



LONDON BREED
MAYOR

CITY AND COUNTY OF SAN FRANCISCO
Department of Police Accountability
ONE SOUTH VAN NESS AVE., 8th FLOOR
SAN FRANCISCO, CA 94103



PAUL DAVID HENDERSON
EXECUTIVE DIRECTOR

DPA MEMORANDUM
TO THE COMMISSION CONCERNING SFPD'S WITHHOLDING OF RECORDS IN OFFICER-INVOLVED SHOOTINGS OCCURRING IN 2023

TO: President Cindy Elias, cindy.elias@sfgov.org
Vice President Max Carter-Oberstone, max.carter-oberstone@sfgov.org
Commissioner Larry Yee, lawrence.yeel@sfgov.org
Commissioner James Byrne, jim.byrne@sfgov.org
Commissioner Kevin Benedicto, kevin.benedicto@sfgov.org
Commissioner Jesus Yanez, jesus.g.yanez@sfgov.org
Commissioner Debra Walker, debra.walker@sfgov.org

FROM: Paul Henderson, Executive Director, Department of Police Accountability
Diana Rosenstein, Legal Team Manager, Department of Police Accountability

DATE: September 22, 2023

The San Francisco Police Commission (“Commission”) is currently tasked with resolving a dispute between DPA and SFPD related to the SFPD’s recent decision to withhold evidence in officer-involved shooting investigations. This matter is before the Commission for dispute resolution because since 2003, SFPD and DPA (at the time “OCC”) have used the “*Protocol Between The Office Of Citizen Complaints and The San Francisco Police Department Re: Responding To Requests For Documents For OCC Investigations*” agreement to resolve disputes about document production.¹ This agreement states that all disputes about the production of documents must be brought by the parties to the Commission.² *Section VI. Denial of Disclosure*, requires SFPD to provide DPA with “the specific legal and factual basis for the denial of each requested item.” If DPA disagrees, it is required to inform the Chief of Police and the Commission, and if the matter cannot be resolved between the parties, the matter shall be referred to the Police Commission for resolution.

DPA has referred three such matters to the Commission, with one more on the way. All the matters pertain to officer-involved shootings (“OIS/OISes”) that have occurred solely in 2023. In all instances, DPA requested that SFPD provide basic documents such as the police report and body-worn camera footage, and SFPD has refused, citing Evidence Code §1040, invoked on behalf of the San Francisco District Attorney’s Office (“SFDA”). DPA now submits this Memorandum at the direction of Commission Vice President Max Carter-Oberstone. DPA requests that this Commission order SFPD to disclose the materials DPA is seeking so that DPA can fulfill its charter-mandated obligation to investigate OISes in a timely and thorough manner.

¹ <https://sfgov.org/dpa/sites/default/files/OCC%20Document%20Protocol.pdf>. This agreement was entered into by the parties pursuant to SF Admin Code §96.3(a), which states, “Unless the Police Department and the DPA mutually agree in writing to an alternative deadline(s), or (ii) the Police Commission, by a two-thirds vote, establishes an alternative deadline(s) not to exceed ten business days, the Police Department shall disclose all such documents within five business days from the date of DPA’s request.”

² *Id.* at pg. 2, § VI. DENIAL OF DISCLOSURE

BACKGROUND

In 2016, San Francisco enacted a local ordinance, mandating that, “The DPA shall conduct a timely and complete investigation of any incident occurring within the City and County of San Francisco in which a member of the uniformed ranks of the San Francisco Police Department discharges a firearm resulting in the physical injury or death of a person, even if the discharge is accidental.”³ Since the creation of this mandatory investigative function, DPA has investigated numerous SFPD OISes with the prompt and full cooperation of the SFPD—up until this year.

Also in 2016, the SFDA established the Independent Investigation Bureau (“IIB”), “...based on recommendation from SF Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement.”⁴ In April of 2019, SFDA George Gascon and SFPD Police Chief William Scott signed a Memorandum of Understanding (“MOU”) that allowed SFDA’s IIB to criminally investigate, among other things, OISes involving sworn members of the SFPD.⁵ This arrangement was renewed in an MOU between SFDA and SFPD signed by SFDA Chesa Boudin and SFPD Chief William Scott in 2021.⁶ This MOU is still in place today.

From April 2019 to December of 2022, San Francisco experienced seven (7) OISes. All, except one that occurred at the San Francisco Airport, were jointly investigated for different purposes—as required by law and other applicable policies—by DPA, SFPD, and IIB jointly and simultaneously. **At no point did SFPD deny DPA access to records related to these OIS incidents. The cooperative exchange of information continued, relatively unhindered, even though the language of the SFPD/SFDA MOU indicated that SFDA would be the lead criminal investigator since 2019.**

Since December of 2022, San Francisco has experienced four (4) OISes. In all four incidents, SFPD has denied DPA access to basic, rudimentary documents, such as police reports, body-worn camera (“BWC”) footage, and other basic records, asserting that they have been instructed by IIB to withhold this information from DPA. What is most puzzling about this request is DPA has participated in viewing the crime scenes of all of incidents, viewed BWC footage, and virtually sat in on interviews of officers and witnesses conducted by IIB in relation to the incidents.

In his September 6, 2023 letter to the Commission on this issue, Chief Scott asserts, “Since the MOU negotiations, IIB has insisted that all evidentiary materials, whether initially compiled by SFPD or IIB, for any critical incident investigation belong to IIB. Moreover, IIB insists that such materials are privileged under Evidence Code section 1040.” The letter also asserts that DPA is provided with materials disclosed at Town Halls. However, Town Hall materials consist of carefully curated excerpts of heavily redacted BWC footage, which is largely unhelpful to DPA’s investigative efforts. Town Hall materials do not contain all BWC footage from the incident, any police reports, or supplemental reports, including inspector’s chronologicals of investigation, all of which are crucial to DPA’s charter mandate to investigate these cases in a “timely” and “complete” manner. Moreover, before the 2023 Town Halls occurred, DPA was granted access to the scene and materials outside the scope of the information provided by SFPD to the public during the Town Halls, as explained in the previous paragraph.

This perplexing practice began despite all other factors, laws and agreements continuing to remain exactly the same. This new practice of withholding crucial information from an independent civilian oversight agency

³ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-21310#JD_96.11

⁴ <https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/PoliceCommission051921-SFDA%27sOfficeIndependentInvestigationsBureau%26ReponsetoOIS.pdf>

⁵ <https://www.sfdistrictattorney.org/wp-content/uploads/2020/08/MOU-SFDA-SFPD-OIS.pdf>

⁶ <https://sfdistrictattorney.org/wp-content/uploads/2021/11/2021-SFDA-SFPD-IIB-MOU.pdf>

mandated to conduct OIS investigations flies in the face of basic principles of 21st Century Policing, the CRI recommendations SFPD has been working to implement since 2016, and the basic requirements of the San Francisco Charter. Neither SFPD nor IIB has provided DPA or this Commission with any explanation for why these specific records must be blanketed in secrecy, and any attempt to continue to withhold these records is without merit.

The City Attorney’s Office in their September 20, 2023 memo, concludes, “The Charter and Administrative Code most likely require disclosure of OIS investigative records to DPA before the conclusion of the SFDA’s criminal investigation as a general matter, but under Charter Section 4.136(g), Government Code Section 25303, and Evidence Code Section 1040(b)(2), do not compel disclosure of these records if such disclosure would impede the SFDA’s state law duties to investigate and prosecute crimes.”

The 2023 memo also suggests, “For each record DPA requests from SFPD, SFPD should work with the SFDA to determine whether disclosing information to DPA would impede the SFDA’s exercise of authority under Government Code Section 25303, and to document the basis for that determination.” This language also supports DPA’s position that blanket withholding of all evidence is without merit.

There is no evidence SFPD and IIB can offer to prove that DPA’s possession of these documents and records in past cases has ever impeded SFDA’s duties to investigate and prosecute crimes. DPA has had these types of records in their possession in other OIS investigations for years without any indication from either agency that DPA’s investigation hampered their investigative efforts. At best, SFPD and IIB can only speculate about possible unlikely hypothetical scenarios where that may occur, but speculation is not evidence.

LEGAL ANALYSIS

In his September 6, 2023 letter to the Commission, Chief Scott stated, “We have checked with our City Attorney to determine whether IIB may lawfully invoke Evidence Code section 1040 and the theory has been affirmed.” (Emphasis added.) In theory, any public entity, including DPA and the Commission, can invoke Evidence Code §1040 to prevent disclosure of any information. However, that invocation is conditional, not absolute, and requires review to determine whether the privilege has been properly invoked.

I. SFPD CANNOT INVOKE EVIDENCE CODE § 1040(b)(2) BECAUSE OF ITS ABSOLUTE DUTY OF DISCLOSURE TO DPA UNDER SAN FRANCISCO ADMINISTRATIVE CODE § 96.11

Prior discussions of the issue have been just that—theoretical. Now that the parties have been called to provide briefing on the issue, a more thorough review of the law calls that theory into doubt. Previous general discussions centered around general ordinance, SF Charter § 4.136(j)⁷, which provides,

“In carrying out its objectives, including the preparation of recommendations concerning departmental policies or practices referenced above, the investigations referenced above, and the audits noted below, DPA shall receive prompt and full cooperation and assistance from all departments, officers, and employees of the City and County, which shall, unless prohibited by state or federal law, promptly produce all records and information requested by DPA...”

⁷ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_charter/0-0-0-52612#JD_4.136

SFPD and IIB believe that the clause, “unless prohibited by state or federal law” means they can invoke Evidence Code §1040(b)(2) and withhold records from DPA. However, a different and more specific section of the San Francisco Charter exists without that qualifying language, which requires SFPD to cooperate with DPA.

A. SF Administrative Code § 96.11 requires SFPD to promptly and fully to cooperate and assist DPA in Officer-Involved Shooting Investigations.

Unlike SF Charter Code § 4.136(j), a general ordinance that mandates that all agencies cooperate with DPA in all categories of investigation, auditing, and policy making, SF Admin Code § 96.11 is specific to OIS investigations. Unlike the general provision, this section says, “**The Police Department and its officers and employees shall provide the DPA with prompt and full cooperation and assistance in connection with the DPA’s investigations under this Section.**” This mandate is not qualified by “unless prohibited by state or federal law” and is specifically aimed at the investigation of OISes. Therefore, SFPD’s reliance on Evidence Code §1040, at least when it comes to OISes, is misplaced.

SFPD is bound by this provision to provide DPA the records we seek in the four OISes that have occurred since the beginning of 2023 and the records should be provided promptly. Because this section does not have the exception language of SF Charter Code § 4.136(j), SFPD cannot invoke the MOU or hide behind the SFDA’s mandate that the records be withheld because SFPD has an independent duty to provide DPA with records it has in its possession. This mandate does not change simply because SFPD has chosen to provide said records to another City Agency.

B. The MOUs between SFPD and SFDA both mention SF Admin Code §96.11, not SF Charter §4.136

It is also important to note that both parties now seeking to bar DPA from obtaining records necessary for investigation of OIS cases, in their own MOU, explicitly agree in writing that DPA’s role in OIS investigations is governed by SF Admin Code § 96.11, rather than SF Charter Code § 4.136. This is a direct, knowing, and specific acknowledgment that DPA has a duty to conduct these investigations and SFPD has a direct responsibility to DPA in these specific investigations. In both the 2019 and 2021 MOUs between SFPD and SFDA, DPA is mentioned only once with the same, identical language:

SFDA and SFPD acknowledge that pursuant to Prop D, the Department of Police Accountability (DPA) is responsible for “conducting timely and complete [administrative] investigation of any incident occurring within the City and County of San Francisco in which a member of the uniformed ranks of the San Francisco Police Department discharges a firearm resulting in the physical injury or death of a person, even if the discharge is accidental.” **S.F. Admin. Code § 96.11.**” (Emphasis added. See FNs 4-5.)

Thus, Both SFPD and SFDA, two separate times in two separate MOUs acknowledge that they are aware of this specific section and the duties bestowed on the respective parties. Their attempt to ignore this mandate by invoking Evidence Code §1040 and Government Code Section 25303 is therefore meritless.

II. SFPD CANNOT INVOKE EVIDENCE CODE §1040(b)(2) BECAUSE THE WITHHELD INFORMATION WAS NOT OBTAINED IN CONFIDENCE AND THE BALANCING TEST WEIGHS HEAVILY IN FAVOR OF DISCLOSURE.

To invoke confidentiality over information under Evidence Code §1040(b)(2), a public entity must first prove that it obtained the information in confidence, and then it must prove that the necessity for preserving the

confidentiality of the information outweighs the necessity for disclosure in the interest of justice.⁸ That means, assuming, without conceding, that SFPD can invoke the official information privilege on behalf of SFDA, the official information privilege SFPD is asserting is conditional and not absolute, requiring the Commission to review whether it is being invoked in a legally appropriate manner.

A. Since SFPD did not acquire the withheld information in confidence, SFPD cannot now invoke the privilege.

To assert this privilege, SFPD must first prove that they acquired the information they are withholding in confidence. Some criminal investigations involve information that is derived from confidential sources. For example, police use confidential informants, and clandestine locations to conduct surveillance and investigations, and revealing this information would interfere with other ongoing investigations, warranting the assertion of the information privilege. However, OIS investigations, while high profile and tragic, are not derived from confidential sources.

It is clear that BWC footage, incident reports, and other evidence obtained during OIS investigations does not come from confidential sources because that is **evidence routinely collected in all criminal cases** and used in open forums such as criminal and civil courts. Invocation of this privilege under current circumstances is also baffling because SFPD has already given DPA access to much of the evidence it now seeks to withhold. During the initial investigation of all four OISes, DPA was provided access by SFPD and SFDA to the crime scene, access to listening to officer interviews, and access to viewing of all BWC footage. Therefore, it makes no sense to now deny DPA access to police reports that document the incident, audio recordings of interviews DPA listened to, and BWC DPA has already viewed.

Moreover, even if some of the evidence SFPD has collected in these investigations was obtained from a confidential source, for example a witness who credibly fears gang retaliation and should remain anonymous for the perseverance of life, that evidence should be redacted, and the rest of the records produced. Wholesale nondisclosure under these circumstances is alarmingly inappropriate.

B. If the Commission decides SFPD acquired the information in confidence, SFPD must then prove the need to maintain confidentiality of the records outweighs the substantial need the DPA has to use these materials to investigate OIS incidents, which SFPD cannot do because the City, the Department of Justice, and Community Stakeholders have expressed repeatedly that there is a strong public interest in DPA conducting these investigations promptly and thoroughly and with cooperation from other City agencies.

Assuming, without conceding, that SFPD satisfies the threshold burden of showing that the information was acquired in confidence, the statute next requires the Commission to weigh the parties' interests and to sustain confidentiality over the records only if "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."⁹ In light of SF Admin Code § 96.11, the Collaborative Reform Initiative Guidelines, and the public sentiment about how these investigation should be conducted, SFPD cannot meet this burden.

By enacting SF Admin Code §96.11, the people of San Francisco have spoken. They want DPA to conduct swift, thorough, and independent OIS investigations and they want SFPD to cooperate and assist in that important task. Transparency, swiftness, and cooperation between SFPD, SFDA, and DPA was also a key

⁸ *Marylander v. Superior Ct.* (2000) 81 Cal. App. 4th 1119, 1126.

⁹ *Marylander v. Superior Ct.* (2000) 81 Cal. App. 4th 1119, 1126.

recommendation of a San Francisco Civil Grand Jury Report.¹⁰ The U.S. Department of Justice was unequivocal in its recommendation, as well:

“The SFPD’s investigative protocols are comparable to those followed by other professional major city police departments. However, IAD staff members, along with some of SFPD’s partners such as members of the District Attorney’s Office and the OCC assigned to respond to such incidents, are not as integrated. **Lack of collaboration and cooperation in investigating officer-involved shooting incidents can undermine procedural justice and transparency for the department. The SFPD needs to develop protocols and memoranda of agreement to ensure the highest level of cooperation and oversight into the investigation of officer-involved shooting incidents.**”¹¹ (Emphasis added.)

Therefore, any reason, likely minor and theoretical, that weighs in SFPD’s and IIB’s favor against disclosure, is wholly outweighed by the prolific and abundant reasons why this information should be disclosed to DPA. Even the creation of IIB and all the protocols concerning the administrative and criminal investigations of OIS cases were predicated on the idea that DPA, SFPD and IIB would investigate these incidents in a cooperative manner. Finally, it is important to point out that the City Attorney’s Office acknowledges that DPA is not “the public,” and disclosing these records to DPA is not the equivalent of disclosing this information to the public. Like SFPD, DPA is cloaked by identical confidentiality mandates for information it collects during its investigations by Penal Code § 832.7 and the *Pitchess* statutes, which are more specific and controlling than even Evidence Code §1040(b)(2).¹²

In sum, the strong public interest in disclosing these documents to DPA, which is not the public at large, so that DPA can conduct a swift and thorough investigation outweighs any reason to continue to hold these basic records in confidence.

III. SFPD AND IIB ARE INDEPENDENT AGENCIES THAT CANNOT AND SHOULD NOT DIRECT EACH OTHERS’ INVESTIGATIONS

The whole point of creating IIB was to ensure criminal investigations of officers’ actions during an OIS were conducted independently. If SFPD is at the investigative mercy of IIB, that cannot happen. In reality, IIB does not have any of the tools necessary to independently investigate an OIS. Practically speaking, in OIS investigations SFPD and SFDA/IIB perform independent investigative responsibilities that create different types of evidence in OIS investigations, and the majority of the evidence is processed, collected, stored, and analyzed by SFPD because IIB does not have the facilities or the personnel to conduct those investigatory steps.

For example, the crime scene at an OIS is entirely processed by SFPD, in most cases, before IIB even arrives on the scene. IIB does not have a CSI unit or evidence storage capabilities. Therefore, SFPD facilities are used to process and store evidence, based on SFPD policies and procedures, without any “guidance” from IIB, not the other way around, and SFPD does not wait for IIB’s direction before CSI processes the scene and collects, preserves, and stores all physical evidence at SFPD facilities. The only investigative function IIB actually controls is the interviewing of witnesses. Therefore, to label IIB as the “leader” of these investigations is a notion not

¹⁰ https://civilgrandjury.sfgov.org/2015_2016/2015-16_CGJ_Final_Report_Transparent_Investigations_Fatal_SFPD_Shootings_7_6_2016.pdf, “The 2015-2016 San Francisco Civil Grand Jury calls upon all City agencies involved in the investigation of these incidents — from the SFPD and the Police Commission to the District Attorney’s Office (“DA” or “DA’s Office”) and the Office of Citizen Complaints (“OCC”) — to take immediate action to complete the investigations more timely and make the entire process more transparent.”

¹¹ https://www.sanfranciscopolice.org/sites/default/files/2018-11/DOJ_COPS%20CRI_SFPD%20OCT%202016%20Assessment.pdf, pg. 214.

¹² *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal. App. 4th 385, 400–01.

rooted in reality. In reality, only SFPD personnel have the knowledge, experience, and the facilities to conduct the majority of the investigative functions related to OIS investigations.

Moreover, it is important to note that SFPD investigations turn into OIS cases, not the other way around. In other words, tragically, an OIS occurs when SFPD officers respond to routine calls for service or on-view questionable conduct, and things take a turn for the worse. Thus, the investigation of an OIS begins once an OIS has occurred. However, all the steps taken before an OIS occurs are routine and not conducted at the direction of IIB, and any evidence gathered, documented, or obtained in such a manner is never obtained at the request of IIB.

CONCLUSION

Since 2016, San Francisco and all departments involved in the investigation of OIS cases have been moving towards a model of cooperation, and swift and thorough investigation recommended to us by other government agencies, task forces, and other reports from various stakeholders. The Charter and Administrative Code establish a goal of disclosure of OIS investigative records to DPA before the conclusion of the SFDA's criminal investigation as a general matter, and SFPD and IIB cannot credibly invoke Government Code Section 25303, and Evidence Code Section 1040(b)(2) to thwart the disclosure of the records because precedent proves that disclosure of these records to DPA has never impeded criminal investigations in OIS cases.

To allow SFPD to withhold records from DPA that are necessary for DPA's investigation flies in the face of the goals the City has been setting to reform SFPD, and more specifically, the investigation of OIS cases. The Commission should ask itself, why SFPD and IIB, after all the discussions about reform, are fighting harder against transparency and accountability than they are for integrity and professionalism?