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San Francisco Police Commission
1245 Third Street, Sixth Floor
San Francisco, CA 94158

Re: Police Department Surrebuttal

Dear Members of the San Francisco Police Commission:

The Department of Police Accountability filed its rebuttal to the Police Department's opposition memorandum on December 29. DPA chiefly claims the Police Department failed to answer the questions posed by the City Attorney. This is untrue. The City Attorney posed two questions:

> [T]he issue of whether SFPD must disclose OIS-related records turns on two factual questions: [1] Does SFPD possess those records on behalf of the SFDA while acting as an agent of the SFDA? And, if so, [2] would disclosure of the records to DPA (but not the general public) during the course of the criminal investigation impede the SFDA's investigatory or prosecutorial functions?[1]

The Police Department answered these. First, yes, the Police Department is an agent of the District Attorney for these purposes because the District Attorney is the lead investigative agency and has instructed the Police Department to hold evidence on its behalf.[2] Furthermore, because the Police Department is an agent of the District Attorney, this dispute is between the District Attorney and DPA, and is, therefore, outside this Commission's jurisdiction. Second, yes, disclosure, in all cases, constitutes interference because of the impact evidence disclosure could have on witnesses.[3]

On the contrary, from whether the District Attorney leads the investigation, to whether DPA's subpoena power is absolute, to the degree of specificity required to prove interference with the District Attorney's investigation, it is DPA who has ignored or misstated[4] the City Attorney's conclusions and framework. We correct the record here.

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[1] CAO Mem. at 6.
[2] SFPD Op. Mem. at 2-3 ("[T]his is a disagreement between DPA and the District Attorney, with the Police Department acing merely *as an agent*.").
[3] *Id.* at 5-10.
[4] DPA opens its brief by claiming that the City Attorney found that disclosure was "likely" required: "The Commission must conclude—like the City Attorney did—that 'the Charter and Administrative Code most likely require disclosure of OIS investigative records to DPA before the conclusion of the SFDA's criminal investigation

I. The Police Department is an agent of the District Attorney's Office for OIS investigation purposes.

DPA's central claim on rebuttal is that the Police Department is not an agent of the District Attorney in OIS investigations because (1) the MOU does not grant the District Attorney lead authority; and (2) in practice, the Police Department and District Attorney cooperate to investigate covered incidents. These assertions are wrong and confuse the issue. DPA spends much of its brief arguing that the District Attorney is not the lead investigative agency—despite the City Attorney concluding they are—to explain why the Police Department is not the District Attorney's *agent*. These are separate issues which DPA muddles into one.

A. The MOU assigns lead responsibility for criminal OIS investigations to the District Attorney.

The MOU repeatedly states that the District Attorney is charged with conducting the investigation into the *officer's* conduct during any covered incident whereas the Police Department is charged with conducting the ancillary investigation. Yet, DPA argues that the MOU does not grant SFDA lead authority over the investigation and its evidence, because "SFPD is listed as an investigative partner."[5] DPA errs by selectively quoting the MOU.

DPA represents that the MOU states that "SFDA and SFPD will jointly and cooperatively investigate all Covered Incidents."[6] Left on the cutting room floor is the following: "SFDA's role will be to *lead the independent* investigation and assessment of whether SFPD personnel committed any violations of criminal law during a covered incident. *Independent of SFDA*, SFPD's role will be to conduct ancillary criminal and administrative investigations of a Covered Incident."[7] If this were not sufficiently clear, the MOU repeats this arrangement throughout:

- "Notwithstanding the *SFDA's investigation to determine whether an officer* committed a criminal offense during any Covered Incident, SFPD shall retain the authority to conduct ancillary criminal investigations."[8]
- "Assistant district attorneys and inspectors from SFDA will respond to the scene and will *lead the criminal investigation into the covered incident*, with assistance from the SFPD. The *primary objective* of SFDA's investigation is to accurately, thoroughly, and objectively investigate the incident and to determine the potential criminal liability, or lack thereof, *of SFPD officers* involved in a Covered Incident."[9]
- "SFDA responsibilities: [¶] . . . F. Conduct an *independent investigation* of the facts and circumstance of the Covered Incident . . . ."[10]

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as a general matter . . .'" But DPA omits the rest of the City Attorney's sentence, which shows that they *did not* "conclude" disclosure was "likely" required here: "but under Charter Section 4.136(j), 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." (CAO Mem. at 7.)

[5] DPA Rebuttal at 4.

[6] *Id.*

[7] SFDA/SFPD MOU at 3 (emphasis added).

[8] *Id.* at 2 (emphasis added).

[9] *Id.* at 3 (emphasis added).

[10] *Id.* at 4 (emphasis added).

- "At the conclusion of *SFDA's investigation* of a Covered Incident, the District Attorney or his/her designee, shall review and analyze all the evidence to determine *whether any SFPD officer* acted unlawfully."[11]

Importantly, the City Attorney also determined the District Attorney was the lead:

- "Here, *the SFDA* leads criminal OIS investigations . . . ."[12]
- "In San Francisco, the SFDA and SFPD have agreed as a policy matter that *the SFDA will lead* OIS criminal investigations."[13]
- "The current MOU provides that SFDA will 'lead the criminal investigation into the [OIS], with assistance from the SFPD.'"[14]
- "SFPD leads the investigation into criminal conduct by non-law enforcement personnel connected with the OIS . . . *but does not criminally investigate the officer* involved in the OIS."[15]
- "Because of the SFDA's lead role in OIS investigations . . . ."[16]
- "In criminal cases *that are not subject to the MOU* . . . SFPD typically leads the criminal investigation."[17]

The City Attorney found that this arrangement was purposeful and part of long-standing efforts to reform the Police Department: "This structure for OIS investigations, with the SFDA's IIB unit leading those OIS criminal investigations, is one result of police reform efforts San Francisco has pursued in collaboration with the California and U.S. Departments of Justice."[18] The Department of Justice itself described the arrangement as: "The [SFPD] Homicide Detail once performed a criminal investigation of the officer involved in OIS incidents. *This function is now performed by the Office of the District Attorney*, which is not under the auspices of the [SFPD]."[19]

Finally, before taking its most recent position that the "plain language" of the MOU does not grant the District Attorney lead authority in the investigation, DPA previously described the District Attorney's role as follows: "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.*"[20]

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[11] SFDA/SFPD MOU at 8 (emphasis added).
[12] CAO Mem. at 1 (emphasis added).
[13] *Id.* at 3 (emphasis added).
[14] *Id.*
[15] *Id.* (emphasis added).
[16] *Id.* at 6.
[17] *Id.* at 5 (emphasis added).
[18] *Id.* at 4.
[19] *Id.* (emphasis added).
[20] DPA Op. Br. at 2 (emphasis added).

B. The Police Department's role in collecting and maintaining evidence does not mean the District Attorney lacks ultimate authority in the OIS investigation.

Despite the plain language of the MOU—and the collective understandings of the Police Department, the District Attorney, the City Attorney, and the Department of Justice—DPA argues that the District Attorney cannot be the lead investigator because "the SFDA has virtually no control over the initial OIS investigation and no capacity to collect, process, and store evidence."[21]

This argument confuses the ability to *conduct* immediate police tasks with the right to *lead* the investigation. The fact that the Police Department collects and processes evidence reflects the nature of the respective roles of a prosecutor's office and a police department: the District Attorney obviously lacks the personnel to conduct immediate police investigations in the manner the Police Department can. Thus, to address this problem the MOU assigns certain immediate investigative responsibilities to the Police Department. But this does not mean that the District Attorney lacks lead authority or is merely "along for the ride."[22]

C. The Police Department is an agent of the District Attorney because it cannot and does not exercise independent control or judgment regarding the sharing of evidence.

In finding that the SFDA is the lead in OIS investigations, the City Attorney narrowed the issue before the Commission to the following:

> *Because of the SFDA's lead role in OIS investigations*, a court would likely conclude that OIS investigative records held by SFPD during the pendency of the criminal investigation should be treated as SFDA records for purposes of interpreting disclosure obligations, so long as *SFPD is acting at the direction of the SFDA as the SFDA's agent* and is maintaining any investigative records on behalf of the SFDA.[23]

In other words, the question for the Commission *is not* whether the District Attorney is the lead (the City Attorney concluded it is) but whether the Police Department is acting under the direction of the District Attorney as the latter's agent regarding the withholding of records. The answer to this question is unquestionably yes: the Police Department has exercised no independent authority and has merely followed the directives of the District Attorney, who has the power to issue such directives by virtue of being the lead investigative agency.

The only way the Police Department could not act as the District Attorney's agent is if it decided to foreclose production to DPA independently of the District Attorney. But this did not happen: the District Attorney is the party who exercised its right not to disclose the evidence to DPA and the Police Department was obliged to abide.

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[21] DPA Rebuttal at 4.
[22] *Id.* at 6 (emphasis added).
[23] CAO Mem. at 6.

II. The Police Department provided specific reasons why disclosure during the criminal investigation is inappropriate.

DPA also claims the Police Department failed to provide sufficiently specific reasons to withhold evidence. In making this argument, DPA ignores the meaning of "specific" in this context.

A. The Police Department provided specific reasons consistent with the law as defined by the City Attorney and underlying legal authorities.

In its previous letter, the Police Department provided specific reasons why ordering disclosure during the criminal investigation would impede the District Attorney's investigatory powers. These included concerns that witnesses could be tainted, target officers could learn of information from the criminal investigation, and that witnesses could be dissuaded from cooperating. Notably these concerns were limited to a specific time and duration: only during the open criminal investigation.

In response, DPA claims the Police Department failed to follow the City Attorney's legal framework, arguing that these bases are insufficiently "specific." DPA notes: "The law is unambiguous. The City Attorney accurately stated, 'But the mere possibility that a local law could apply in a way that impedes the SFDA's state law duties is not sufficient . . .' In other words, the mere possibility that [local law] might hypothetically impede an investigation is not enough."[24]

DPA misapplies the City Attorney's use of that quotation. The City Attorney cited *Dibb v. County of San Diego*, 8 Cal.4th 1200 (1994), which dismissed a facial challenge to a law requiring disclosure of law enforcement records to a citizen review board based upon the mere possibility of abuse.[25] For that purpose, the Court held that generalized concerns were insufficient. The court left open, however, the possibility that specific instances could result in a finding of unlawful interference. Notably, Justice Kennard's concurrence suggests that the *timing* of a request—"particularly when those [criminal and administrative] investigations are conducted simultaneously"—would be problematic.[26] No one in this dispute claims that DPA's subpoena power is broadly unlawful. The issue is whether the *specific use*—that is, during a criminal investigation—violates state law.

For what constitutes "specific," the City Attorney relied upon *Rivero v. Superior Court*, 54 Cal.App.4th 1048 (1997): "The *Rivero* court's decision to invalidate the Sunshine Ordinance provision requiring disclosure of all closed investigative files relied on *specific examples* of harms that would result from this blanket disclosure requirement."[27] But the "specific" harms the court relied upon were not "actual" or "in fact" harms, as DPA argues must be presented. Rather, the *Rivero* court found sufficient the concern that disclosure would dissuade witnesses from

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[24] CAO Mem. at 7.
[25] *Dibb*, 8 Cal. 4th at 1219 (Kennard, J., concurring) ("Because this case presents only a facial challenge . . . .").
[26] *Id.*
[27] CAO Mem. at 6 (emphasis added).

cooperating—even in future cases.[28] Importantly, the *Rivero* court consciously dismissed arguments—like those DPA makes here[29]—that the District Attorney was required to establish "actual" harms: the District Attorney in that case was not required to prove that an *actual* witness was dissuaded from participating.[30]

DPA argues that "SFPD conjures up very generic hypothetical scenarios that could potentially occur in all cases where DPA is seeking disclosure, but no concrete evidence that those harms may occur in the pending cases . . . ."[31] In other words, DPA concedes that the District Attorney's concerns could happen, but the District Attorney has not provided "concrete evidence" that they have or will. But this is precisely what *Rivero* and the City Attorney require. This is the end of the inquiry.

B. The City Attorney did not require the Police Department to justify harm on a case-by-case basis.

DPA also claims that the City Attorney's opinion required the Police Department to provide specific examples "in each individual case."[32] The City Attorney actually stated: "The Commission may ask SFPD to explain why disclosure of OIS investigative records to DPA before the SFDA concludes a criminal investigation in specific cases, *or in all cases*, would interfere with the SFDA's exercise of one of its state law functions in specific ways."[33] The Police Department provided specific reasons that apply to *all cases*, but only in a specific, limited context—during pending criminal investigations—and explained why a case by case approach is not only unworkable, but inconsistent with *Rivero*.[34]

The City Attorney's memorandum did recommend that the Police Department should consult with the District Attorney to determine whether certain records should be withheld.[35] The Police Department has done that and the District Attorney's position remains the same: all the files are subject to confidentiality until the close of their investigation.

III. DPA has still not shown how withholding records harms its investigative aims.

DPA asserts that "withholding all records . . . could lead to drastic outcomes in cases where discipline may have to be forfeited because the delays prevent DPA from conducting a timely

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[28] CAO Mem. at 6.
[29] DPA Rebuttal at 1 ("In its 11-page memo, SFPD does not provide this Commission with any examples where DPA's independent OIS investigation impeded the SFDA's criminal investigation.").
[30] *Rivero*, 54 Cal.App.4th at 1058 ("Amici curiae's position that summary judgment was premature because [the District Attorney] *did not prove obstruction* of his investigative or prosecutorial function also fails. The propriety of locally compelled disclosure of a district attorney's closed investigation files is a *question of policy and law*. It is not to be decided differently in each county based on evidence about a particular district attorney's office *or the factual nuances of individual cases*.") (emphasis added).
[31] DPA Rebuttal at 7.
[32] *Id.*
[33] CAO Mem. at 7 (emphasis added).
[34] SFPD Op. Mem. at 6-7 & 10-11.
[35] CAO Mem. at 2.

and thorough investigation."[36] But DPA makes no effort to explain how that could possibly come to pass: no one is threatening DPA with withholding records beyond the criminal investigation, during which time DPA's limitations period tolls.

DPA invokes the "Fajitagate" case as a "cautionary" tale for when evidence is not immediately shared with DPA. But that case demonstrates precisely why the current policy is of no threat: that court held that the limitations period was tolled and DPA's administrative case could proceed. Moreover, DPA implies that a twenty-year old police administration's decision to not provide DPA evidence following the closure of the District Attorney's investigation is somehow like the issue before us. It is not. Here, the Police Department has made clear that DPA would be entitled to *everything* in its possession the day the District Attorney closes its investigation.

IV. DPA's example cases are irrelevant.

DPA also cites "real life" examples but these cases have no bearing on this dispute. DPA first cites an instance where they obtained records from an Attorney General OIS investigation to demonstrate record-sharing. But, if anything, this case goes against DPA's position. There, the Attorney General withheld evidence from DPA and the Police Department for over a year and half until it agreed to release redacted information pursuant to a public records request. We are unsure why DPA sees this practice as acceptable when the Attorney General does it, but worthy of condemnation when the District Attorney does it. (Moreover, despite the year and half delay, DPA does not claim their investigation was thwarted.) This case proves the rule: records must be withheld until and when the investigating agency finds disclosure will not affect their criminal investigation.

Second, DPA cites the Everett investigation. But DPA demonstrates that the point is moot: they have the records. Second, this case represents a unique set of facts where a party was charged and proceeds to trial while the OIS investigation remains open. It is not representative of the broader question before the Commission. Third, because the investigation against the officer remains open, DPA's limitations period remains tolled.

V. DPA's subpoena power is at the heart of this dispute and is not absolute.

In its opening brief, DPA argued that its power to compel disclosure of records from the Police Department is "absolute."[37] Obviously, this compelled the Police Department to respond and correct this misstatement of law: DPA's power is qualified by the Charter and state law.[38] As shorthand for this power, the Police Department described it as a "subpoena power," because it functions as an administrative subpoena for records and a similar power was so described by the California Supreme Court in *Dibb*. At all times, however, the Police Department's brief made clear that it was citing the powers contained in Charter section 4.136(j) and Administrative Code section 96.3.

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[36] DPA Rebuttal at 9.
[37] DPA Op. Br. at 3.
[38] SFPD Op. Mem. at 4-5.

Instead of answering substantively, DPA argues that by using the term "subpoena power" the Police Department must have been referring to Administrative Code section 96.6—despite the Police Department's actual citations—and accuses the Police Department of introducing a red herring. The Police Department's brief never referred to section 96.6.

It is unclear whether DPA still maintains that its power to obtain—or subpoena!—records is "absolute," as it has made no substantive response. If so, the Commission should dismiss this point for the reasons previously outlined.

VI. Conclusion.

This issue has placed the Police Department in the unenviable position of attempting to satisfy two opposing parties to whom the Police Department owes legal obligations that remain in tension with one another. The only way the Police Department can satisfy its obligations to both parties is to maintain the confidentiality which the District Attorney asserts until the close of the criminal investigation, at which point DPA would be granted its evidence.

This arrangement prejudices neither the District Attorney nor DPA and allows both entities to fulfil their duties under state and local law.

Sincerely,

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