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TO: Mayor Paul Soglin
Madison Common Council
Madison Police Department Policy & Procedure Review Ad Hoc Committee

FROM: Michael P. May, City Attorney
Patricia A. Lauten, Deputy City Attorney
Marci A. Paulsen, Assistant City Attorney

DATE: January 31, 2018

RE: OFFICE OF THE CITY ATTORNEY RESPONSE TO OIR
POLICY AND PROCEDURE REVIEW

In December, 2017, the OIR Group issued its report "Madison Police Department Policy and Procedure Review." The City Attorney has reviewed OIR's recommendations for the Madison Police Department contained in the Report. We have several comments and concerns regarding legal issues raised by the recommendations in the Report. We have provided a copy of these comments and concerns to the MPD, and they should be included in the response being issued by the MPD. Since these are our comments and concerns, we think it appropriate that we issue them separately.

Our response will first state the recommendation being considered, and then our response to it.

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

CITY ATTORNEY RESPONSE: The City Attorney agrees that MPD should continue to take an active role in collaborative programs that address systemic inequity.

The City Attorney disagrees that the “Unpaid Ticket Resolution Days” should be an event that is held annually or even on a regular basis. It would be a self-defeating project. Once offenders know that all they have to do is wait a few months and their ticket will be forgiven, the deterrent effect of a citation is gone. A significant amount of staff time and resources were necessary to prepare and facilitate these events. The number of cases that were successfully resolved was not enough to justify the use of those resources. The City Attorney worked with individuals with unpaid forfeitures to drastically reduce the amounts owed and allow for payment plans and/or community service hours so that participants could successfully resolve their debts. Our data shows that only 39% of the participants actually paid the reduced amounts and/or completed the community service hours, resulting in less than half of the cases being closed. In the majority of the cases—61%—the Municipal Court has been required to continue efforts to collect forfeitures owed.

The City Attorney believes that if further “Unpaid Ticket Resolution Days” were offered regularly, individuals could circumvent the regular court process in the hopes of getting a more favorable resolution. This would result in more individuals failing to resolve their cases in a timely fashion and lead to the use of even more staff resources outside of regularly scheduled work time. The purpose of these days was to provide a one-time reduction in forfeiture amounts owed in an attempt to resolve outstanding debt and relieve financial hardships, but to do this regularly would undermine the regular court process. In November, when the City Attorney became aware of the recommendation to have further Unpaid Ticket Resolution Days, we asked OIR to contact us so that we could provide our input and concerns. Mike Gennaco indicated to ACA Paulsen that she would be contacted by a member of his team to receive this input. OIR never contacted the City Attorney.

RECOMMENDATION 20: MPD should devise ways to incentivize its bilingual officers to assist in providing translation assistance in the field, including consideration of adopting a pay differential.

CITY ATTORNEY RESPONSE: This recommendation is subject to collective bargaining. Whether the City could bargain such a change, and the cost of doing so, is unknown.

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

CITY ATTORNEY RESPONSE: This recommendation is subject to collective bargaining. Whether the City could bargain such a change, and the cost of doing so,

is unknown.

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

CITY ATTORNEY RESPONSE: The City Attorney has several concerns regarding this recommendation due to the possibility it may have an adverse impact on any potential criminal investigation. Under Wis. Stats. Sec. 175.47, MPD is authorized to conduct an internal review of the critical incident and does so through its Professional Standards and Internal Affairs Department (PS&IA). However, MPD is not the “investigator” reviewing the incident to determine whether there are any potential criminal violations. Under current policy and State law requirements, an outside law enforcement agency, usually the Wisconsin Department of Justice’s Division of Criminal Investigation (DCI) conducts the criminal investigation. Therefore, DCI agents determine the timing of officer statements and not MPD. MPD does take a voluntary Public Safety Statement from the involved officer(s) immediately after the incident which is a summary of the event in order to: determine injuries, determine the type of force used, determine location of witnesses and involved parties and determine the status of the scene to preserve relevant evidence.

Because officers involved in a critical incident can face criminal prosecution for their actions, it would be a violation of their Fifth Amendment right against self-incrimination to compel a statement after a critical incident. Therefore, any attempt by MPD to obtain an officer’s statement prior to DCI arriving on the scene could adversely impact the District Attorney’s ability to prosecute a criminal case against the officer(s).

Under the well-known case of Garrity v. New Jersey, 385 U.S. 493 (1967) an officer may be compelled to provide a statement during an internal affairs investigation. However, this compelled statement cannot be used in any subsequent criminal case if the District Attorney decides to bring charges. Currently, most MPD officers provide a voluntary statement to investigators and cooperate fully with DCI’s investigation. If this recommendation were implemented officers would be more likely to invoke their Constitutional right under the Fifth Amendment against self-incrimination.

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

CITY ATTORNEY RESPONSE: The City Attorney does not agree with this recommendation. As stated above, under State law, MPD does not control the

investigation and has no authority to direct DCI, or any other agency, on their protocol for conducting officer-involved death investigations.

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

CITY ATTORNEY RESPONSE: MPD's PS&IA conducts a comprehensive review of officer-involved shooting incidents and examines the topics OIR recommends in #75 above. In addition, PS&IA contacts subject matter experts when necessary to review specific actions the officer took to ensure compliance with policy and procedure (i.e., a Taser subject matter expert reviewing an officer's Taser deployment during an incident). MPD holds a critical incident debriefing after the incident. The Chief of Police reviews every PS&IA report involving a critical incident, with corrective action or additional training always an option that the Chief has. In addition, MPD's training department incorporates scenarios from particularly challenging calls into its training curriculum.

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

CITY ATTORNEY RESPONSE: The City Attorney's Office and MPD command staff work closely with litigation counsel during legal cases. If shortcomings are identified during or after litigation, the City Attorney's Office reviews them with MPD command staff. MPD has never hesitated to implement policy changes or additional training when they are warranted. Changes to MPD policies were made and publicized in the last couple of years. In addition, MPD policies and procedures are accessible to the public through MPD's website. Just because a case settles before a trial or a jury reaches a verdict adverse to the City, does not mean there needs to be a corrective action plan. Litigation cases settle for a plethora of reasons, many of which are not related to the merits of the case. Settling a case is not an indication or admission of fault or wrongdoing by the City or MPD.

The City Attorney currently provides a public announcement regarding any judgment or settlement in which the City or its employees are a party and will continue to do so. However, the City Attorney will not be convening a public meeting to discuss the specifics of any case. Discussions with City employees, discussions

regarding settlement and discussions regarding litigation strategy are protected by attorney-client privilege. In order to effectively do our job, the City Attorney must be able to have open, honest, and confidential discussions with our clients.

RECOMMENDATION 77: The City should have regular dialogue with its police liability insurer to examine what risk management initiatives might result in lower premiums or could be funded by the insurer.

CITY ATTORNEY RESPONSE: The City currently meets regularly with its liability insurer. Both the City and its liability insurer regularly look at ways to reduce the City's and its other members' premiums and liability risks. As an example of this, the City and MPD personnel have attended presentations put on by its insurer to learn of different ways the City can achieve this goal. Specifically, the City has attended presentations on police policies and the litigation climate. Later this year, the City's insurer will be hosting a loss control training that will include a law enforcement track.

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

CITY ATTORNEY RESPONSE: MPD's Standard Operating Procedure (SOP) on the Use of Deadly Force states that "deadly force is a measure of last resort, only to be employed when an officer reasonably believes all other options have been exhausted or would be ineffective." MPD employs a variety of tools and tactics to minimize the likelihood of a deadly force encounter.

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

CITY ATTORNEY RESPONSE: Graham v. Connor is nearly 30 years old and is the Constitutional standard all officers must follow when deploying deadly force. The City attorney is aware of no police department in the United States who subjects its officers to a more stringent standard for using deadly force. As stated in #89 above, MPD trains its officers that deadly force is a last resort and already deploys less lethal force options such as bean bag rounds and Tasers. Moving away from the Graham v. Connor standard could mean the officers could only employ deadly force *after* they have been attacked, shot at or injured. An officer who is incapacitated is unable to protect himself or defend innocent citizens. The City Attorney cannot recommend abandoning Graham v. Connor for another standard. Employing a more stringent standard may have the unintended effect of making the City and its officers open to greater liability, as claims might be made that failure to meet the City's new self-imposed standard was actionable.

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

CITY ATTORNEY RESPONSE: This recommendation is subject to collective bargaining. Whether the City could bargain such a change, and the cost of doing so, is unknown.

RECOMMENDATION 108: MPD should work with the City and the Professional Police Officers' Association to consider the feasibility of moving sergeants to the Association of Madison Police Supervisors.

CITY ATTORNEY RESPONSE: This recommendation is subject to collective bargaining. Whether the City could bargain such a change, and the cost of doing so, is unknown.

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

CITY ATTORNEY RESPONSE: This recommendation is subject to collective bargaining. Whether the City could bargain such a change, and the cost of doing so, is unknown.

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

CITY ATTORNEY RESPONSE: MPD already does attempt to mediate civilian complaints when it is appropriate and when the citizen is willing to meet with MPD staff to discuss their complaint and the outcome of the internal investigation. The City Attorney encourages MPD to continue this process when appropriate. However, the City Attorney believes there are serious practical difficulties in going beyond the current practice and accepting this recommendation. For this recommendation to be effective, both parties would have to sign numerous waivers. The citizen would have to sign a document waiving their right to bring an action against the officer with the PFC. The citizen would also have to sign a second document waiving their right to initiate a civil action based on the event that is in dispute. Further, the police officer would have to sign a waiver document agreeing to accept the results of the mediation and waiving his/her right to appeal the matter to the PFC. Even with all these waivers in place, the City Attorney has concerns with proceeding down this path. Either party could attempt to argue against the signed waiver, ignore the mediation outcome and proceed with the matter either before the PFC or in civil litigation (with potentially significant negative implications for the City). Finally, to be effective, a formal mediation project needs professional mediators. The cost of hiring outside mediators would be expensive, and would be a deterrent to establishing such a program.

RECOMMENDATION 139: If MPD adopts body-worn cameras, it should commit to periodic evaluations (e.g., a one-year, three-year, and five-year review) to assess the qualitative and quantitative impact of the technology on the agency and stakeholders. Such periodic reviews should seek to identify whether the agency should continue its program and, if so, whether policy revisions are necessary to achieve or maximize the identified benefits.

CITY ATTORNEY RESPONSE: The report does not include a recommendation for the implementation of body cameras, and provides only a very minimal discussion on the potential civil liability impact of body cameras. The City Attorney supports body cameras for the simple reason that the cameras will assist the City in determining potential civil liability. The cameras provide an unbiased view of what occurred during an incident. With this camera view the City would have additional information, not now available, to determine whether the City has any potential liability. If there is significant potential civil liability for the City, the City and its insurer could settle civil lawsuits early on, without the City and its insurer incurring substantial costs of prolonged litigation. Therefore, the City Attorney recommends that Madison look very closely at the use of such cameras, with the goal of providing body cameras for all MPD officers.

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

CITY ATTORNEY RESPONSE: The matter of performance evaluation is an administrative decision, which may vary by mayoral administration. While the City Attorney sees benefit in allowing for public input, the manner of public input is to be determined by those making the evaluation. The use of that input or of any part of the performance evaluation, when applied to the Police or Fire Chief is also limited by state law.

The City Attorney does not, however, agree that there should or could be a finding of “cause” if someone believes the Chief’s performance has fallen significantly below community expectations. Under Wis. Stats. Sec. 62.13(3) the Chief shall hold his officer “during good behavior, subject to suspension or removal by the board for cause.” It would not be considered “cause” under the statute if someone believes the Chief’s performance falls significantly below community expectations. “Community expectations” is a vague undefinable term and to subject the chief to removal from office for this reason would not be permissible under the statute.

RECOMMENDATION 142: The City should consider whether to consult with its state legislative representative to propose amending the PFC statute so that the Chief of Police serves a fixed term, subject to renewal by the PFC.

CITY ATTORNEY RESPONSE: The City Attorney agrees with considering this recommendation.

RECOMMENDATION 146: Madison should enhance its civilian oversight by establishing an independent police auditor's office reporting to a civilian police review body.

CITY ATTORNEY RESPONSE: The City Attorney may support this recommendation. Before doing so, we would want to know specifics on how this would function. The report is lacking any specific details on the auditor. Further inquiry is needed on how the auditor's office would be set up, who would be in the office, who would supervise this position, the cost of the auditor and how to have assurances that the auditor would be a truly independent office not subject to political will and not in violation of the statutory duties and obligations of the PFC. That being said, the City Attorney believes that there may be a lot to gain in terms of public trust in the MPD if a truly independent and professional auditor could provide some outside review of incidents.

Errors within the OIR Report.

There are several facts that are inaccurately stated in the Report. The City Attorney has reviewed MPD's corrections on these facts and is in agreement with those items they have outlined. However, there is one specific factual inaccuracy that involves the City Attorney and must be noted:

"Footnote 139: The settlement allowed the officer to be employed for an additional sixty days and then allowed him to retire. The PFC challenged the settlement on the basis that they retained jurisdiction, since the officer was still a City employee. Before the court ruled on the challenge, the sixty days elapsed and the matter ended up being moot."

OIR did not ask for input or clarification on this specific issue from the City Attorney. Had they done so, the City Attorney would have provided some clarification of the specifics of this case. What OIR cites in this footnote is not an accurate statement of what occurred in the case. On June 21, 2013, the City did file a complaint with the PFC against an officer. However, on June 28, 2013, the City reached a settlement agreement with the officer whereby he agreed to either retire or resign by November 23, 2013. Therefore, the City withdrew its complaint and on July 8, 2013, the PFC granted the City's motion and dismissed the case. At that point in time, the City was no longer a party to any action before the PFC involving said officer. There was however, a second complaint that had been filed by a private citizen that was still pending against this officer in front of the PFC, but as indicated the City was not a party to this action. The officer filed a motion, in circuit court, to enjoin the PFC from

January 31, 2018

Page 9

hearing that complaint because the officer believed the case was moot due to his plan to separate from service within five months, not sixty days. The circuit court scheduled various motions and hearings on the issue but as stated in the OIR complaint the case was dismissed when the officer did retire from MPD.

CC: Michael Gennaco, OIR
Chief Mike Koval, MPD