January 6, 2023

VIA EMAIL

Chief William Scott
San Francisco Police Commission
San Francisco Police Headquarters
1245 3rd Street
San Francisco CA 94158
Via email: william.scott@sfgov.org; SFPD.Commission@sfgov.org; Stacy.A.Youngblood@sfgov.org

Re: Meet and Confer Process and Impact on Implementation of Departmental General Orders

Dear Chief Scott, President Elias, Vice President Carter-Oberstone and Commissioners Benedicto, Byrne, Walker, Yanez and Yee:

The Bar Association of San Francisco ("BASF")[1] writes regarding its concern about the meet-and-confer process that the San Francisco Police Department ("SFPD") and its bargaining representatives may be planning to engage in with the San Francisco Police Officers Association ("SFPOA") on the Police Commission's ("Commission") Draft General Order 9.07 – Traffic Enforcement & Curtailing the Use of Pretext Stops ("DGO 9.07"). This legal analysis was provided to BASF by Colin West and Joseph Lewis of the Morgan Lewis & Bockius law firm in San Francisco[2]. As explained herein, SFPD is not required to meet-and-confer with the SFPOA over the fundamental policy decisions that comprise DGO 9.07. Despite SFPD's custom of voluntarily and exhaustively meeting and conferring with SFPOA over any matter the SFPOA wishes to discuss, including Draft General Orders, the Department should cease from further engaging in protracted bargaining that is not legally required and disserves the people San Francisco, as the Commission has repeatedly directed.

The SFPOA has a documented history of obstructing policy reform by requesting to meet-and-confer with the Commission over issues that are not properly subject to bargaining and then extending those negotiations by months and years. In the

[1] The Bar Association of San Francisco ("BASF") represents approximately 7,000 members and is the largest legal organization in Northern California dedicated to criminal justice reform. In 2015, BASF established the Criminal Justice Task Force ("CJTF"), consisting of judges, prosecutors, public defenders, law enforcement, private defense counsel, civil liberties advocates, and others, to advance systemic reforms in San Francisco.

[2] Police Commissioner Kevin Benedicto of the Morgan Lewis & Bockius law firm was not involved in drafting this legal analysis.

last few years, numerous organizations at the federal, state, and local level have admonished the SFPOA for this practice.

The U.S. Department of Justice ("U.S. DOJ") took note in 2016 when it published a 432-page "Assessment of the San Francisco Police Department" ("Assessment"), which made 272 recommendations to improve the SFPD.[3] The Assessment included a review of the bargaining process between SFPOA and the Commission over DGO 5.01 – Use of Force policy, and found that while SFPD and the Commission collaboratively worked with community stakeholders to update DGO 5.01, the policy had not been implemented at the time of the report "because of collective bargaining practices," and recommended that SFPD and the Police Commission "expedite the process in the future for other policy development."[4]

In 2020, the California Department of Justice ("Cal DOJ") evaluated SFPD's compliance with the U.S. DOJ's recommendations and reported that SFPD had not fully complied with its duty to identify ways to expedite the meet-and-confer process.[5]

In October 2020, BASF wrote to the Commission and SFPD proposing a slate of structural reforms to the City's collective bargaining process with SFPOA, in particular, to the meet-and-confer process. See **Exhibit A**. That letter provided a detailed legal analysis of the issues that are, and are not, subject to mandatory bargaining. In sum, the letter explained that SFPD is not required to meet-and-confer with SFPOA over "management and policy decisions", such as Draft General Orders.

Nevertheless, SFPD and the SFPOA have persisted in their practice of delaying the implementation of policy reform by voluntarily and unnecessarily negotiating the terms of Draft General Orders, including DGO 9.07, despite explicit directions from the Commission not to do so. BASF continues to field complaints from criminal justice agencies, community groups, and other stakeholders familiar with the negotiations that SFPOA substantially delays reform by drawing out negotiations and requesting to discuss "management matters" that are not properly the subject of bargaining. BASF writes this letter as DGO 9.07 may needlessly stall in meet-and-confer. New case law from the Court of Appeal underscores

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[3] https://www.sanfranciscopolice.org/sites/default/files/2018-11/DOJ_COPS%20CRI_SFPD%20OCT%202016%20Assessment.pdf

[4] See Assessment, p. 38.

[5] See Cal DOJ & Hillard Heintze, SFPD Collaborative Reform Initiative, Phase II (March 4, 2020) –18 Month Progress Report, App'x C at 3, available at https://oag.ca.gov/system/files/media/hillard-heintze-phase3-report-sfpd-cri-021122.pdf

SFPD's obligation to cease bargaining with the SFPOA over a clear management and policy decision.

I. LEGAL BACKGROUND

California's Meyers-Milias-Brown Act (Govt. Code § 3500, et seq.; "MMBA") governs labor relations with public sector employees, including peace officers. The MMBA requires management to meet and confer in good faith with union representatives over matters that are within the "scope of [union] representation," i.e., "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Govt. Code § 3504.

On June 23, 2022, the California Court of Appeal reversed the California Public Employment Relations Board ("Cal PERB") in an important case reaffirming peace officers' limited bargaining rights. *County of Sonoma v. Public Employment Relations Bd*. (2022) 80 Cal.App.5th 167 ("*County of Sonoma*"). The *County of Sonoma* opinion limited the scope of the City's bargaining obligation by holding that the California Supreme Court's decision in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638 ("*Claremont*") sets forth the exclusive test to determine whether any managerial decision is subject to bargaining. Importantly, the *County of Sonoma* holding *is also not* limited to the subject matter that was at issue in that case—procedures regarding the investigation and discipline of peace officers—and clearly applies to DGO 9.07.

Claremont held that fundamental managerial decisions on "the merits, necessity, or organization of any service or activity provided by law or executive order," are outside the scope of representation and are not subject to the bargaining requirement. *Claremont*, 39 Cal. 4th at 631 (employer has the unconstrained right to make fundamental management or policy choices). *Claremont* went on to explain that "[t]he definition of 'scope of representation' and its exceptions are 'arguably vague' and 'overlapping.'" *Id.* at 631. Thus, to clarify, the California Supreme Court formulated a three-part test to address "whether an employer's action implementing a fundamental decision" was subject to the bargaining requirement. *Id*. at pp. 628.

> First, if the management action *does not* have a significant and adverse effect on wages, hours, or working conditions of the bargaining-unit employees, there is no duty to meet and confer. *Claremont*, at 638.

> Second, if there is a significant and adverse effect, "we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision." *Ibid.* If it does not, "the meet-and-confer requirement applies." *Ibid.*
>
> "Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test." *Ibid.*

In sum, a public employer's "duty to bargain arises under two circumstances: (1) when the decision itself is subject to bargaining, and (2) when the effects of the decision are subject to bargaining, even if the decision, itself, is nonnegotiable." See also *El Dorado County Deputy Sheriff's Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950, 956. Management matters that do not have a significant and adverse effect on wages, hours, or working conditions of the bargaining-unit employees are not subject to meet-and-confer.

II. The Commission's decision to adopt Draft DGO 9.07 is not subject to decision bargaining, and the new policy does not have any effect on wages, hours, or working conditions of the bargaining-unit employees, much less a "significant and adverse effect."

DGO 9.07 – Traffic Enforcement & Curtailing the Use of Pretext Stops, lists the following statement as its "Purpose":

> The goal of this General Order is to reduce racial bias in the enforcement of our traffic laws, and in particular, to curtail the use of pretextual stops. These stops—which use the traffic code as a pretext to conduct stops and searches absent any concrete evidence of criminal wrongdoing—are disproportionately carried out against people of color and provide no demonstrable public safety benefit. Limiting this ineffectual practice will free up valuable resources to focus on strategies proven to stop and prevent crime. To that end, our traffic enforcement efforts should be focused on what matters most: ensuring the safety of our sidewalks and roadways.

Importantly, the MMBA recognizes "the right of employers to make unconstrained decisions when fundamental management or policy choices are made." *Claremont*, 39 Cal. 4th at 632. "To require public officials to meet and confer with their employees regarding fundamental policy decisions . . . would place an intolerable burden upon fair and efficient administration of state and local government." *Berkeley Police Ass'n v. City of Berkeley* (1977) 76 Cal. App. 3d 931, 937. Indeed, at least as to some core management issues—such as

placing policy limits on the use-of-force, or other management functions that maintain public confidence in law enforcement—negotiation, even if purportedly "voluntary" and nonbinding, is inappropriate and inconsistent with the law. *San Jose Peace Officer's Ass'n v. City of San Jose* (1978) 78 Cal. App. 3d 935, 947 ("government agency may not suspend, bargain or contract away its police power" arising under the California Constitution, which encompasses, among other things, the "power of a city to enact and enforce regulations relating to the use of firearms by police officers.")

Claremont itself was addressed to a policy that required officers to record the race and ethnicity of persons subject to vehicle stops who were not arrested or cited. Exactly like DGO 9.07, the policy at issue in *Claremont* was intended as measure against racial profiling and to improve relations between the community and law enforcement— factors that compelled the Court's reasoning in reaching a decision. *Id*. at 632. The Court ultimately decided that the City of Claremont was not required to meet and confer concerning its decision to require officers to complete the required documentation concerning race and ethnicity.

Thus, the law is clear that the Commission's decision to adopt DGO 9.07 is well within management's prerogative and is not appropriate for collective bargaining.

The DGO also does not have any "effect" on working conditions of SFPD members. As you know, DGO 9.07 contains three parts: (1) Limiting Stops for Low-Level Offenses; (2) Limiting Searches & Questioning; and (3) Data Collection, Reporting & Supervisory Review.

> The first section, "Limiting Stops for Low-Level Offenses." provides that officers "shall not stop or detain the operator of a motor vehicle" solely based on one or more of nine identified low-level traffic offenses. The nine offenses listed reflect those that do not impact public safety yet, as documented, disproportionately impact motorists of color. The policy specifically states that "nothing in this DGO prevents members from initiating a stop for any infraction or criminal offense based on reasonable suspicion or probable cause."
>
> The second section, "Limiting Searches & Questioning", provides that "During a traffic stop for a violation punishable as an infraction under either the California Vehicle Code or San Francisco Transportation Code," a police officer "shall only ask investigatory questions regarding criminal activity if reasonable suspicion or probable cause for a criminal offense arises during the traffic stop.
>
> The third section, "Data Collection, Reporting & Supervisory Review", provides that police officers must record the instances when they ask

> about unrelated criminal activity or for permission to conduct a consent search. In such circumstances, officers must document the reason for the stop, the circumstances justifying a request to conduct a consent search, and if an incident report is not otherwise required, officers shall memorialize this information in a CAD and of course, on their body-worn camera.

In *Ass'n of Orange Cnty. Deputy Sheriffs v. Cnty. of Orange* (2013) 217 Cal. App. 4th 29, the Court of Appeal held the county had no obligation to negotiate with the union over a policy that prohibited deputies from accessing the department's investigation file prior to being interviewed as part of the investigation. *Id*. at 44-45. The decision noted that the policy implemented "best practices" in investigations and was designed "to ensure the integrity and reliability of future internal affairs investigations." *Id*. at 45. DGO 9.07 follows similar design concepts by reducing racial bias, freeing up valuable resources, and ensuring safety.

Also, in Ass'n for *Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles* (2008) 166 Cal. App. 4th 1625, the Court of Appeal found that a policy prohibiting deputies from speaking with each other about an officer-involved shooting before being interviewed about the incident by investigators was a fundamental policy decision excluded from mandatory bargaining. *Id*. at 1644. That Court noted that the policy's objective "was to collect accurate information regarding deputy-involved shootings," and thus "foster greater public trust in the investigatory process." *Id.* The official "Purpose" stated in the text of DGO 9.07 is analogous: "ensuring the safety of our sidewalks and roadways".

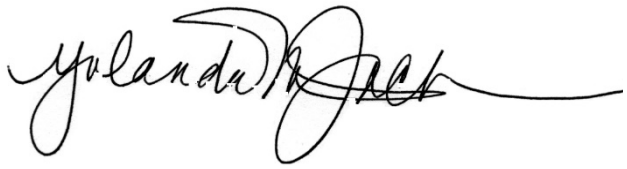
Finally, in a 2018 ruling on SFPD's use-of-force policy, the Court of Appeal reasoned that the City is not required to meet-and-confer over, let alone arbitrate, changes to the use-of-force policy, because such a requirement "would defeat the purpose of requiring cities to make fundamental managerial or policy decisions independently" and because "*it would essentially allow the Association to hold the policy in abeyance indefinitely by claiming the City acted in bad faith when it ended its voluntary negotiations without conferring over certain unstated impacts the policy might have on police officers*." *San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n* (2018) 238 Cal.Rptr.3d 753, 764. From a public interest perspective, the subject-matter of DGO 9.07—*Curtailing the Use of Pretest Stops*—is indistinguishable from the use-of-force updates presented to the Court of Appeal in 2018.

Even if the SFPOA were to assert there was some purported impact on working conditions related to the requirement that members report and review data concerning stops, the Department's management rights would clearly prevail under *Claremont*. The *Claremont* decision noted that on average, it took two

minutes for an officer to complete the required documentation and that officers might complete between four and six forms related to traffic stops during each shift. 39 Cal. 4th at 629. The *Claremont* Court agreed with the superior court that "the impact on the officers' working conditions was de minimis." *Id.* Here, any actual impacts on working conditions are equally *de minimis*, and any obligation to bargain is clearly foreclose by *Claremont*.

In conclusion, SFPD and the Commission should not allow the SFPOA to slow down the implementation of necessary reforms such as DGO 9.07 by requesting extended, unauthorized, and inappropriate meet-and-confer processes. Instead, the Commission should insist—and SFPD must agree—that the parties only negotiate only over matters that are mandatory subjects of bargaining.

Sincerely,



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THE BAR ASSOCIATION OF SAN FRANCISCO

EXHIBIT

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THE BAR ASSOCIATION OF SAN FRANCISCO

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October 22, 2020

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Dear San Francisco Supervisors and Police Commissioners:

The Bar Association of San Francisco's Criminal Justice Task Force ("BASF-CJTF"[1]) writes regarding our concern about the tentative Memorandum of Understanding ("MOU") reached between the S.F. Department of Human Resources ("DHR") and the S.F. Police Officers' Association ("SFPOA") that is subject to SFPOA membership and the S.F. Board of Supervisors approval. . BASF-CJTF proposes long overdue reforms to DHR's practices in conducting collective bargaining meet-and-confer sessions with SFPOA.

Executive Summary

BASF-CJTF is concerned because this MOU was negotiated without consulting the Police Commission, S.F. Department of Police Accountability ("DPA"), the District Attorney's Office ("DA"), or other key stakeholders in San Francisco Police Department's ("SFPD") collaborative reform process.[2] The new MOU that extends the SFPD contract does not

[1] The Bar Association of San Francisco ("BASF") represents 7,500 members and is the largest legal organization in Northern California dedicated to criminal justice reform. In 2015, BASF established the Criminal Justice Task Force ("CJTF"), consisting of judges, prosecutors, public defenders, law enforcement, private defense counsel, civil liberties advocates, and others, to advance systemic reforms in San Francisco.

[2] In connection with our concerns, we are simultaneously serving requests on DHR for materials related to the negotiation of the MOU under the California Public Record Act (Govt. Code § 6250 *et seq.*; "CPRA").

advance any of the objectives of the collaborative reform process. These significant omissions counsel against your approval of the MOU. At a minimum, we call upon you to delay a vote on ratification of the MOU until November, (1) to enable the development of accompanying reforms (proposed herein) to the City's relationship with the SFPOA, and (2) to assess the relative financial cost of rejecting the MOU after the November election, given that the election results could strengthen the City's financial outlook.

Instead, we propose a slate of structural reforms to the City's collective bargaining process with SFPOA, in particular, to the meet-and-confer process. For many years, BASF-CJTF has fielded complaints from criminal justice agencies, community groups, and other stakeholders familiar with the negotiations, that SFPOA substantially delays reform by drawing out negotiations with DHR, by arguing to include management matters that are not properly the subject of bargaining.

Thus, reforms to collective bargaining with SFPOA are long overdue. The City must prioritize transparency, timeliness, and the advancement of substantive police reforms. The law supports these principles: it recognizes that formulating policies that promote public safety and trust between police agencies and the communities they serve is a fundamental duty of local government that must not be encumbered with undue delays, or worse, bargained away behind closed doors. *State law permits far greater transparency in collective bargaining than DHR's current practices.*

We propose the following immediate changes:
(1) DHR must stop agreeing to meet and confer with SFPOA over management matters that are not subject to collective bargaining under California law;
(2) DHR must set clear boundaries to the meet-and-confer process to end unreasonable delays on reforms for matters within the scope of representation;
(3) meet-and-confer meetings and related correspondence between DHR and SFPOA should be public and transparent; and,
(4) DHR should consult with key stakeholders concerning reform objectives throughout negotiations with SFPOA.

The first three of these changes could be memorialized in the MOU, although agreement between the parties is not necessarily required. The last reform simply requires changes to the manner in which DHR

interacts with stakeholders. All of these reforms could be implemented without any changes to the MOU because, these proposals are consistent with California law and none requires agreement with SFPOA (*see infra.*) *Thus, all of these reforms could be achieved by legislative action by the Board of Supervisors, or by directive from the Police Commission.*

I. The City must reform the meet-and-confer process between DHR and SFPOA before approving the MOU.

The existing meet-and-confer process between DHR and SFPOA urgently needs reform. In 2016, the U.S. Department of Justice ("USDOJ") identified the problem with Recommendation 3.2:

> The SFPD should work with the Police Commission to obtain input from the stakeholder groups and conduct an after-action review of the meet-and-confer process to identify ways to improve input and expedite the process in the future for other policy development.

USDOJ made this particular recommendation following the meet-and-confer between DHR and SFPOA over Department General Order ("DGO") 5.01 ("Use of Force"). That high-profile negotiation was drawn out over six months, despite USDOJ's urgent pleas for it to conclude.

SFPD claims to be in "substantial compliance" with Recommendation3.2's requirements.[3] In a July 2020 memo to the Police Commission, SFPD claimed that it had solicited input from stakeholders in the 2016 use-of-force policy negotiations, conducted an after-action review in 2017, and identified and implemented ways to streamline the meet-and-confer process with Commission staff in 2018-19.[4] However, a recent report from the California Department of Justice ("Cal DOJ") and Hillard Heintze, reveals that SFPD consulted with the Police Commission regarding Recommendation 3.2, but has not met its required

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[3] *See* Ex. A. Sgt. Kilshaw Email to Police Commission, re: "protocols when receiving DGOs/policies for Commission adoption," July 7, 2020 (asserting, "Recommendation 3.2 achieved substantial compliance in May 2020.").

[4] *See* Ex. B. SFPD Collaborative Reform Completion Memorandum (March 3, 2020).

stakeholders' input, conducted an after-action review, or identified ways to expedite the meet-and-confer process.[5]

SFPD's efforts have not been effective. Since 2016, the meet-and-confer process has delayed—*by months to years*—a number of policy reforms that promote public safety and reinforce public trust in SFPD. For example, DHR's meet-and-confer negotiations with SFPOA have delayed *for years* proposed changes to DGO 10.11 ("Body Worn Cameras" (BWC)) that were approved by the Police Commission in January 2018. More recently, implementations of DGO 5.17 ("Bias-Free Policing Policy") and DGO 5.23 ("Interactions with Deaf and Hard of Hearing Individuals") also were delayed as a result of the meet-and-confer process.

BASF-CJTF will submit California Public Records Act ("CPRA") requests to DHR for materials related to the meet-and-confer processes for each of these DGOs. Remarkably, the public, and even the Police Commission, DPA, the DA's Office, and other stakeholders in the collaborative reform process, *are often unaware of when or why DHR is conducting meet-and-confer meetings with SFPOA* over policies that the Police Commission has already approved. As set forth below, greater expediency and transparency in the process would comport with California law and lead to superior policy outcomes for San Francisco.

II. California law requires the City to meet-and-confer over working conditions; negotiation of management matters is neither required nor appropriate.

DHR must stop voluntarily negotiating over management matters with SFPOA, and instead limit negotiations to working conditions and, under limited circumstances, the "effects" of management decisions on working conditions. *See* Govt. Code §3504. Contrary to the law, the Police Commission's explicit direction, as well as SFPD's representations to Cal DOJ, DHR's steady practice has been to negotiate exhaustively over any matter SFPOA wishes to discuss.[6] Since reform efforts began in 2016,

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[5] *See* Cal DOJ & Hillard Heintze, SFPD Collaborative Reform Initiative, Phase II (March 4, 2020) – 18 Month Progress Report, App'x C at 3, *available at* https://oag.ca.gov/system/files/attachments/press-docs/Final%20Hillard%20Heintze%20Phase%20II%20Report%20for%20the%20San%20Francisco%20Police%20Department-1.pdf.

[6] The current MOU states that the City or DHR "shall give reasonable written notice to the Association of *any proposed change in general orders* or other matters within the scope of representation as specified by

SFPOA has exploited this practice repeatedly to delay management reforms that never should have been the subject of collective bargaining in the first place.

California's Meyers-Milias-Brown Act (Govt. Code § 3500, *et seq.*; "MMBA") governs labor relations with public sector employees, including peace officers. The MMBA requires management to meet-and-confer in good faith with union representatives over matters that are within the "scope of [union] representation," *i.e.*, "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, *except, however*, the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Govt. Code § 3504 (emphasis added).)

Thus, management matters are the clear exception to meet-and-confer. Importantly, the MMBA recognizes "the right of employers to make unconstrained decisions when fundamental management or policy choices are made." *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal. 4th 623, 632. "To require public officials to meet and confer with their employees regarding fundamental policy decisions . . . would place an intolerable burden upon fair and efficient administration of state and local government." *Berkeley Police Ass'n v. City of Berkeley* (1977) 76 Cal. App. 3d 931, 937. Indeed, at least as to some core management issues—such as placing policy limits on the use-of-force, or other management functions that maintain public confidence in law enforcement—negotiation, even if purportedly "voluntary" and non-binding, is inappropriate and inconsistent with the law. *San Jose Peace Officer's Ass'n v. City of San Jose* (1978) 78 Cal. App. 3d 935, 947 (local "government agency may not suspend, bargain or contract away its police power" arising under the California Constitution, which

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Government Code Section 3504.5." *See* MOU between City and County of San Francisco and SFPOA Units P-1 and P-2A (July 1, 2018-June 30, 2021) (emphasis added), *available at* https://sfdhr.org/sites/default/files/documents/MOUs/POA-2018-2021.pdf. We do not believe that the parties intended the MOU to obligate the City and DHR to negotiate over "any proposed change to a general order," regardless of whether the change falls within the scope of representation. As set forth below, such a purported obligation would far exceed, and arguably violate, California law. This language must be struck from the MOU to comply with the limitations placed by law on the scope of collective bargaining negotiations.

encompasses, among other things, the "power of a city to enact and enforce regulations relating to the use of firearms by police officers").

Where management decisions have a significant adverse *effect* on wages, hours, or working conditions, the California Supreme Court has adopted a balancing test to determine whether those effects must be subject to the meet-and-confer requirement. *Building Material and Const. Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal. 3d 651, 660; *Claremont*, 39 Cal. 4th at 638. The test asks whether "the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." *Building Material*, 41 Cal. 3d at 660; *Claremont*, 39 Cal. 4th at 630.

In balancing these factors, "a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.'" *Building Materials* 41 Cal. 3d at 660; *Claremont*, 39 Cal. 4th at 638 ("We believe this 'transactional cost' factor is not only consistent with the *Building Material* balancing test, *but its application also helps to ensure that a duty to meet and confer is invoked only when it will serve its purpose*." (emphasis added)). Delays caused by extended bargaining and the legal process are an important "transactional cost" incurred by management under this analysis. The Court of Appeal, in a 2018 ruling on SFPD's use-of-force policy, reasoned that the City is not required to meet-and-confer over, let alone arbitrate, changes to the use-of-force policy, because such a requirement "would defeat the purpose of requiring cities to make fundamental managerial or policy decisions independently" and because "*it would essentially allow the Association to hold the policy in abeyance indefinitely by claiming the City acted in bad faith when it ended its voluntary negotiations without conferring over certain unstated impacts the policy might have on police officers.*" *San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n* (2018) 238 Cal.Rptr.3d 753, 764 (emphasis added).

SFPD entirely overlooked the *Building Materials* balancing test entirely in its "Completion Memorandum" for Recommendation 3.2.[7] The City

[7] *See* Ex. B. SFPD Collaborative Reform Completion Memorandum (March 3, 2020) ("However, even in those instances where the decision is squarely a managerial prerogative, those decisions may have effects - for example on employee training and discipline - that are subject to meet and confer.").

Attorney's Office has also taken a very restrictive view of the law perhaps to avoid litigation, but this has been at the cost of needed reforms. For example, in 2018 the City Attorney's Office and DHR apparently advised the Police Commission that the City was legally obligated to meet and confer with SFPOA over the DGO 10.11 (BWC) restriction prohibiting officers from reviewing BWC footage before making a statement to investigators regarding an officer-involved shooting or an in-custody death. The ensuing meet-and-confer process took *2.5 years* and resulted in the addition of *a single, non-binding sentence* to the policy (*see infra*).

In fact, the law is clear that such a restriction is within management's prerogative and is not an appropriate subject for collective bargaining. In *Ass'n of Orange Cnty. Deputy Sheriffs v. Cnty. of Orange* (2013) 217 Cal. App. 4th 29, the Court of Appeal held the county had no obligation to negotiate with the union over a policy that prohibited deputies from accessing the department's investigation file prior to being interviewed as part of the investigation. *Id.* at 44-45. The decision noted that the policy implemented "best practices" in investigations and was designed "to ensure the integrity and reliability of future internal affairs investigations." *Id.* at 45. Very similarly, in *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles* (2008) 166 Cal. App. 4th 1625, the Court of Appeal found that a policy prohibiting deputies from speaking with each other about an officer-involved shooting before being interviewed about the incident by investigators was a fundamental policy decision excluded from mandatory bargaining. *Id.* at 1644. The Court noted that the policy's objective "was to collect accurate information regarding deputy-involved shootings," and thus "foster greater public trust in the investigatory process." *Id.*

It is impossible to distinguish these decisions materially from DGO 10.11's restriction prohibiting officers from reviewing their BWC footage prior to making a statement to investigators in officer-involved shootings and in-custody deaths. The City Attorney was aware of these decisions during the meet-and-confer process because they were raised in the 2018 use-of-force litigation, yet the negotiations were allowed to proceed.[8]

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[8] The cases were discussed by the League of California Cities in an *amicus* brief filed in support of the City Attorney's Office during the litigation brought by SFPOA against SFPD's use-of-force policy. *See* Br. of Amicus Curiae League of California Cities, et al., (January 30, 2018), *available at* https://www.cacities.org/Resources-Documents/Member-

In 2019, recognizing that DHR's willingness to collectively bargain over any matter was impeding reform efforts, former Police Commission President Robert Hirsch memorialized the Commission's prior directive from 2018 to DHR "to only meet and confer over mandatory subjects of bargaining."[9] SFPD also cites this directive in support of its claim to Cal DOJ that it has complied with Recommendation 3.2. Unfortunately, it is clear that DHR has not complied with the Commission's orders and that SFPD's representation to Cal DOJ continues to be false.

For example, the Police Commission recently released meet-and-confer correspondence from SFPOA to DHR concerning DGO 5.17, the bias policy.[10] The bias policy is a classic management matter that should not be the subject of collective bargaining. DHR, however, describes SFPOA's communication as a "counterproposal" to DGO 5.17. SFPOA's letter to DHR states: "On behalf of the San Francisco POA we want to thank you and the members of the City meet and confer team for discussing the proposed modifications to DGO 5.07 [sic], Bias-Free Policing. During our meet and confer session we raised a number of questions regarding the proposed language." *Id.* What follows are a variety of proposed changes to the bias policy that have no conceivable relation to working conditions. *Id.* For example, SFPOA requested that reference to the Fourth Amendment be removed from the introductory passage of the bias policy. *Id.*

That DHR elected to meet-and-confer over DGO 5.17 raises troubling questions about what other matters DHR has negotiated in the past several years. It also raises serious questions about the soundness of the City Attorney's legal advice concerning the scope of mandatory

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Engagement/Professional-Departments/City-Attorneys/Request-Amicus-Support/Recent-Filings/Briefs-(1)/San-Francisco-POA-v-San-Francisco-Police-Commissi.

[9] Ex. C. R. Hirsch Ltr. to Cmdr. Walsh (June 19, 2019).

[10] Ex. D. L. Preston Memo to Police Comm., Re: DGO 5.17 Policy Prohibiting Biased Policing

(July 6, 2020) (attaching R. Lucia Ltr. to L. Preston, Re: DGO 5.17 Bias-Free Policing / Meet & Confer (June 25, 2020)), *available at* https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Memorandum%20-%20DGO%205.17%20Policy%20Prohibiting%20Biased%20Policing%20%2807.06.20%29_1.pdf.

bargaining under the MMBA. Sadly, this approach to collective bargaining is the norm, not the exception, even after SFPD claims to have "substantially complied" with Recommendation 3.2, in part by supposedly limiting bargaining to mandatory subjects only.

SFPOA has should not be permitted to slow down the implementation of reforms such as DGO 5.17 by engaging DHR in extended, unauthorized and inappropriate meet-and-confer processes. The Police Commission, the Board of Supervisors, and the Mayor should demand that DHR abide by the Commission's directive to negotiate only over matters that are mandatory subjects of bargaining. Likewise, the Police Commission should consider seeking independent counsel if the City Attorney continues to misadvise on the parameters of mandatory collective bargaining, thereby enabling inappropriate discussions over management matters. Finally, we note that releasing all meet-and-confer correspondence between DHR and SFPOA, and making the meetings publicly accessible and transparent to key stakeholders will ensure that DHR ceases negotiating matters that are management's prerogative.

III. California law requires a good faith effort to discuss working conditions with the union within a reasonable timeframe, but not over extended periods.

A second problem identified by USDOJ in Recommendation 3.2—and not adequately addressed by SFPD or DHR—has been the unreasonable length of the meet-and-confer process. This problem has stalled numerous reforms. DHR should negotiate reasonable schedules and deadlines with SFPOA for meet-and-confer sessions, and if SFPOA refuses to do so, *DHR must promptly declare impasse on matters rather than indulging in delays*.

DHR has not done so. For example, it met and conferred with SFPOA over DGO 10.11 (BWC) policy, for *nearly two and a half years* over a *single non-binding sentence* after the policy was approved by the Police Commission. In January 2018, the Police Commission adopted changes forbidding officer review of BWC footage in officer-involved shootings and in-custody deaths. Stakeholders have been advocating for such changes since 2016, when the original policy was passed. In a process completely hidden from public view, the revised policy resulting from this meet-and-

confer was not made public until very recently.[11] After years of negotiation, DHR revealed that the change from the meet-and-confer process constituted *one non-binding sentence*. In the meantime, implementation of the restrictions on officer review of BWC footage—a matter implicating public trust in law enforcement that is clearly within management's prerogative under California law (*see supra*)—was delayed for years. No further changes to the policy could be considered until the existing amendments were finalized. Thus, this basic reform has been unacceptably stalled.

Not only are these delays are not mandated by state law, such an extended process is contrary to the law—particularly as to matters, which implicate public trust in law enforcement. *See Building Materials* 41 Cal. 3d at 660; *Claremont*, 39 Cal. 4th at 638. SFPD's "Completion Memorandum" states: "Placing arbitrary deadlines on the meet and confer process at the onset of negotiations would be viewed by the courts as bargaining in bad faith."[12] Placing *arbitrary* deadlines on negotiations might evince bad faith, but adhering to reasonable timelines and seeking negotiated deadlines certainly does not.

The MMBA broadly defines the "good faith" bargaining requirement as follows:

> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule,

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[11] *See* DGO 10.11 (Eff. 01/10/18) (redline), *available at* https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/PoliceCommission100720-DGO10.11BodyWornCamerasback%20from%20m%26c.pdf.

[12] *See* Ex. B. SFPD Collaborative Reform Completion Memorandum (March 3, 2020).

> regulation, or ordinance, or when such procedures are utilized by mutual consent.

See Gov't Code § 3505. Notably, the statute does not require secrecy, or any specific or extended time frame for negotiations. And, according to the California Supreme Court, conducting the required meet-and-confer in good faith should place a "minimal" burden on the democratic functions of local government. *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach* (1984) 36 Cal. 3d 591, 599.

The courts have interpreted "good faith" to require, from both sides, "a genuine desire to reach agreement. The parties must make a serious attempt to resolve differences and reach a common ground." *Santa Clara Cnty. Corr. Peace Officers' Ass'n, Inc. v. Cty. of Santa Clara* (2014) 224 Cal. App. 4th 1016, 1044. However, "[e]ven if the parties meet and confer, they are not required to reach an agreement because the employer has 'the ultimate power to refuse to agree on any particular issue.'" *Claremont*, 39 Cal. 4th at 630 (quoting *Building Material*, 41 Cal. 3d at 665). Thus, even "adamantly insisting on a position does not necessarily establish bad faith." *Santa Clara Cnty. Corr. Peace Officers' Ass'n*, 224 Cal. App. 4th at 1044 (citing *Public Employees Ass'n v. Bd. of Supervisors* (1985) 167 Cal. App. 3d 797, 805-806).

"The MMBA does not attempt to specify how long or how frequently parties must meet in order to establish prima facie good faith or when impasse may be declared." *Santa Clara Cty. Corr. Peace Officers' Ass'n,* 224 Cal. App. 4th at 1038. The parties, however, are "free to agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement." *Id.* at 1038-39 (union agreed to 45-day period following notice).

Notably, California courts have been fairly reluctant to find that public employers have "rushed to impasse" based on the supposed failure to allow sufficient time for bargaining. *See, e.g., Vallejo Police Officers Ass'n v. City of Vallejo* (2017) 15 Cal. App. 5th 601, 628 (rejecting such claim). Although the California Public Employment Relations Board (PERB) has proven more willing to do so, that administrative board's purported jurisdiction over claims of unfair labor practices brought by unions representing peace officers has not been tested in the courts, and in any case, its opinions are also subject to judicial review. *See Ass'n of Orange Cnty Deputy Sheriffs v. Cnty of Orange*, PERB Dec. No. 2657-M (PERB

decision purporting to claim jurisdiction over such claims, a ruling which was not appealed to the courts).

We are aware that DHR's attempt to reduce the *notification period* to SFPOA for USDOJ-recommended reforms that fall within the scope of representation, from 30 to 14 days, was rejected by an arbitration panel in 2018. That limited arbitration decision should not dissuade the City and DHR from pressing for changes to the MOU to implement reasonable timelines and deadlines for the meet-and-confer process. As then-arbitrator Carol Isen wrote in support of that proposal to change the MOU: "I believe the City's proposal strikes a reasonable balance between the City's desire for swift implementation of reform measures recommended by the DOJ and [SFPOA's] right to have a meaningful say over any impacts on its members' terms and conditions of employment with [SFPD]."[13]

DHR must make it a priority to negotiate timelines that enable the Police Commission to deliver needed reforms. Deadlines should be set forth in the MOU. *Santa Clara Cty. Corr. Peace Officers' Ass'n,* 224 Cal. App. 4th at 1038-39. If SFPOA refuses to agree to reasonable deadlines, DHR must be prepared to declare impasse on matters where SFPOA delays and evinces bad faith in the meet-and-confer. The City Attorney may caution that doing so could risk litigation, but it is the right thing to do, there is support in the law, and the community expects it.

According to SFPD, in an apparent effort to comply with Recommendation 3.2, DHR has now implemented standing meetings with SFPOA and detailed to SFPD the same negotiator who permitted long delays in prior meet-and-confer processes.[14] Simply scheduling more meetings for collective bargaining, untethered to any particular subject or policy, will not speed the process—especially given that SFPOA has demonstrated its ability to drag out the meet-and-confer process over months and years with DHR's negotiators. Scheduling more standing meetings between DHR and SFPOA does not support a finding that SFPD has "substantially complied" with Recommendation 3.2.

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[13] *See In re: City and Cnty. of San Francisco and SFPOA* (Arb. Award, May 4, 2018) at 23, *available at* https://sfdhr.org/sites/default/files/documents/Notices/POA-Final-Award.pdf.

[14] *See* Ex. B. SFPD Collaborative Reform Completion Memorandum (March 3, 2020).

Consistent with California law, meet-and-confer meetings concerning reform that matters that fall within the scope of representation should be scheduled quickly, placed on the agenda, focused in scope, and brought to resolution expeditiously. Otherwise, SFPD reform is unnecessarily delayed and the public trust irreparably harmed.

IV. California law permits a meet-and-confer process that is publicly-accessible and open to stakeholder input; transparency and inclusion measures would improve negotiations.

DHR's meet-and-confer process with SFPOA occurs behind closed doors. Such secrecy is not legally required and is not the norm across all jurisdictions. Greater transparency would improve the process and advance substantive police reforms.

BASF-CJTF urges the City to adopt the following changes:
(1) DHR should publicly notice meet-and-confer meetings in advance for public attendance;
(2) all meet-and-confer correspondence and communications between the parties should be posted publicly in a timely fashion in advance of meetings; and
(3) DHR should consult with key public agencies and other stakeholders regarding reform objectives, before, during, and after the meet-and-confer process.

Various experts have argued in favor of increasing public participation in bargaining, or at least improving the transparency of such negotiations. Professor Stephen Rushin recently urged policymakers to "make collective bargaining sessions over police disciplinary procedures open to the public," noting that "[t]he collective bargaining process generally excludes individuals most at risk of experiencing police misconduct."[15] Not only are communities of color excluded from the process, so are affinity groups within the ranks of SFPD (such as Officers for Justice SF), whose interests may not be well represented by SFPOA. Likewise, key stakeholders, such as the DA's office, DPA, and even the Police

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[15] Stephen Rushin, *Police Union Contracts*, Duke Law Journal vol. 66, no. 6 (March 2017) at 1244-45, *available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj.

Commission, often have little to no visibility into, much less influence over, the substance or course of meet-and-confer negotiations. Excluding these viewpoints has led to secretive negotiations between DHR and SFPOA that have failed to advance reform objectives—witness the recently negotiated MOU.

San Francisco deserves better. Notably, a number of states (Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oregon, Tennessee, and Texas) already require public employee collective bargaining to occur in open public meetings.[16] In Texas, for example, state law requires that meet-and-confer deliberations between public employers and police unions "shall be open to the public."[17]

In 2016, community groups and advocates in Austin, Texas, took advantage of these laws to attend meet-and-confer meetings and advocate for reform positions.[18] Those who led the campaign related their experiences recently in *The New York Times*:

> [A]lmost every week in 2017, our coalition attended meetings between the city and the police association. [¶] We packed chairs around the periphery of the room, took detailed notes and then cross-referenced every change to the previous contract. Then we'd return to the offices of council members and city negotiators to urge them to support our reforms. [¶] Negotiators from the city told us that our presence changed the dynamics of the bargaining by compelling real dialogue between the city and the association. In previous years, the union had railroaded the city for exorbitant

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[16] *See generally* Eric Shannon, Washington Policy Center, Policy Brief, *Transparency in public employee collective bargaining: How Washington compares to other states* (December 2018) ("Opening public employee collective bargaining is clearly working in many states in creating more open, honest, and accountable government."), *available at* https://www.washingtonpolicy.org/library/doclib/Shannon-Transparency-in-public-employee-collective-bargaining.pdf.

[17] *See* Tex. Local Govt. Code § 174.108, *available at* www.statutes.legis.state.tx.us/SOTWDocs/LG/htm/LG.174.htm.

[18] Mark Wilson, "Meet-and-confer negotiations with police ineffective, groups say," *Austin Statesman*, August 8, 2017 (updated September 25, 2018), *available at* https://www.statesman.com/news/20170808/meet-and-confer-negotiations-with-police-ineffective-groups-say.

pay increases and stipends in exchange for negligible improvements in oversight. [19]

As it turned out, greater transparency and public participation in Austin's meet-and-confer meetings prompted sea changes in an otherwise entrenched system. First, the city council rejected the re-negotiated MOU because it did not include meaningful reforms, and instead sent the negotiators back to the bargaining table; then, after initially backing out, the union relented and replaced its chief negotiator with a representative who was receptive to community input; ultimately, the city council voted to approve a revised MOU that saved the city almost $40 million and included reform measures.[20] Similar community engagement here in San Francisco could lead to similar dramatic benefits.

Nothing in the MMBA or any other provision of California law requires meet-and-confer discussions to occur behind closed doors, or compels DHR to maintain meet-and-confer correspondence in confidence. *See* 61 Ops. Cal. Atty. Gen. 1, 2-3 (Jan. 4, 1978) (California Attorney General legal opinion noting that the MMBA "is silent as to whether 'meet and confer' sessions may be private, or must be open to the public"). To the contrary, the meet-and-confer sessions are not confidential, and independent summaries of what was discussed at the meetings, as well as the communications between the parties, may be provided to the public as well as other stakeholders.

The Brown Act generally does *not* govern meet-and-confer sessions with unions, unless a quorum of members of the relevant legislative body (such as the Police Commission) attend the bargaining session, thereby triggering the Act's open meeting requirements. *Id.* at 4-5. However, the Brown Act still implicates the transparency of the meet-and-confer process in several ways. First, it limits legislative bodies to conferring in closed session with their bargaining representatives regarding the "salaries, salary schedules, or … fringe benefits" paid to employees, as well as "any other matter within the statutorily provided scope of representation." *See* Gov't Code § 54957.6(a). Such closed sessions must

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[19] Sukyi McMahon, Chas Moore, "To Reform the Police, Target Their Union Contract" *N.Y. Times*, April 8, 2019, *available at* https://www.nytimes.com/2019/04/08/opinion/austin-police-union-contract.html.

[20] *Id.*

be for "the purpose of reviewing [the agency's] position and instructing the local agency's designated representatives." *Id.*; *Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 917 (statutory exceptions permitted closed session must be narrowly construed). Second, the Brown Act does *not* permit legislative bodies to go into closed session to discuss matters that are not subject to bargaining under the MMBA, *i.e.*, beyond of the scope of union representation.[21] (Govt. Code § 54957.6(a).) It is thus inappropriate and contrary to statute for the Police Commission to discuss management issues related to ongoing reforms, in closed session. *San Jose Peace Officer's Ass'n,* 78 Cal. App. 3d at 947.

Meet-and-confer correspondence between the parties—i.e., opening bargaining offers, counters, and any other communications between the parties—may also be released to the public and other stakeholders. The MMBA is silent as to such communications between the parties, and thus does not prohibit their disclosure. The MOU does not contain any relevant confidentiality provisions. No legal privilege or protection applies to arms-length negotiations.[22] The Brown Act expressly permits legislative bodies to authorize the release of information that is acquired during closed session, *see* Gov't Code §54963—and, as noted above, the Police Commission has actually exercised this authority fairly recently, to release meet-and-confer communications received from SFPOA regarding DGO 5.17.

The CPRA also permits disclosure of arms-length correspondence between DHR and SFPOA. As SFPD's "Completion Memorandum" notes, the CPRA exempts from disclosure records "related to activities governed by [the MMBA] that reveal a local agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy…." Gov't Code § 6254(p)(2). However, the same provision goes on: "This paragraph shall not be construed to limit the disclosure duties of a local agency with respect to any other records relating to the activities governed by the employee

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[21] BASF-CJTF is very concerned that, in the past, the Police Commission may have discussed in closed sessions with DHR meet-and-confer negotiations "voluntarily" undertaken regarding matters, such as the use-of-force policy, that are not within the scope of representation. This practice must end, as it violates the Brown Act.

[22] Notably, SFPOA has never agreed to maintain confidentiality in its discussions with DHR, and its leadership has not hesitated to speak to the news media about negotiations whenever it deems doing so to be strategically advantageous.

relations act referred to in this paragraph." *Id.* Here, as with the Brown Act, the statutory exceptions are to be narrowly construed. *Bd. of Trustees of Cal. State Univ. v. Super. Ct.* (2005) 132 Cal. App. 4th 889, 896; *see also* Gov't Code § 6254(p)(2) ("This paragraph shall not be construed to limit the disclosure duties of a local agency with respect to any other records relating to the activities governed by the employee relations act referred to in this paragraph.")

In sum, California law allows greater transparency and inclusion in the meet-and-confer process, and recent experiences in other jurisdictions suggest that opening the meetings and negotiations to the public can advance reform efforts. Indeed, BASF-CJTF's experience in the USDOJ collaborative reform process has consistently taught that greater transparency and community participation in police policymaking improves outcomes, advances reforms, and reinforces public trust in law enforcement.

Conclusion

We know the Board of Supervisors and Police Commission remain committed to timely and meaningful reform of SFPD, including the relationship between the City and SFPOA. As the recent national demonstrations and calls for police reform reveal, the stakes for San Francisco could not be greater. We stand in partnership with the Board of Supervisors, the Police Commission, the SFPD, and the City to achieve our shared goals for police reform.

Sincerely,

Stuart Plunkett
President, Bar Association of San Francisco

cc:

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Exhibit A

From:	Kilshaw, Rachael (POL)
To:	SFPD, Commission (POL)
Cc:	Youngblood, Stacy (POL); Lohaus, Phillip (POL); CABRERA, ALICIA (CAT); Preston, Darryelle (POL)
Subject:	protocols when receiving DGOs/policies for Commission adoption
Date:	Tuesday, July 7, 2020 12:59:44 PM
Attachments:	proceess for handling DGOs.doc Hirsh letter.pdf response to 3.2.pdf

Dear Commissioners:
During last week's meeting there was a request to calendar a discussion about the process of how and why DGOs/policies are handled with respect to the meet and confer process. The Commission office can provide some information about the process at this time.

In 2016 the US DOJ recommended that the "SFPD work with the Police Commission to obtain input from the stakeholder group and conduct an after-action review of the meet and confer process to identify ways to improve input and expedite the process in the future for other policy development." (rec 3.2) To address one part of the recommendation the Commission President Hirsch and members of the Commission staff worked with the SFPD, the City Attorney's Office ("CAO") and the Department of Human Resources ("DHR") to develop protocols for the handling of DGOs/policies when received from the SFPD. The internal protocols were developed in 2018 and revised in 2019. I have attached a copy of the current Protocols for your review (first attachment).

In 2018 then Commission President Hirsch instructed DHR in closed session to only meet and confer over mandatory subjects of bargaining. Commission President Hirsh memorialized this directive in a letter to the SFPD. (second attachment)

In 2020, Commission staff submitted the cover letter to Hillard Heintz regarding recommendation 3.2 outlining the steps the SFPD, the Commission, DHR and the CAO have taken to expedite the meet and confer process. It provides additional information about the steps taken to expedite meet and confer. I have attached that letter for your review (third attachment). Recommendation 3.2 achieved substantial compliance in May 2020.

Regarding the status of outstanding policies still in meet and confer, there are 5:

- DGO 5.17
- Protocols for in person disciplinary hearings
- BWC policy
- Disciplinary Matrix
- SB 1421 protocols

The Commission staff tracks the items in meet and confer and routinely asks DHR (now Ms. Preston) and/or CAO about the status.

Of the 5 items in meet and confer, you will be addressing 4 in closed session on Wednesday. Contrary to public statements, the Commission Office has not been notified that meet and confer has concluded on the BWC policy, which is why the Commission will be provided an update in closed session. As you can see in attachment #1, once DHR, (now Ms. Preston – SFPD Director of Labor

Relations and DHR Liaison) concludes the meet and confer process, they notify the Commission Office and request that the item be placed on the agenda for adoption in open session. That notification has not happened.

I know this information only explains the "how" part of your questions regarding policies getting to meet and confer. The Commission staff will defer to DHR, CAO or Ms. Preston to explain the "why" each policy is identified for meet and confer.

Please let me know if you have any questions.
Rachael

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Exhibit B

Collaborative Reform Completion Memorandum

Finding # 3: The SFPD and the Police Commission collaboratively worked with community stakeholders to update Department General Order 5.01 - Use of Force policy.

Recommendation # 3.2 The SFPD should work with the Police Commission to obtain input from the stakeholder group and conduct an after-action review of the meet and confer process to identify ways to improve input and expedite the process in the future for other policy development.

Response Date: March 3, 2020

Executive Summary: Department General Order 5.01 had last been revised in 1995. In late 2015 the Police Commission ("Commission") directed the San Francisco Police Department ("Department") to present a revised Use of Force policy to the Commission for adoption no later than February 2016. The Commission convened a working group and identified various stakeholders that included Department members, members of community-based organizations, members of the community and members of other City agencies for the purpose of developing an updated Use of Force policy. The process to revise DGO 5.01 began on December 9, 2015. Members of the working group felt the February 2016 deadline was arbitrary and did not allow enough time to develop a Use of Force policy and requested that the meetings continue past the Commission's due date of February 2016. The Commission agreed to the request, and the working group completed the draft policy in June 2016. During the seven-month period the group developed two versions of a Use of Force policy that reflected policy enhancements, and included recommendations from the Final Report of the President's Task Force on 21st Century Policing, the Police Executive Research Forum, and the U.S. DOJ-COPs Office. On June 22, 2016 the Department presented the two policies to the Commission, at which time the Commission voted to approve one version of the Use of Force policy for the purposes of engaging in the "meet and confer" process with the San Francisco Police Officers' Association ("POA"), as required by California Government Code § 3500 et seq., also known as the Meyers-Milias-Brown Act ("MMBA").

The MMBA requires public agencies to provide notice to recognized employee organizations, and upon request, to meet with them over changes on matters within the scope of representation before implementing the changes. The MMBA excludes from the meet and confer obligation fundamental managerial decisions addressing the merits, necessity, or organization of any service or activity provided by law or executive order ("managerial decisions"). However, the MMBA does require the agency to meet and confer over the impact of managerial decision on employees ("effects bargaining") before implementing managerial decisions. The San Francisco Charter ("Charter") and the Memorandum of Understanding between the City and the POA ("MOU") impose equivalent meet and confer obligations.

The Charter authorizes the Commission to adopt rules and regulations, and other policies, procedures and Department General Orders (collectively, "DGOs"), governing the Department. (Charter § 4.104.) Managerial decisions are not subject to meet and

confer. However, even in those instances where the decision is squarely a managerial prerogative, those decisions may have effects – for example on employee training and discipline – that are subject to meet and confer. Accordingly, under the MMBA, Charter and MOU, the City as the public employer must engage in effects bargaining with the POA before implementing a managerial decision. As the policy decision maker on all DGOs, the Commission has an essential role in that meet and confer process, working with the City's Department of Human Resources ("DHR") on the negotiations. That process cannot end until the City completes the effects bargaining. Placing arbitrary deadlines on the meet and confer process at the onset of negotiations would be viewed by the courts as bargaining in bad faith

Compliance Measures:

1) Work with the Police Commission.

The Department worked with members of the Commission staff to develop a survey (see exhibit 1 – survey to Use of Force stakeholders) to send to various members of the community, members of community-based organizations, and members of other City agencies to obtain input on ways to improve input into policy development and expedite the meet and confer process for future policy development. While the questions were about the process for the Use of Force policy, they were purposely broad so the answers could be used to improve the process for future policy development.

The following questions were developed by the Department and the Commission staff and were included in the survey:

1) What did you value about the re-engineering of [Use of Force] DGO 5.01 and what areas could be improved?
2) Re-engineering the Use of Force policy was a lengthy process. Can you suggest ways to expedite this process in the future?
3) In reference to DGO 5.01, the SFPD sought input via stakeholder and Police Commission meetings. How else can we encourage thoughtful input?
4) Any additional thoughts and comments as we continue to improve policies and related negotiations are conducted.

2) Obtain input from all relevant stakeholder groups.

On July 17, 2017, the above referenced survey was sent via email to approximately 20 members of the Use of Force working group (see exhibit 2 – list of working group members who received survey and July 17, 2017 email to working group members with survey attached). While these members worked on the Use of Force policy, many who received the survey have been members of other Department/Commission working groups that developed other Department General Orders – both before and after the Use of Force working group. The survey was sent to:

Joyce Hicks*	Director of the Department of Police Accountability
Samara Marion*	Policy Director at the Department of Police Accountability
Marty Halloran*	President SFPOA
Teresa Ewins*	President Pride Alliance

Mark Marquez*	Latin Police Officers Association
Yulanda Williams	President of the Officers for Justice
Brian Kneuker*	Asian Police Officers Association
LaWanna Preston	Department of Human Resources
Michael Ulrich	Department of Human Resources
Sheryl Davis*	Director of the Human Rights Commission
Jennifer Friedenbach*	Director of the Coalition on Homelessness
Jeff Adachi*	Public Defender
Rebecca Young*	Assistant Public Defender
Sharon Woo*	Assistant District Attorney
Colin West	Blue Ribbon Panel
Kevin Benedicto*	Blue Ribbon Panel
Terri Boher*	CIT working group
Julie Traun*	Bar Association of San Francisco
Alan Schlosser*	ACLU
Cecile O'Connor	CIT working group

*in addition to working on the Use of Force policy, these individuals have worked on additional policy development working groups (either before or after the UOF working group, or both)

On July 31, 2017 the Department sent a reminder email (see exhibit 3 – follow up email to stakeholders) to the recipients asking for a response to the survey.

The Department received four responses – the POA, the DPA, the Coalition on Homelessness and the San Francisco Bar Association. In addition, although the ACLU – Northern California did not send in a response to the July 17, 2017 or the July 31, 2017 request to complete the survey, it had submitted a February 29, 2016 letter to the Police Commission during the Use of Force working group process that includes recommendations regarding the meet and confer process. The ACLU's letter is included in this response. (See exhibit 4 – responses from POA, DPA, Coalition on Homelessness, San Francisco Bar Association, and ACLU – Northern California)

3) Conduct an after-action review of the meet-and-confer process.

The Commission and the Department conducted an after-action review of the meet and confer process:

A. Both agencies reviewed the responses to the survey questions and the February 29, 2016 letter (see again exhibit 4 – responses from POA, DPA, Coalition on Homelessness, San Francisco Bar Association, and ACLU – Northern California) about the meet and confer process. The suggestions included:

- The POA recommended 1) the Department have a final decision maker with the authority to agree to proposals present during all negotiations, 2) the Department should engage with the POA on early drafts of policy revisions before presenting a draft of the policy to the working group, 3) the Department should revise its policies on a more

frequent schedule and not wait two decades, and 4) the Police Commission should comply with MMBA by fulfilling its duty to meet and confer in good faith.

- The DPA recommended 1) that all meet and confer issues are identified before discussions begin, 2) reasonable timelines are adhered to, and 3) "more collaboration and strategy be committed to how the new policy and training are rolled out so that reasons for the changes and the officers' concerns are addressed in a manner that advances and not undermines reforms."
- The Coalition on Homelessness did not have any specific recommendations but stated that in their opinion the POA's decision to claim labor issues in meet and confer was an incorrect assessment.
- The San Francisco Bar Association recommended 1) that the POA not have such a large and prominent role in the policy drafting because it is unfair that they will have another opportunity during meet and confer, 2) the role of DHR needs to be revisited, and there needs to be a bright line between policy and working conditions, and not negotiate over non-work related conditions, and 3) there needs to be more clarity on the definition of "working conditions," which is too broadly defined.
- The ACLU recommended that the Commission clarify 1) whether fundamental policy decisions are a mandatory subject of bargaining under MMBA, and if not, clarify if the City voluntarily agrees to meet and confer under these circumstances, 2) the scope of the matters discussed in meet and confer and the procedures when there is an impasse, and 3) whether, through the meet and confer process, the policies approved by the Commission are subject to revision once in the meet and confer process.

B. With the Use of Force process and the survey responses in mind, the Commission met with members of DHR and the City Attorney's Office ("CAO") on June 13, 2018 in a closed session meeting to discuss ways to expedite the meet and confer process within the provisions of the MMBA, the City Charter and the MOU. The Commission and the Department are not able to release the minutes or the audio recording from closed session item 7a as the Commission voted in item 8 not to disclose any portion of the closed session meeting pursuant to San Francisco Administrative Code section 67.12. (See exhibit 5 – agenda including closed session item 7a and open session item 8 from the June 13, 2018 Commission meeting, and language from San Francisco Administrative Code 67.12 (a)).

C. On June 28, 2018 members of the SFPD, the Commission staff and a member of DHR met (see exhibit 6 – calendar invite to meeting and agenda) to discuss ways to streamline the process of 1) providing draft DGOs to DHR, 2) DHR providing an opinion on whether the draft DGO is subject to meet and confer or whether the DGO can be placed on the Commission agenda for adoption without meet and confer, and 3) DHR conducting the meet and confer with the POA.

D. In a series of emails from December 11, 2019 through January 2, 2020, members of the Department, DHR and the POA discussed scheduling regular meetings (see exhibit 7 – emails among SFPD, DHR and POA) to ensure meet and confer negotiations among the three parties are consistent and regularly scheduled.

The Department and the Commission considered all the recommendations from the stakeholders and were able to implement many of them. Others recommendations were not implemented. For example, not allowing the POA to have a "large and prominent role in the policy drafting because it is unfair that they will have another opportunity during meet and confer" was not implemented. The POA and other employee groups are welcome to attend any working group meeting, as are all members of the public.

4) Identify ways to improve input and expedite the process in the future for other policy development and implementation.

Based on the after-action review and discussions, DHR, the Department and the Commission have done the following in an attempt to expedite the meet and confer process for future DGOs:

1. The Commission has instructed DHR to meet and confer only over mandatory subjects of bargaining. (See exhibit 8 – letter from Commission President Hirsch to Commander Walsh).

2. The Commission staff, the Department and DHR developed a process in an attempt to streamline the meet and confer timeline: 1) The Commission staff providing DHR/CAO a copy of the draft DGO prior to the DGO being placed on the agenda so DHR/CAO can provide an opinion on whether the draft DGO is subject to meet and confer, 2) providing DHR with an "order of priority" list of DGOs when they are sent to DHR for meet and confer, and 3) providing the Department's training plan, if available, to DHR along with the DGO for inclusion in the discussions during meet and confer. The group developed the following protocols (see exhibit 9 - Police Commission Protocols for DGOs):

   - Once the Police Commission Secretary receives a draft DGO from Written Directives requesting it be calendared on the Commission agenda, the Police Commission Secretary emails the draft DGO to a designated DHR representative, with a courtesy copy to a designated Deputy City Attorney ("DCA"), asking for an opinion on whether the draft DGO as written is subject to meet and confer. The DHR representative or the DCA provides an opinion on whether the DGO is subject to meet and confer. These emails are subject to the attorney client privilege, and the official information privilege (California Evidence Code 1040) outlined in the MOU between the CAL DOJ, the Department, and the Commission will not protect the attorney client privilege, which would be waived upon the release of these emails. However, this procedure is outlined in step 4 of the Police Commission Protocols for DGOs. (see again exhibit 9 – Police Commission Protocols for DGOs, step #4)
   - If DHR/DCA opines that the DGO **is not subject** to meet and confer, the Police Commission Secretary posts the DGO for members of the public for at least 10 days prior to the Commission voting on the DGO, and places the DGO on the agenda as "Discussion and possible action for adoption of DGO XX.XX." (See exhibit 10 –

examples of agendas with DGOs with no need for meet and confer.) The DGO is effective the date of the Commission vote.

- If DHR/DCA opines that the DGO **is subject** to meet and confer, the Police Commission Secretary posts the DGO for members of the public for at least 10 days, and places the DGO on the agenda as "Discussion and possible action to approve revised Department General Order XX.XX for purposes of engaging in the meet-and-confer process with the Police Officers Association, as required by law." (See exhibit 11 – examples of agendas DGOs with a need for meet and confer.) The DGO is not effective until after meet and confer is finalized.
- After the vote to approve a DGO for meet and confer, the Police Commission Secretary emails the draft DGO along with the training plan, if available, to a designated DHR representative, with a courtesy copy to a designated DCA, directing DHR to begin negotiations and notify the Police Commission staff when negotiations are complete, or in the alternative, advise if they need direction in a closed session meeting from the Commission during negotiations.(see exhibit 12 – samples of emails to DHR with the DGO for meet and confer.)
- DHR has requested that the Commission prioritize the DGOs in order of importance.
- The Commission staff requests quarterly status updates from DHR on the progress of the DGOs in the meet and confer process. (see exhibit 13 – samples of emails to DHR asking for status updates)
- Once DHR notifies the Commission staff that the negotiations have concluded and provides the Office with the final version for the Commission to vote on, the Police Commission Secretary posts the DGO for members of the public for at least 10 days, and places the DGO on the agenda as "Discussion and possible action to adopt revised Department General Order XX.XX." (see exhibit 14 – examples of agendas with DGOs that had been subject to meet and confer being placed on the agenda for a vote to adopt.) The DGO is effective the date of the Commission vote.

3. The Department, DHR and the POA have a standing four-hour meeting each month (see exhibit 15 – Chief's calendar with scheduled meetings) dedicated to conducting negotiations on DGOs that are subject to meet and confer. The agendas for the February 2020 and the March 2020 meetings are attached. (see exhibit 16 – agendas for the February 25, 2020, March 11, 2020 and March 16, 2020 meetings and email from DHR regarding agenda setting). DRH has explained that the agendas for upcoming meetings are set at the end of each meeting. To date, the agenda has been set for the upcoming March 11, 2020 and March 16, 2020 meetings, and no agendas for meetings after that date have been set. There are no official minutes taken for meet and confer meetings. The Department does not maintain any notes from the meet and confer sessions. DHR does take bargaining notes which are privileged and not subject to release pursuant to Government Code 6254(p)(2). DHR holds the privilege and declines to release the bargaining notes to the Department or the Commission. (see exhibit 17 – language from Government Code 6254(p)(2)).

Exhibit C

The Police Commission

CITY AND COUNTY OF SAN FRANCISCO

ROBERT HIRSCH
President

June 19, 2019

Commander Peter Walsh
San Francisco Police Department
1245 3rd Street, 4th Floor
San Francisco, CA 94158

Re: U.S. Department of Justice Recommendation 3.2

Dear Commander Walsh:

The Commission has previously instructed the City and County of San Francisco's Department of Human Resources, the City's bargaining representative, to only meet and confer over mandatory subjects of bargaining.

Please feel free to contact me should you have any questions.

Sincerely,

Robert Hirsch
President
San Francisco Police Commission