest that the administrative process is as or more impactful in ensuring officer accountability and reducing the likelihood of further deadly force incidents. MPD and the City Attorney further opine that it is critical that investigative protocols be devised that will increase the likelihood that officers will voluntarily provide statements. However, an investigative protocol that is effective at obtaining timely and pure evidence must take precedence over distorting best investigative practices in an effort to persuade officers to provide voluntary statements. Including a waiting period to accommodate officers' interests and entice them to provide voluntary statements confuses investigative priorities.

MPD argues that the public safety statement provides some initial information about the incident shortly after the shooting event, inferring that the need to obtain additional information from the involved officer is lessened by this practice. As MPD knows, the public safety statement is not designed to obtain critical "state of mind" evidence from the officer but simply to learn the basic information necessary to stabilize the incident, such as the number and direction of rounds, and whether there are any outstanding suspects. This sparse information is intentionally kept brief, and is not inherently insightful into why the officer decided to use deadly force.

MPD argues that there is insufficient time to process other evidence to ready the investigator for an interview of the involved officer on the date of the shooting. This concern is belied by the hundreds of shootings we have reviewed where an interview has occurred on the date of the incident. In those cases, a detailed interview was conducted by investigators and helpful information has been obtained from the individual most knowledgeable about the incident. Moreover, those agencies have learned that if there remain additional questions for the involved officer as the evidence is further processed and analyzed, they can always conduct a supplemental interview of the officer.

MPD notes that one group of police psychologists affiliated with the International Association of Chiefs of Police has endorsed a 24-72 hour waiting period as helping the memory of involved officers. However, that position has not been endorsed by the larger organization nor is it the position of other professional policing groups such as the Police Executive Research Forum. In contrast, the arm of the United States Department of Justice that investigates "pattern and practice" Constitutional violations by police agencies has expressed concern about agencies who have endorsed a 48-hour waiting rule.



Though we recognize that there are a number of affiliated police groups and police unions who endorse the waiting rule and who point to memory studies as a reason for waiting, those studies fail to adequately consider the potential for contamination of recall during the waiting period during a high-profile event such as an officer-involved shooting. MPD also does not address the fact that in the officer-involved shooting context, the officer has a high likelihood of his or her memory being contaminated and impacted by exposure to outside stimuli. While the officer is waiting, information about the shooting, videos of the shooting, and debate about the shooting is swirling all around the officer from media sources, fellow officers, his or her legal representative, and a myriad of other sources. Police agencies who ensure that a “pure” statement of the officer is obtained the date of the incident prevent such contamination from occurring and that their investigation is free from that cloud. We have attached an article from our associate Dr. Samuel Walker, a respected academic scholar and the author of “Police Accountability” who presented before the Ad Hoc Committee on oversight, “Police Union Contract ‘Waiting Periods’ for Misconduct Investigations Not Supported by Scientific Evidence” that further discusses this issue.

In support of MPD’s resistance to this recommendation, the City Attorney misstates law when he says that it would be a violation of an officer’s Constitutional rights to compel a statement after a critical incident. If the City Attorney were correct, hundreds of agencies who do so would have been taken to account for these systemic Constitutional rights violations of its officers. The Supreme Court has clearly indicated that government agencies can require employees to provide statements; the only consequence is that any statement cannot be used as a basis for any criminal prosecution. And in the plethora of cases in which officers do not provide voluntary statements, prosecutors have been able to render opinions about whether those officers should be subject to criminal prosecution.

The City Attorney further states that the Department of Criminal Investigations determines the timing of officer statements, not MPD. The City Attorney is correct that DCI determines the timing of officer statements relating to the criminal investigation. But this does not extend to the administrative investigation. There is nothing in the DCI guidelines that speak to administrative investigations and how they should proceed.

The above discussion and our experience demonstrate that obtaining a pure statement from the involved officer on the date of the incident is the best practice with regard to officer-involved shootings and other critical incidents. But we differ most from MPD in their assessment that the loss of voluntary statements would undermine public confidence and community trust. On the contrary, in our experience what has roiled various communities are officer-involved shooting protocols where agencies allow officers a “waiting period” before attempting to get from them a statement of what happened, in

contrast with standard investigation techniques and with public expectations. It is telling that these “waiting” protocols have been uniformly supported by police associations, and opposed by those in support of police reform. To further our point, we have attached a news article “Complaints in Baltimore About Law Offering Protections for Officers”, April 30, 2015, New York Times, and an editorial “Portland Police’s 48 Hour Rule a Barrier to Accountability”, February 7, 2016, The Oregonian, where these sentiments have been expressed. MPD’s hesitations regarding public trust are not borne out by our experience in different jurisdictions, or our sense of the Madison community. We hope the Department will reconsider.

RECOMMENDATION 69: MPD should clarify its SOP on officer-involved deaths and other critical incidents to ensure that investigators obtain a statement from involved and witness officers prior to providing the officers opportunity to review any recording of the incident.

In its response, MPD expresses support and advances the sound investigative and evidentiary rationale for a process we endorse whereby an officer provides a pure statement, has an opportunity to review any video, and then can supplement the statement based on recollection refreshed by viewing the video. However, MPD expresses intent on keeping the “OICI Commander” exception that would allow an officer the opportunity to view the video upon the officer’s demand if he/she then agrees to provide a voluntary statement. Again, as with the officer waiting period, MPD values the importance of obtaining voluntary statements so highly that it is willing to discard sound investigative and evidentiary principles to entice an officer to provide them.<sup>4</sup> MPD has struck the wrong calculus in this regard. We urge the Department to reconsider the recommendation.

As for the City Attorney’s response, it misses the point of the recommendation. Our recommendation does not speak to directing or influencing DCI’s protocol for an officer-involved investigation. It is a recommendation designed to eliminate an exception to MPD’s current protocol that is apt to swallow the rule.

RECOMMENDATION 72: MPD should create guidelines within its officer-involved critical incident SOP to address the concerns of witnesses to the incident.

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<sup>4</sup> And there is nothing to prevent officers after having viewed a video to then tell investigators they have changed their mind and now decline to provide a voluntary statement.

In its response MPD indicates it has received no concerns regarding how witnesses to an officer-involved shooting have been handled and that there is sufficient guidance to how to handle witnesses in its stop and frisk SOP. In our review, we did hear from community stakeholders about how some of the witnesses were treated in at least one recent officer-involved shooting. Moreover, we are aware of other jurisdictions in which agencies have compounded community tensions after officer-involved shootings by transporting witnesses to the station without clear guidance on whether the witnesses are “voluntarily” agreeing to participate. Some of this upset has even transferred to the civil liability arena, resulting in liability to the jurisdiction for providing insufficient guidance to handling detectives and officers. Even if Fourth Amendment guidance is provided to MPD generally in another section of the SOP, there is no downside to incorporating those principles in the specialized context of a critical incident investigation, and therefore reiterate our support for this change.

RECOMMENDATION 73: MPD should automatically conduct an administrative investigation of all officer-involved shootings and other critical incidents separate from any criminal investigation, including, at a minimum, re-interviewing involved and witness officers.

We appreciate MPD’s receptivity to re-interviewing involved and witness officers relating to a critical incident if information about tactical decision making and other policy, training, or equipment issues that are not the focus of the criminal investigation. However, MPD still expresses reticence about devising a protocol where such an interview is undertaken in every case.

It is critical for an agency interested in learning and improving from a critical incident to value the collection of facts and insight, even regarding secondary concerns. In the hundreds of detective and administrative interviews we have reviewed, there has consistently been additional, relevant, and often critical information that emerges from the administrative interview. We again urge adoption of an SOP where an administrative interview of involved and witness officers is routine and automatic.

RECOMMENDATION 75: MPD should develop a robust review process after a critical incident such as an officer-involved shooting that examines the incident through the lenses of performance, training, supervision, equipment and accountability. The review process should consider pre-incident decision making and tactics, the use of force, and post-incident response, including the provision of medical care and communication with family members. The

review process should include the development of a corrective remedial plan designed to identify and address any issues identified.

**RECOMMENDATION 82:** On selected force incidents, MPD should convene a panel to roundtable the incident, to identify training, policy, supervision, and equipment issues, and to develop an appropriate after-action plan.

We are pleased that in its response MPD has expressed support for these recommendations. As we indicate in our report, anxiety about whether information developed during this process may be subject to litigants or the general public should not be used to defeat it or compromise its robustness and critical underpinnings. There are legal protections available when a law enforcement agency rigorously self-examines and uses that process to improve. And even if there were some public access and litigation concerns, those should of course take a back seat to any initiative that reduces the likelihood of further deadly force incidents and increases officer safety through critical self-scrutiny.

The response of the City Attorney that MPD is already doing all that we recommend is incongruous with the response of the Department, and not supported by the information reviewed by OIR Group.

**RECOMMENDATION 76:** After a civil judgment or significant settlement involving MPD activity, the Department and its attorneys should convene a meeting intended to holistically review the incident and any insight learned from the litigation process itself, and should devise a public corrective action plan that addresses any policy, performance, training, supervision, investigative, and equipment issues identified during the course of the litigation.

We are appreciative of MPD's support for this recommendation, but disappointed by the City Attorney's response. In our long history of reviewing adverse judgments and significant settlements, virtually all of them provide a forum for improving performance, training, guidance and the handling of the litigation itself. And of course, developing a remedial plan is not an admission of "fault or wrongdoing," but a sign that an organization can and wants to get better. In the same way that we urge MPD to be reflective and self-critical, we urge the Office of the City Attorney to adopt a similar posture, at least as to police-involved litigation.

The City Attorney states that the Office will not be convening a public meeting to discuss the litigation and cites all of the reasons it cannot be transparent, yet our recommendation

does not ask it to. Progressive City Attorney offices in other jurisdictions have found ways to honor their confidentiality duties but still be proactive in devising public corrective action plans that assist the law enforcement agency in its interest in improvement. We hope that the City Attorney will reconsider our recommendation in this light.

RECOMMENDATION 78: MPD should make clear through policy and training that an officer who witnesses another officer use force is required to report it and document his or her observations in a supplemental report.

In its response, and consistent with our observations, MPD indicates that sometimes officers who witness force document that observation. It also offers no objections to making this documentation a requirement or any rationale for not implementing this protocol. We urge the Department to implement this important gap in its current SOP.

RECOMMENDATION 79: MPD should amend its force reporting protocols so that, for certain categories of force, supervisors are required to conduct a separate investigation meeting basic investigative standards sufficient for a thorough and complete review of the incident and the events leading up to it.

In its response, MPD notes that whenever a person complains of the force used on him, an investigation is initiated. However, by relying so heavily on the complainant's initiative, MPD fails to recognize the internal value of conducting an investigation into the force incident. Moreover, there are many reasons why a person may or may not complain about the force; merely because no complaint is filed does not necessarily mean the force was appropriate or necessary. The only reason MPD gives for not conducting force investigations is one of resources; however, scores of progressive agencies recognize the importance of proactively conducting investigations whenever significant force is used. We urge MPD to find the resources so that it can join those agencies' ranks.

RECOMMENDATION 80: MPD should adopt policy requiring a supervisor to evaluate whether each use of force was within policy, as well as compliance with any other policies implicated such as the foot pursuit or de-escalation policies, with a supporting analytical narrative that also demonstrates a holistic review of all the circumstances surrounding the use of force.

Of all of the police agencies' force protocols we have reviewed, MPD's is the only one that does not require an initial recommendation or finding by the field supervisor as to whether any force used was within policy. MPD lags uncharacteristically in this regard and claims its current resource allotment prevents assigning its supervisors this responsibility. While MPD does indicate it is willing to "fine tune" this process, our position is that a more substantive change should be a priority.

RECOMMENDATION 81: In evaluating force incidents, MPD should go beyond a determination of whether the use of force met a Constitutional standard or was inconsistent with Department policy, to also identify any tactical or other performance issues, and determine whether additional remedial action – such as discipline, training, or debriefing – is appropriate.

MPD responds that the items that should be identified during the force review process are completed by the MPD use of force coordinator. As we indicate in our report, the addition of the use of force coordinator has significantly contributed to a more robust evaluation of force incidents. However, we nonetheless advocate more involvement by field supervisors in the process in identifying performance issues, and that most importantly, that MPD begin documenting and recording any such analysis by either the field supervisor and/or the use of force coordinator.

RECOMMENDATION 88: MPD should proactively seek input from City stakeholders and the public before completion and implementation of any new policies or changes to its existing policies.

MPD asserts that this recommendation; identical to the recommendation of President Obama's Task Force on 21<sup>st</sup> Century Policing would be cumbersome and delay needed updates. To suggest that community input is too cumbersome runs contrary to the Task Force's recognition that any community input should be solicited and valued by a police agency, especially with regard to the "rules" that govern its conduct. If time is of the essence, MPD could certainly deploy an interim policy (as it recently did with its backup policy) and then seek input from the community. To suggest, as MPD does, that many policy changes do not directly affect the community shows a disregard, or at least an underestimation, of the potential value of community input and of the reality of each policy's direct or indirect influence on the form of policing in Madison. The response also fails to recognize how "department philosophy" should incorporate "community philosophy" on how MPD should guide its officers. If an anticipated policy change does not affect the community, seemingly the community will not bother to weigh in. But our

position is that it should have the opportunity, rather than being preempted by the Department's approach to policy development.

RECOMMENDATION 89: MPD should modify its use of force policies to more clearly instruct officers on the duty to employ tactical alternatives to force, and to make clear the Department's expectation that officers follow tactical principles of officer safety.

In this recommendation we suggest that MPD include language in its SOP that instructs officers to "ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or unsafe actions and that it is often tactically superior to withdraw, take cover, or reposition." MPD responds that it already has adopted language that speaks to the "same concepts." We respectfully disagree. While the language recommended by the Common Council President's Work Group instructs officers that deadly force is a measure of last resort, it provides no express instruction to officers on avoiding placing themselves in harm's way; nor does it speak to the tactic of taking cover or repositioning. The additional language would effectively reinforce the principle recommended by the Common Council President's Work Group.

RECOMMENDATION 90: MPD should publicize to its officers and its community its commitment and willingness to go beyond the *Graham v. Connor* standards when it further refines its policies relating to the use of force.

In its thoughtful response, MPD recognizes that it can and does provide additional guidance to officers beyond Graham's objective reasonableness test. That recognition is all that this recommendation is intended to do. The City Attorney's response wrongly interprets the recommendation as suggesting that we are asking for abandonment of the Graham standard. The City Attorney's response is also inconsistent with the position taken in MPD's response, and has already caused confusion to the general public.

#### RECOMMENDATIONS regarding Use and Deployment of ECDs (91-96)

This section of our report largely commends the Department for a set of Electronic Control Device (ECD) policies that is generally more progressive than the guidelines of many agencies we have reviewed. We also want to reiterate – as we stated in our report – that our review of MPD use of force incidents revealed no concerns about overuse or inappropriate use of ECDs, so we have no reason to doubt that the Department's training on ECD use thoroughly addresses the policy deficiencies we noted. However, because the use of ECDs always has the potential to be controversial and their inappropriate use

has resulted in serious and tragic consequences, the better approach is to expressly include those training principles in Department policy. MPD offers no compelling reason for the further guidance not to be part of their SOPs.

RECOMMENDATION 91: MPD should amend its Electronic Control Device Use SOP to limit ECD use to circumstances involving violent or assaultive subjects, or to prevent subjects from harming themselves or others.

The MPD Response states that we misread the SOP on ECD deployment. We are pleased to learn that the intent of the policy is for the paragraph in question (part (a)) to reflect two requirements. A simple tightening of the language to clarify that – perhaps as simple as adding the “and” that MPD says is intended – will address our concern, and the possibility that others could similarly misread the language of the SOP.

RECOMMENDATION 92: MPD should modify its ECD guidelines to prohibit ECD use on women obviously pregnant, elderly individuals, obvious juveniles, individuals on stairwells, rooftops, or other elevated positions, and bicyclists.

The MPD response notes that this is a training issue and argues that a complete prohibition on ECD use in these situations would be unwise, preferring to leave officers some discretion to use the device in accordance with their training.

The current ECD policy prohibits use of an ECD under four specific circumstances, absent exigent circumstances: (a) Against handcuffed subjects; (b) Against subjects fleeing on foot; (c) Against subjects operating a motor vehicle; and (d) From a moving vehicle. At a minimum, MPD should add to this list of qualified prohibitions those categories included in Recommendation 92.<sup>5</sup>

RECOMMENDATION 93: MPD should modify its ECD guidelines to require officers to re-assess the threat posed by an individual prior to any successive ECD application.

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<sup>5</sup> If MPD believes that there is a need to have an “exigent circumstance” exception to prohibited use (although it is hard to contemplate an exigent circumstance when ECD use would be appropriate in dealing with a person on a rooftop), it should define what circumstances would constitute an exigency. The IACP Model Policy cited by MPD in support of its position elsewhere, specifically instructs officers that ECDs should generally not be used in any situation where the officer has a reasonable belief that the subject might fall resulting in death or serious physical injury.



The MPD response notes that threat assessment is a cornerstone of its use of force training and, as a result, implies that it does not need to be included in the ECD guidelines. We do not disagree that the principle is covered in training, but believe it is wise nonetheless to include it in a policy specific to ECD use because of the frequency with which we have seen officers from other agencies use the device multiple times, beyond its necessity or usefulness, and the significantly increased health risk for persons on whom the ECD is used.

RECOMMENDATION 94: MPD should modify its ECD guidelines to preclude officers from deploying more than three ECD applications on an individual, or a prolonged single application lasting longer than five seconds.

RECOMMENDATION 95: MPD should modify its ECD guidelines to preclude multiple officers from simultaneously deploying their ECDs on an individual.

The MPD response to these recommendations notes that these concerns are addressed in training, and argues against an absolute prohibition, leaving officers the discretion to decide whether and when to use an ECD in these situations. We disagree. At a minimum, the issues of successive or prolonged ECD application and multiple simultaneous applications should be addressed in the ECD guidelines, even if MPD chooses not to adopt complete prohibitions.

RECOMMENDATION 96: MPD should modify its ECD guidelines to require medical clearance for all subjects on whom an ECD has been used, and to have ECD darts removed by medical personnel.

MPD responds that having a subject upon whom an ECD is used be medically cleared is “wasteful” and unnecessary. While we recognize that there are differing perspectives on this issue, we side with the many police agencies that recognize that it would only take one occurrence with a bad consequence to include and justify the precaution for medical clearance and dart removal by medical professionals.<sup>6</sup>

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<sup>6</sup> As an example, the City of San Francisco Police Department is considering transitioning to ECD deployment for the first time and its current draft policy requires that after every ECD use, medical personnel are called, there is a medical evaluation, and that the darts are removed by medical professionals. The SFPD draft policy also includes express guidance similar to that we espouse regarding the maximum number of ECD cycles to deploy and to discourage use on especially vulnerable populations.

RECOMMENDATION 97: MPD should amend its SOP on Foot Pursuits to fully address the safety concerns associated with chasing a suspect without communicating with dispatch, solo foot pursuits, pursuing in unfamiliar areas or after losing sight of the suspect, and chasing a suspect while not in full patrol uniform and gear.

MPD indicates that our recommendations to amend its SOP are fully addressed in training. While training is important, there needs to be clear guidance through policy so that all officers understand in writing what the expectations of the Department are when they engage in a foot pursuit.

RECOMMENDATION 104: The City should work to revise the current agreement with the Police Association in order to provide MPD more flexibility regarding shift and location assignment of officers.

MPD's response acknowledges the limitations of the current process cited in our report, including the removal of discretion from management on how most efficiently to deploy officer resources. The only advantage cited by MPD is the "fundamental fairness" of seniority in shift selection. If MPD takes back managerial discretion in how to deploy officers most efficiently, uses that discretion fairly, and communicates those decisions effectively to its officers, we believe that officers will recognize that the deployment decisions are "fair" and appropriate and will result in a deployment that will better serve the communities of Madison.

RECOMMENDATION 105: MPD should reinstitute an officer performance evaluation system that collects and incentivizes progressive policing activity.

MPD indicates its interest in implementing a performance evaluation system. As indicated in our report, the evaluation system should not focus on measuring traditional police activity, but should focus on capturing information that is not as easy to acquire. For that reason, the daily activity logs that we advocate elsewhere would be a source of raw information and data that has not traditionally been effectively collected and analyzed by MPD. It is the non-traditional information obtained from the daily activity logs that should be the basis of any evaluative system developed by MPD.

In our view, the evaluation metrics need to be developed by MPD so that its core values and philosophy of policing are clarified and emphasized. It would also be critical for MPD to obtain community and outside stakeholder input so that shared values are incorporated. While this evaluation system must be "home grown," at MPD's request we

have included a performance evaluation from the Palo Alto Police Department that recognizes community interaction and problem solving as critical components of its officer assessment and places those values at the top of its qualities to be considered.

RECOMMENDATION 107: MPD should change its current SOP to require presentation and signature of the consent to search forms prior to executing a voluntary search.

MPD does not address in its response whether it agrees with President Obama's Task Force on 21<sup>st</sup> Century Policing recommendation that when law enforcement seeks consent to conduct a search, that it should explain that a person has the right to refuse consent and obtain written acknowledgment that they have sought consent to search. If it does not agree, it should articulate why. If it does agree, the current SOP and training do not accomplish the objective of the Task Force and its SOP should be modified consistent with this recommendation so that the objective can be achieved.

RECOMMENDATION 113: MPD should regularly seek input from its contract psychologists about ways to improve the background investigation process, both with respect to particular individuals' applications and more broadly on a systemic basis.

In its response, MPD supports the recommendation but indicates that additional funding may be necessary to carry it out. We are not sure that an additional outlay of resources may be needed to accomplish this straightforward task, at least with respect to particular individuals' applications. The contract psychiatrists are already reviewing the applicant materials and it would seem facile for them when doing so to identify potential gaps in the investigative materials and report them back to MPD.

RECOMMENDATION 114: MPD should engage community members at the interview stage of its promotional process.

While MPD indicates support for this recommendation in its response, it sets out the structural barriers that exist that currently prevent full implementation. In our experience, those protocols could be reconfigured if community input is highly valued in the process, including the need to bargain with the association.

RECOMMENDATION 117: MPD should consider whether using Academy class rank for purposes of seniority places outsized importance on such criteria, or whether there are alternatives for determining the "seniority" of students from the same class.

In its response, MPD indicates that competitive class ranking is important to provide incentive for recruits to give maximum effort, and then states that the impact of the class rank does not have a major impact on an officer's career options. MPD slightly misses the point here; officers and former officers of color that we talked to did indicate to us their "perception" that Academy class rank was important and impactful on their subsequent career. MPD should consider eliminating reliance on objective testing to determine class rank, particularly if the study we recommend doing (Recommendation 116) shows disparate impact.

**RECOMMENDATION 126:** MPD should change its policy so that all interviews of victims, witnesses, or complainants to internal investigations that could result in discipline are recorded unless the situation proves impossible or if a civilian witness declines.

In its response, MPD offers no objection to this recommendation other than increased cost. Scarcity of resources should not be an impediment to making this change in policy and practice consistent with best investigative practices. Internal investigations examining to learn whether an MPD employee violated policy are critical to the Department's accountability system and should comport with best investigative protocols such as recording interviews.

**RECOMMENDATION 130:** MPD and the City should devise and promote a mediation program to resolve civilian complaints outside of the traditional disciplinary process.

Other than the need for additional resources, MPD expresses support for this recommendation. The City Attorney, on the other hand, presents a number of potential roadblocks to establishing a formal mediation program, none of which have prevented a number of other police agencies throughout the country from adopting one. New York City and Washington, D.C., for example, both have vibrant mediation processes that have served both their communities and police agencies well. The City Attorney also complains about cost as a deterrent to establishing such a program. In some jurisdictions, that cost has been mitigated by recruiting volunteers from the legal community or having the independent police auditor facilitate the program. Past experiences with other agencies have proven that the challenges advanced by the City Attorney can be overcome if there is a will in the City to establish such a program.

RECOMMENDATION 133: Rather than rely entirely on the computer to identify early intervention candidates, MPD's Early Intervention System should regularly request first-level supervisors to identify officers who might benefit from the remedial aspects of the program.

MPD's response does not address the actual recommendation to incorporate sergeant input into the building of the Early Intervention System. In developing the system, we urge MPD to do so.

RECOMMENDATION 141: The City should institute protocols calling for a performance evaluation process for the Chief of Police at fixed intervals, with the evaluation being a potential basis for a finding of "cause" should the Chief's performance fall significantly below community expectations.

The City Attorney's response suggests that there could never be a time when a Chief's performance in relation to community expectations could itself suffice to constitute "cause." We respectfully disagree. A reasonable interpretation of the statute would suggest that extremely poor performance and unresponsiveness to the community at some point could and should constitute "cause." The repeated use of the term "someone" in the City Attorney's response suggests a misreading of the recommendation. We certainly do not suggest that a single person's dissatisfaction with a Chief's performance could constitute cause for removal.

RECOMMENDATION 143: MPD and the independent auditor should continue to review the MPD disciplinary decisions on significant discipline to determine to what degree the PFC post-disciplinary process is impacting those decisions.

MPD disagrees that the PFC post-disciplinary process impacts its disciplinary decisions. We still believe the structural incentives and their potential influence merit ongoing attention. Should our recommendation to create an independent police auditor be accepted, it will be noteworthy and important to gain the auditor's perspective on this issue after his or her having had an opportunity to dig into individual cases and evaluate trend lines.