



**U.S. Department of Justice**

**Civil Rights Division**

*Special Litigation Section - PHB  
950 Pennsylvania Avenue, NW  
Washington, DC 20530*

December 23, 2008

**Via Electronic Mail and First Class Mail**

The Honorable Marc A. Ott  
City Manager  
City of Austin, Texas  
P.O. Box 1088  
Austin, TX 78767

Chief Arturo Acevedo  
Austin Police Chief  
715 East 8th Street  
Austin, TX 78701

Re: Austin Police Department

Dear Mr. Ott and Chief Acevedo:

As you know, on May 31, 2007, the Civil Rights Division initiated an investigation of the City of Austin, Texas Police Department ("APD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"). We would like to take this opportunity to express our appreciation for the cooperation we have received thus far from the City of Austin and the APD.

To date we have reviewed many relevant APD policies and procedures, and conducted interviews with City of Austin officials, APD command staff, a cross-section of APD line officers and supervisors, representatives of the Office of the Police Monitor ("OPM"), the Austin Police Association ("APA"), numerous community leaders, and other citizens.

At the beginning of our investigation, we committed to providing the APD with technical assistance, where appropriate, to enhance APD practices and procedures and to ensure compliance with constitutional rights. During our meetings with Chief Acevedo and the APD command staff in September and November 2007, we advised that we would provide in writing more specifics about recommendations our police practices experts had made orally. In this letter, we convey our recommendations regarding some of the APD's written policies, including the revised policies provided to us in May and June 2008. We view the technical assistance

provided below as recommendations and not mandates. These recommendations were developed in close consultation with our police practices consultants and follow the productive dialogue we had with APD officers and Austin officials. We strongly urge the APD to consider the technical assistance recommendations in revising its policies and procedures.

Significantly, as will be discussed throughout this letter, while work remains ahead, our expert consultants have noted that the revised policies are a significant improvement over the APD's prior policies. We thank the APD for its work in revising the policies, including the APD's efforts at addressing many of the areas we pointed out during our on-site visits. Important aspects of our review process have yet to be completed, namely incident assessment. Therefore, this letter is not meant to be exhaustive, but rather focuses on recommendations we can provide at this stage of our investigation.

Additionally, we hope this letter will assist in our mutual goal of ensuring that the APD provides the best possible police service to the people of the City of Austin. We look forward to continued cooperation toward this goal. Though we have already provided you with some examples of policies used by other police departments, we would be happy to provide additional examples where needed.

## **I. POLICIES AND PROCEDURES**

**The APD should revise and update its policies and procedures to be consistent and comprehensive.**

Policies and procedures are the primary means by which police departments communicate their standards and expectations to their officers. Accordingly, it is essential that the APD's policies be comprehensive, comprehensible, up-to-date, and consistent with relevant legal standards and contemporary police practices. As we discuss in detail below, several of the APD's policies and procedures are inconsistent with generally accepted police practices and are insufficiently detailed to provide the appropriate guidance for officer conduct.

We are aware that the APD is in the process of updating both its use of force policy and its internal affairs investigations policies.<sup>1</sup> It is also our understanding that in drafting its new

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<sup>1</sup> We note that during Chief Acevedo's relatively brief tenure with the APD, the APD has not only engaged in the process

policies, the APD has in part utilized model policies that we provided to the APD during the course of our investigation. We base our recommendations in this letter on the most recent policies that the APD provided to us. We again applaud the APD's initial efforts in updating these policies and recommend that any additional updates be made consistent with the feedback contained in this letter.

To ensure consistency, we recommend that once the APD completes updating each policy, that the APD distribute the completed policy or procedure to all of its officers. All officers should provide a written acknowledgment of their receipt, review, and understanding of all APD policies. We suggest that the APD designate an individual responsible for reviewing any revisions to new policies and, where necessary, to bring to the command staff's attention needed changes to ensure consistency between APD policies. This individual would also be responsible for ensuring that all officers receive complete copies of policy manuals and policy revisions, and for maintaining copies of officers' signed acknowledgments.

## **II. USE OF FORCE**

**The APD should revise its use of force policies and adopt an appropriate use of force continuum.**

In the course of duty, police officers are sometimes required to use deadly and less lethal force. Because the use of force can place officers, civilians, and subjects at serious risk of harm, it is incumbent upon law enforcement agencies to ensure that officers use force appropriately. Use of force policies and procedures must clearly set forth standards for appropriate use of force that are in accordance with constitutional standards.

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of updating these policies, but also the APD has implemented a number of other changes, including: dramatically increasing community relations, implementing discipline for sustained policy violations, forming a "violent crime task force," implementing a "criminal hotspot response strategy," reorganizing command structure and alignment of some units, beginning the "safe surrender" program, and introducing new uniforms and cruisers. We certainly encourage Chief Acevedo to continue working with Austin's officers and the community as he assesses and makes changes to better serve the public.

### A. Legal Standards Governing the Use of Force

Whether a particular use of force by an officer in the course of seizing an individual is constitutional is governed by the Fourth Amendment's objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 394 (1989); Mace v. City of Palestine, 333 F.3d 621, 623 (5th Cir. 2003). Uses of excessive force by police officers in the course of arrest, investigatory stop, or other seizure are violations of the Fourth Amendment.<sup>2</sup> Id. The analysis requires a balancing of the quality of intrusion on the individual's Fourth Amendment interests against the governmental interests. Graham, 490 U.S. at 396; Gutierrez, 139 F.3d at 447. The criteria courts apply to assess an excessive force claim include the severity of the crime at issue, whether the suspect presents an immediate safety threat to the officers or others, and whether the suspect is actively resisting or attempting to evade arrest. Graham, 490 U.S. at 396; Gutierrez, 139 F.3d at 447. Lack of specific policy guidance on the appropriate use of force may lead officers to believe that they are justified in using force in situations in which it would be unreasonable or unnecessary. Conversely, unclear or overly general policies may result in officers refraining from using necessary and appropriate force out of an unwarranted fear of using excessive force.

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<sup>2</sup> A seizure -- i.e., by means of physical force or show of authority -- is the event that triggers Fourth Amendment protections. See Petta v. Rivera, 143 F.3d 895, 900 (5th Cir. 1998) (discussing United States v. Lanier, 520 U.S. 259, 396 n. 10 (1997)). The Fifth Circuit has consistently held that claims of excessive force by law enforcement in the course of a seizure should be analyzed under the Fourth Amendment's reasonableness standard rather than a Fourteenth Amendment substantive due process approach. Gutierrez v. San Antonio, 139 F.3d 441, 452 (5th Cir. 1998). The Constitution, however, affords Fourteenth Amendment Substantive Due Process protection from physical abuse by police officers for claims that are not susceptible to proper analysis under a different specific constitutional right -- e.g., an excessive force claim without a seizure to trigger a Fourth Amendment analysis. Petta, 143 F.3d at 901. Similarly, once an arrestee becomes a pre-trial detainee, Fifth and Fourteenth Amendment Due Process protections, rather than the Fourth Amendment, are the appropriate constitutional basis for excessive force claims. Valencia v. Wiggins, 981 F.2d 1440, 1444-45 (5th Cir. 1993).

The Supreme Court held that deadly force<sup>3</sup> is permissible only when a suspect poses an immediate threat of serious physical harm to the officer or another person. Tennessee v. Garner, 471 U.S. 1 (1985). The only exception to this general rule is the "fleeing felon" rule, which allows police officers to use deadly force to prevent the escape of a suspect in cases where there is probable cause to believe the suspect either poses an immediate threat of serious harm to the officer or another, or has committed a crime involving the infliction or threatened infliction of serious physical harm. Id. Yet, even in such circumstances, police are required to provide a warning, if feasible, before using deadly force. Garner, 471 U.S. at 11; Colston v. Barhart, 130 F.3d 96, 99 (5th Cir. 1997). Deadly force is permissible only for as long as the threat remains. When the threat is over, the use of deadly force must stop. Russo v. City of Cincinnati, 953 F.2d 1036, 1045 (6th Cir. 1992) (finding deadly force not proper after subject dropped knife); Abraham v. Raso, 183 F.3d 279, 294-95 (3d Cir. 1999) (holding that an officer cannot continue to use force with impunity once the threat has stopped). APD's use of force policy does not comport with these legal standards in all respects. Accordingly, as discussed in further detail below, we recommend that the APD revise its use of force policy to incorporate these constitutional standards.

## **B. APD's Use of Force Policy**

We base our review on the APD's newly revised "Response to Resistance" policy and, where applicable, make reference to the APD's prior use of force policy.

### **1. Preamble**

In general, a use of force policy should begin with a preamble setting forth the police department's basic doctrine on use of force. Specifically, with respect to the APD, this preamble should include a statement that the APD values the protection and sanctity of human life. Moreover, the preamble should set forth the general expectations that the APD holds for officers' use of force -- i.e., that officers are prohibited from using force unreasonably or as a means of punishment or interrogation. The use of force policy originally provided to

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<sup>3</sup> Deadly force is force "'carry[ing] with it a substantial risk of causing death or serious bodily harm.'" See Gutierrez, 139 F.3d at 446 (citing Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988)).

us, Use of Force General Policy B101, effective April 20, 2000, and revised January 26, 2007, sets forth expectations of what the policy is not: not a higher standard of care with respect to third party claims. This disclaimer overshadowed the mission statement that was part of the same policy. The APD's newly revised policy includes similar disclaimer language but only as part of a larger preamble setting forth the APD's values and expectations of officers' duties. Response to Resistance Policy B101a, issued June 1, 2008. The new preamble more adequately frames this disclaimer in context with the APD's values. In practice, the APD should ensure that its officers not use a disclaimer to justify uses of force inconsistent with the values set forth in the preamble.

## 2. Definitions

To ensure consistency in the application of the use of force, a successful use of force policy should also define key terms such as lethal force, less lethal force, force, etc. The APD's revised policy fails to define lethal force even though the policy sets forth criteria for use of "deadly" force. Response to Resistance Policy B101a.03. We recommend that the APD define "lethal force" to include any use of force that is likely to cause death or serious bodily injury in accordance with Tennessee v. Garner, supra, 471 U.S. 1.

Some of the revised policy's other definitions leave room for excluding uses of force that officers should report. For example, the revised definition of force includes a subjective "minimal resistance" threshold before force must be reported.<sup>4</sup> Response to Resistance Policy B101a.01(A). We recommend that the APD modify its definition of force to eliminate the "minimal resistance" threshold and, instead, include all force used beyond unresisted handcuffing. Moreover, the revised policy's

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<sup>4</sup> As we discussed early in our investigation, the prior policy also excluded uses of force that officers should have reported. The prior policy defined force as "any physical action that causes apparent injury, or causes a person to complain of pain or injury." Requiring a suspect to complain of pain or have apparent pain before an action by an APD officer is considered force excluded the reporting of actual uses of force. The definition excluded uses of force when a suspect did not complain. The definition also excluded the reporting of uses of force when the officer asserted that the suspect's pain was not apparent to him or her. We applaud the APD's prompt response to our technical assistance regarding this issue.

definitions of "injury" and of "serious physical or bodily injury," require a complaint of pain, or an "apparent" injury. These definitions inappropriately exclude injury when a suspect does not complain or when the officer asserts that the suspect's injury is not apparent. Additionally, the APD's revised definition of physical or bodily injury does not require the reporting of all force alleged to have been used by an officer. The policy only requires the reporting of injuries "caused" by the officer. We recommend that the APD modify this definition to include injury *alleged* to have been caused by APD personnel. We also recommend that the APD revise its definition of serious physical or bodily injury to exclude "long term" as a criteria; officers should not have to attempt to determine the long term effects of an injury in order for it to qualify as a use of force. Additionally, the policy should specifically include fractures as serious injuries.

### 3. Permitted Uses of Force

In addition to needing to include key definitions common to the entire use of force policy, we recommend that the policy set forth the APD's rules on when force may be used and what force is prohibited. The APD's general rule on use of force is deficient. The revised policy first includes a requirement that a police officer be objectively reasonable in "lawful law enforcement objectives."<sup>5</sup> Response to Resistance Policy B101a.02(A). A later bolded and underlined restatement in the policy, however, undermines this lawfulness requirement. Specifically, it says: "**The ultimate test is whether the use of force was objectively reasonable.**" Response to Resistance Policy B101a.02(C) (emphasis in original). This overarching policy statement omits any explicit requirement that there be a lawful law enforcement action. Also, significantly, while the revised policy includes a great deal of language to shield an officer's decisions on reasonableness, the revised policy's general rule omits any mention of *necessity* for the use of force. The APD should revise its general statement on the use of force to permit force only when the force used is objectively reasonable because it is *necessary* to overcome resistance offered in a lawful police action to compel an unwilling subject's compliance with an officer's lawful exercise of police authority. This rule should

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<sup>5</sup> The prior policy's generally applicable rule on the use of force for APD officers omitted any requirement that an officer be engaged in a lawful police action. We view the APD's policy change to require a "lawful law enforcement objective," as a significant, positive improvement over the prior policy.

specifically cite the Supreme Court's holding in Graham v. Connor, *supra*, 490 U.S. at 395-96, for the reasonableness requirement. Further, "necessary" should be qualified as the *least* amount of force necessary to overcome resistance offered.<sup>6</sup>

At a minimum, the policy should require that officers use the lowest level of force objectively necessary from the officer's position to safely resolve a situation, including verbal commands and other alternative negotiation techniques. We recommend that the use of force policy include alternatives to more significant uses of force, such as emphasizing announcement of officers' presence, the use of "soft hand" techniques (i.e., using hands to escort rather than control subjects), and other de-escalation techniques.<sup>7</sup> APD's use of force policy should also incorporate the de-escalation techniques appropriate to interactions with individuals with mental illness or who are under the influence of drugs or alcohol, including providing specialized training, e.g., crisis intervention training, or guidance to officers regarding the signs or symptoms for identifying such individuals.

#### **4. Use of Force Continuum**

The APD does not currently employ a use of force continuum, matrix, or any other description of levels of suspect resistance and appropriate officer use of force responses in order to teach its officers a progression and de-escalation of use of force.<sup>8</sup>

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<sup>6</sup> The APD uses the term "necessary" in its policy with respect to use of lethal force. Response to Resistance Policy B101a.03(A). The APD does not, however, use the term with respect to objectively reasonable force. Response to Resistance Policy B101a.02. Nor does the APD define "necessary" in its response to resistance policy.

<sup>7</sup> The revised policy includes a list of criteria an officer should be able to articulate to justify the reasonableness of uses of force. Response to Resistance Policy B101a.02(B). These criteria imply that officers should attempt to de-escalate a situation. The policy does not explicitly require, however, that officers attempt de-escalation, if feasible in the situation.

<sup>8</sup> A use of force continuum, as more thoroughly described in this section, is a diagram, guide, or chart that illustrates a progression of various descriptions of use of force that may be employed consistent with policy.



APD should consider adopting a use of force continuum or other similar tool to provide officers with uniform guidelines about the appropriate use of force (as noted above de-escalation and escalation techniques should be emphasized). We recommend that the APD develop a comprehensive use of force continuum that augments and enhances a revised use of force policy as a training model to effectively assess and engage situations. The use of force continuum should be a fluid and flexible policy guide to provide effective and efficient policing. The continuum should be consistent with accepted policing practices and should be used to train officers to consider lower levels of force first, which protects the safety of both the officer and the civilian.

Specifically, we recommend that the APD develop a use of force continuum that illustrates the various uses of force that may be employed and make them consistent with the terms and definitions outlined in other parts of the policy. The descriptions of force should be more detailed and include the level of force officers should initially engage given the threat presented to them, how the various applications of the options affect their placement in the use of force progression, and what level of force is appropriate in response to different levels of resistance by suspects, including de-escalation techniques and interactions with individuals with a mental illness or who are under the influence of drugs or alcohol. The continuum should include all of the actual types of force used by APD, including: firearms, conductive energy devices,<sup>9</sup> OC spray, impact weapons, canines, and any other uses of force.

Though the revised policy does not incorporate a use of force continuum, the policy uses terminology that implies that officers should be using a continuum in determining reasonable levels of use of force. For example, the policy categorizes chemical agents as "soft intermediate weapons." Response to Resistance Policy B101a.06(A). Also, the policy requires officers to articulate the "[a]vailability and utility of lesser force options." Response to Resistance Policy B101a.02(B)(7). A clearly articulated use of force continuum would bring clarity to this confusing dichotomy used in the revised policy.

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<sup>9</sup> Such weapons are sometimes referred to by a brand name, "TASER," or simply called "stun guns." For consistency purposes, we refer in this letter to all such weapons used by the APD as an "conductive energy devices" or "CEDs."

## 5. Lethal Force

The APD's revised use of force policy appropriately restates the standard for use of lethal force, which the APD refers to as deadly force, articulated in the Supreme Court's holding in Tennessee v. Garner, *supra*, 471 U.S. 1. Response to Resistance Policy B101a.03(A). Unlike the APD's prior use of force policy, the revised policy includes the requirement that a threat be imminent. The revised policy now also addresses the fleeing felon rule,<sup>10</sup> which the prior policy did not. However, unlike the prior policy, the revised policy omits a statement that the use of equipment other than firearms may constitute use of deadly force depending on the technique used. The revised policy also lacks specificity or direction on potentially lethal uses of force. Accordingly, we recommend that the APD's policy specify that "lethal force" includes force methods that employ potentially lethal weapons (e.g., firearms, cars, etc.). Additionally, due to the possibility of death or serious bodily injury from the delivery of blows to the head with impact weapons, we recommend that the APD specifically limit strikes to the head with impact weapons.<sup>11</sup> The policy should also specify

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<sup>10</sup> The fleeing felon rule permits the use of lethal force in the apprehension of a subject only: (1) to defend the officer or a third person from what the officer objectively reasonably believes is an imminent threat of lethal force or force from the subject likely to cause serious bodily injury; or (2) to prevent the escape of a suspect in cases where there is probable cause to believe the suspect either poses an imminent threat of serious harm to the officer or another, or has committed a crime involving the infliction or threatened infliction of serious physical harm, and other means of apprehension are inadequate or unavailable, and if, where feasible, warning has been given. Garner, 471 U.S. at 11-12. The revised policy is slightly more narrow. The revised policy does not specifically permit the use of lethal force against a fleeing felon who has committed a crime involving the infliction or threatened infliction of serious physical harm, and other means of apprehension are inadequate or unavailable. Response to Resistance Policy B101a.03(A). APD policy properly may be more narrow than the furthest constitutional limits on the uses of force.

<sup>11</sup> The revised policy specifies that blows with impact weapons should only be delivered to "vulnerable areas of the body (target areas)." Response to Resistance Policy B101a.07(D). This limiting language is useful, but not explicit on the potential use of impact weapons as deadly force.

that head strikes with a weapon are only permitted as tactics of last resort, to be used only when the use of lethal force would otherwise be authorized. Based on our ongoing review of APD use of force reports, the APD should pay particular attention (and ensure supervisory scrutiny) to the use of closed-fist strikes to the face or head.

## **6. Prohibited Uses of Force**

We also recommend that the APD's use of force policy identify any uses of force that are specifically prohibited or restricted to limited circumstances. For example, a carotid hold or choke hold is typically considered a use of deadly force. Thus, we recommend that the APD's use of force policy explicitly explain that officers should use the carotid hold only in circumstances in which deadly force would be authorized. The use of force policy should also prohibit using force on a subject in a manner that is likely to cause positional asphyxia<sup>12</sup> and the methods and procedures to avoid it.<sup>13</sup>

## **7. Firearms**

The APD's revised duty weapons policy fails to provide clear guidance on the use of secondary weapons. As we have discussed with the APD's command staff, the APD's policy on firearms does not require that line officers register with their supervisors the secondary weapons some line officer choose to carry while on duty. We understand that officers who carry secondary weapons while on duty must qualify with those weapons at the APD's training academy and that the academy keeps record of such qualification. Duty Weapons Policy B101b, issued June 1, 2008. Some mid-level supervisors we interviewed indicated that they knew which line officers among their command carried secondary

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<sup>12</sup> Positional Asphyxia is a fatal condition arising because of the adoption of particular body positions, which cause interference with breathing.

<sup>13</sup> The revised policy refers to positional asphyxia only with respect to transporting subjects on whom chemical weapons have been used. Response to Resistance Policy B101a06(F)(1). This does not address positional asphyxia risks with respect to subjects on whom officers have not used chemical weapons. The APD's policy on transportation of prisoners, however, describes such risks of positional asphyxia and certain avoidance measures. Care and Transportation of Prisoner General Policy B113.02(D)(5).

weapons. Other supervisors were unsure what secondary firearms their subordinates carried. Based on our expert consultants' assessments, we recommend that the APD prohibit its officers from carrying any secondary firearm without the knowledge and approval of their immediate supervisors. All such approvals should be documented. The documentation should include the type of secondary weapon officers are approved to carry and the serial number of that weapon.

Additionally, we recommend APD only permit officers to carry secondary weapon(s) that are included on a list of tools approved by APD command for APD officers for use as a secondary weapon. The APD's prior policy on duty weapons required that firearms range personnel maintain a list of weapons and ammunition authorized for departmental use. Duty Weapons General Policy A303.01(C)(2), effective April 20, 2000, revised January 26, 2007. APD personnel confirmed to us, however, that the APD did not have such a list of approved secondary weapons. The APD's revised duty weapons policy similarly requires APD's firearms range personnel to develop a list of weapons and ammunition approved for departmental use. Duty Weapons Policy B101b.01(C)(2), issued June 1, 2008. Given the prior absence of this required list, we recommend that the APD ensures that it promulgates the list of approved weapons and timely distribute the list with the revised duty weapons policy to mid-level supervisors. The APD should authorize qualification on only those firearms for which the APD has a trainer qualified to assess an officer's proficiency with such firearms. Supervisors should ensure that unapproved weapons are not carried or used on duty.

The revised duty weapons policy permits officers to qualify on up to three handguns and one personally owned rifle for police use. Duty Weapons Policy 101b.02(A). The policy does not, but should, limit the number of weapons an officer may carry on duty at any one time. Also, we recommend that the APD revise its policies to make clear the APD's right to remove approved weapons from officers' lists and under what circumstances, e.g., sustained violation of policy or unavailability of suitable training and qualification programs. Currently, the policy permits officers to remove weapons from their own list of three approved weapons, but the policy does not indicate whether and under what circumstances the APD is entitled to remove weapons from any officer's list of approved weapons. Duty Weapons Policy B101b.06(D)(1).

We further recommend that the APD's firearm policy clearly identify the equipment officers are expected to routinely carry

and the appropriate exceptions. The policy should specify all firearms and *ammunition* that are allowed on- and off-duty. The APD should establish a system of accountability for both department-issued and personal ammunition so that the APD is able to monitor the type and quantity of ammunition used and the circumstances in which it is used. This will facilitate reviews of uses of force, as well as investigations into firearm discharges. We understand that the APD is considering a single-gun policy and a single-impact-weapon policy. A single tool of each level of force use would simplify accountability and training.

Lastly, the APD's duty weapons policy currently prohibits the use and sharing of personally owned rifles. Duty Weapons Policy B101b.11. While this general prohibition is sound, the policy should permit an officer's use of another's rifle or other firearm, without violation of policy, when tactical circumstances warrant doing so in emergent situations.

## **8. Less Lethal Weapons**

We recommend that the APD set forth comprehensive policies that give specific guidance and restrictions on all intermediate force weapons used, including straight and expandable batons, PR24s, Orcutt Nunchakus, chemical weapons, CEDs, impact munitions, and canines.<sup>14</sup> Such guidance should be delineated either in a section for each tool in the use of force policy, or in separate policies for each tool referenced in the use of force policy. The use of force policy should include, among other things: where these and other intermediate force weapons fall within the use of force continuum; the circumstances under which the intermediate weapons should be used and instructions on how to properly use them; prohibitions on the use of the weapons; whether all officers are required to carry them; reporting procedures; and appropriate decontamination and/or medical treatment procedures. Unlike the prior use of force policy, the revised Response to Resistance policy accomplishes many of these goals. Because officers may unnecessarily resort to their firearms if intermediate force options are not available, we recommend that the APD require all officers to carry a chemical

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<sup>14</sup> The revised Response to Resistance policy addresses "less or non-lethal force" generally, before providing guidance on specific tools. Response to Resistance Policy B101a.04. Our expert consultants have indicated that the better terminology to use is simply "less lethal" force, thereby acknowledging that all force is potentially lethal.

weapon, in addition to an impact weapon. Appropriate training and certification on the use and deployment of all intermediate weapons should be developed and implemented.

## **9. Impact Weapons**

As previously stated, we understand that the APD is considering a single impact weapon policy.<sup>15</sup> The revised duty weapons policy, however, does not currently list impact weapons. The revised Response to Resistance policy identifies only a baton but permits the training division to maintain a list of other approved impact weapons.<sup>16</sup> Response to Resistance Policy B101a.07. While the APD certainly has discretion on the impact weapon(s) it chooses to use, we recommend that officers be trained and appropriately re-certified in each tool that officers carry -- as the APD's revised Response to Resistance policy now requires. A large number of tools may make this logistically more complicated. If the APD chooses to continue to permit more than one impact weapon, the APD should make clear to its members what impact weapons are permitted. Accordingly, like with firearms, we recommend that the APD ensure that it promulgate the list of approved impact weapons and timely distribute the list with the revised policy to mid-level supervisors; thereby allowing supervisors to ensure that unapproved weapons are not carried or used on duty. We also recommend that the APD require that its officers carry with them their approved impact weapons.

## **10. Conductive Energy Devices**

Part of our investigation focuses on the APD's use of CEDs. Consistent with generally accepted police practices, the prior duty weapons policy specified that CEDs should not be used against a subject already in handcuffs. Duty Weapons General Policy A303.18(D)(3)(a). We received, however, a number of

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<sup>15</sup> We do not take a position on whether the APD should adopt a single impact weapon.

<sup>16</sup> The APD's prior duty weapon policy listed only a baton and no other impact weapons. Duty Weapons General Policy A303.16(B), effective April 20, 2000, revised January 26, 2007. The prior use of force reporting form provided to us, however, lists no fewer than four separate impact weapons. We were also informed that, in practice, the APD uses multiple impact weapons. Accordingly, despite the appearance in the prior duty weapons policy of the APD having only one impact weapon, in practice, the APD utilizes more than a single impact weapon.

allegations that APD officers had used CEDs on subjects who were already restrained. Even more troubling, neither the APD's revised duty weapons policy, nor the revised Response to Resistance policy contains such a prohibition on the use of CEDs against a restrained subject. We recommend that the APD prohibit the use of CEDs on restrained subjects unless the subject engages in active, violent resistance. We also recommend that the APD revise its policies to require a high level of scrutiny in supervisory review whenever a CED is used on a restrained subject.

The revised Response to Resistance policy permits the use of CED's against a subject who is "potentially" violent. Response to Resistance Policy B101a.08(E) (2). This is too broad. We recommend deleting this reference. The policy should also state that CEDs should not be used to threaten or brandished to intimidate a subject or to coerce a confession.

## **11. Chemical Weapons**

The APD's revised policy requires that officers be trained in the use of Oleoresin Capsicum ("OC") in order to use that chemical weapon. Response to Resistance Policy B101a.06(B) (1). The policy does not provide officers with guidance, however, on how much OC spray to use or in the selection of appropriate anatomical targets or duration of use. This is problematic because during our ongoing investigation, we received complaints that the APD uses OC spray in an indiscriminate fashion, i.e., spraying a crowd without acquiring a specific threat or target. Accordingly, while we are still reviewing use of force incidents, we recommend that the APD make clear in its policy limitations on use of OC spray. OC spray should only be used for a specific threat, for an appropriate target, for a limited duration, at a limited distance to the subject, at appropriate targets on the subject's body (e.g., not up the nose), and compliant with current training techniques and manufacturer's guidelines. Moreover, the APD must ensure that its use of OC spray is consistent with the policy changes.

The APD's revised policy permits the use of chemical weapons on restrained subject, if the subjects are "aggressively"<sup>17</sup>

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<sup>17</sup> The APD's prior use of force policy permitted use of chemical weapons on restrained subjects who resisted "violently." Use of Force Policy B101.05(D) (3). Arguably violently was a higher threshold than aggressive, though neither term is defined in its respective policy.

resisting and lesser means of control have failed. Response to Resistance Policy B101a.06(D). The policy, however, fails to illustrate what would constitute aggressive resistance. Rather than permit the use of OC spray on restrained subjects, the APD policy should require the use of further restraints, e.g., hobble restraints or restraint to a Gurney, for handcuffed subjects who continue to resist a lawful police action.

Both the previous and the revised policy also appropriately require officers to decontaminate subjects on whom chemical weapons have been used. Use of Force General Policy B101.05(D) (5); Response to Resistance Policy B101a.06(F). Our review, thus far, has revealed various individuals' accounts that suggest that the APD has not consistently followed a decontamination policy. Many individuals informed us that they have not been given the opportunity to wash out OC spray or have been sprayed a second time because they were acting out when not given the opportunity to decontaminate. Similarly, review of the APD's use of force reports supports that APD officers have frequently failed to timely or properly decontaminate sprayed subjects. Accordingly, the APD should implement a uniform practice to permit individuals to decontaminate as soon as it is safe to do so.

Lastly, with respect to OC spray, the APD does not weigh OC spray canisters. Spray must be tracked and accounted for, to facilitate accountability and, when necessary, investigations into use of OC spray.

## **12. Impact Munitions**

The APD's prior use of force policy permitted the use of impact munitions in riot control situations and against unarmed subjects whose behavior is "such that i[t] poses a serious danger . . . ." Use of Force General Policy B101.05(E) (2). The revised policy is more specific in the use of impact munitions against armed or suicidal subjects but still permits use of impact munitions to disperse crowds. Response to Resistance Policy B101a.09(B) (4). The use of impact munitions needs to be consistent with the use of deadly force. Rubber bullets should only be used when there is a deadly force option in reserve to use if an impact munition fails. The use of other less lethal impact munitions should be consistent with the APD's less lethal force policy, but the APD's review of the use of all impact munitions should be consistent with the same level of review as lethal force. The use of an impact munition against an unarmed individual should be appropriately limited. We recommend that the APD utilize a separate policy on the control of crowds and



should cross reference that policy in the use of force policy and vice versa.

The current policy requires, generally, that the APD obtain medical treatment for an individual whom the APD strikes with an impact munition. This should be made more explicit, to require that the struck subject be taken to a hospital and cleared for incarceration before being processed at the jail.

### **13. Canines**

There is a separate standard operating procedure for canines that includes an assessment of the reasonableness of the use of force in the deployment of a canine. Canine Unit Standard Operating Procedure ("SOP"), revised January 2008. This SOP does not include the same explanation of reasonableness as is contained in the APD's Response to Resistance policy. As with other uses of force that require their own detailed policies, we recommend that in its use of force policy the APD list canines as a use of force on the continuum of types of uses of force and reference the separate policy governing canine use.

We also have been informed that the APD's canines have been on a lead, i.e., leashed, when some bites have occurred. This may indicate a problem with APD canine officers' control over the dogs. Though we are still reviewing incident reports, we recommend that the APD examine its methodology to ensure that the APD's use of canines is consistent with "find and alert" or "find and bark" practice, i.e., requiring the dog to bark, rather than bite, upon locating the subject. In a "find and bark" standard of operation, a canine is still capable of biting a subject. Consistent with generally accepted policing practices, though, the canine handler or officer decides affirmatively whether the canine should bite the subject. The APD should not leave the decision to bite to the canine's discretion. The APD also should ensure that canine training supports this standard.

The APD's definition of "deployment" for canines includes use of canines on a lead for a search regardless of the canines' involvement in the apprehension. Canine SOP .04(B). This is an overly broad definition of deployment. When inactive uses of canines are counted as deployments this has the effect of diluting the bite ratio, i.e., the ratio of the number of times canines bite (to assist in an apprehension) as compared to the number of times canines are deployed. Accordingly, we recommend that the definition of canine deployment be limited to those circumstances in which canines are utilized off a lead in an actual attempt to apprehend or find a suspect.

When there is a need for canine deployment, we recommend that the APD ensures that deployment is subject to appropriate supervisory oversight. The canine SOP requires general supervisory approval for canine deployment. Canine SOP .06(B). We recommend that the APD update this SOP to require approval from a canine unit supervisor for deployment, i.e., a supervisor already trained on the appropriateness of such deployments, if available. If no canine supervisor is available, then deployment should require a field supervisor's approval.<sup>18</sup>

When canine bites occur, APD's policy requires its officers to report the use of force. The canine SOP, however, is unclear as to whether the reporting and review of bites under the SOP are in addition to, or the same as, the reporting and review procedures under the APD's new Response to Resistance reporting procedure. Accordingly, we recommend that the APD clarify the reporting and review procedures in its canine SOP. This should include a requirement that canine supervisors are required to report to the scene of canine bites.

### **C. Reporting Uses of Force**

We recommend that the APD revise its policy to require all officers involved in a use of force incident, not just the initially involved officer, to prepare their own report detailing the event. In order to accurately report (and subsequently review) uses of force, the APD should also revise its use of force form to require supervisors to collect sufficient information and evidence for later review, oversight, and training.

#### **1. Reportable Uses of Force**

As mentioned with respect to the APD's prior definition of force, the APD practice and policy have been under inclusive in what the APD has considered force, and, in turn, it appears that the reporting of force by officers has been under inclusive. The prior policy, effective since April 2000, only required uses of force to be reported when the subject presented the officer with "consistent and repetitive complaint of pain beyond the initial arrest procedure, which would lead a reasonable person to conclude that an injury could have occurred." Use of Force Policy B101.07(A) (3), revised Jan. 26, 2007. This definition

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<sup>18</sup> The APD should train its field supervisors on general uses of canines and the efficacy and ability of canines to assist in law enforcement, including use of force.

allowed an escape valve from reporting requirements. During our site visits, for example, we were informed that an arm bar takedown<sup>19</sup> was not a use of force under the policy then in effect, unless there was a complaint of recurrent pain or injury. An average citizen would not know that he or she must consistently or repetitively report pain in order for a use of force against them to be reported. Moreover, as written, the prior policy permitted force during an arrest, but only required reporting if pain or injury are apparent after an initial "arrest procedure." "Arrest procedure" was too broad and undefined a term. Requiring reporting only after arrest procedure excluded uses of force against subjects whom the APD did not arrest.

The revised Response to Resistance reporting policy significantly changes the reporting requirements and addresses many of the recommendations our experts made at the conclusions of our on site visits. Even the revised policy, however, leaves some inconsistencies in the reporting requirements. The revised reporting policy adopts a categorization of uses of force for reporting and review, i.e., the most serious, level one, to the least involved, level three.<sup>20</sup> Response to Resistance Reporting, Investigation, and Review Policy B101c.03, issued June 1, 2008. The policy requires employees involved in a use of force to file a Response to Resistance report in Versadex<sup>21</sup> for levels one and two uses of force. Response to Resistance Reporting Policy B101c.04(A) (1) (b). This portion of the policy does not specify what precisely must be reported through this report. Later, however, with respect to level three uses of force, the policy sets forth a list of certain items to be reported through a Response to Resistance report (though Versadex is not then mentioned). Response to Resistance Reporting Policy

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<sup>19</sup> Arm bar is a takedown technique that enables an officer to gain pain compliance with the subject by applying pressure that hyperextends the elbow joint driving the subject's shoulder toward the ground.

<sup>20</sup> We note that much of this policy appears to have been drawn from one of the exemplar policies we provided to the APD. Also, even though the exemplar policy defines the levels of use of force, we do not recommend that the APD follow suit in the placement of definitions of levels of force after other substantive provisions. The APD's policy would benefit from having its definitions of levels of use of force appear prior to its reporting requirements.

<sup>21</sup> Versadex is the APD's computerized reporting system.

B101c.07(A) (2). This inconsistency only serves to breed confusion as to what must be reported and what methodology should be used. Also, the revised policy only requires one Response to Resistance Report from multiple employees who each use the same level of force. Response to Resistance Reporting Policy B101c.01(D). This does not comport with accepted policing practices that require every officer involved in use of force incidents to complete a separate report on his or her involvement and force used.

We recommend that the APD revise its policy to make clear the basic requirement that all involved officers or witness officers complete individual use of force reports for all uses of physical or instrumental force beyond un-resisted handcuffing.

In addition to every officer being required to complete individual reports, we also recommend some other changes and clarifications to the requirements of the revised Response to Resistance reporting policy:

- The revised policy permits a supervisor to re-categorize the investigation of uses of force level, triggering internal affairs involvement, if the investigation reveals a possible policy violation. Response to Resistance Reporting Policy B101c.02(B). We recommend that the APD revise this section to also specify that a citizen complaint at the scene of the use of force, or after the fact, will also elevate the category of investigation and trigger internal affairs involvement.
- The revised policy requires APD supervisors to notify the Special Investigations Unit ("SIU") of potentially criminal uses of force. Response to Resistance Reporting Policy B101c.02(C). If the SIU is required to respond to the scene of potentially criminal uses of force, then we recommend that the policy state this clearly. The policy should also be clear who leads the investigation of the incident if SIU is on scene, either the supervisor or SIU.
- The revised policy requires the watch commander to appoint an investigator to review a use of force involving supervisor's use of force. Response to Resistance Reporting Policy B101c.02(H). The policy should make clear that subordinates should not review supervisors' uses of force, unless the subordinates are trained to conduct internal affairs investigations and are operating in that capacity. The APD also should clarify whether or not the supervisor's

chain of commander superior is to report to the scene of a supervisor's use of force.

- The revised policy places in its lowest category, Level 3, use of CEDs when the officer misses the intended target. Response to Resistance Reporting Policy B101c.03(C)(3). The failure to strike a target should not diminish the level of review of a use of force. Accordingly, we recommend that CED deployments resulting in misses be reported and investigated at the same level as successful CED deployments.
- The APD has revised its policy's reporting requirements, consistent with our recommendations during our on-site visits, to require reporting of officers' active targeting of subjects (when an officer points his or her weapon at a suspect) with firearms.<sup>22</sup> The new Response to Resistance reporting policy requires reporting of active targeting using a firearm, but is still silent with respect to active targeting with impact munitions (to the extent that firearms are not defined to include impact munitions). We recommend that the APD require reporting of all active targeting with these devices by an APD officer. The APD provided us its new Response to Resistance report form from the APD's Versadex. That form does not list active targeting in the data field in which other force options are listed.<sup>23</sup> We

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<sup>22</sup> The prior use of force policy prohibited APD officers from brandishing a firearm unless there would be a basis to use deadly force or "create an apprehension" of deadly force use when such use would be necessary. Use of Force General Policy B101.05(A)(1). The reporting requirements of the APD's prior use of force policy, however, did not require brandishing of a firearm, CED, or impact munition weapon to be reported as a use of force. Accordingly, the APD policy indicated that the APD was not collecting data of uses of force which are prohibited by its own policy. Interviews with APD personnel confirmed that the APD did not require officer to report brandishing. We commend APD for making the change in its updated policy.

<sup>23</sup> The APD provided us an explanation of its Versadex form which included a field to report the number of shots fired. Use of Force Detail Page in Versadex, June 4, 2008. The APD's explanation indicates the use of "0" in the data field to record the number of shots fired indicates active targeting. However, the use of a "0" for active targeting is not distinguishable from an officer merely filling in a zero value for no shots fired, or

recommend that active targeting be added to this field. Tracking of active targeting with CEDs could also be useful as a management tool. Officers could report CED active targeting on incident reports, without a use of force form, if no force is used.

## **2. Reporting Forms**

The APD's revised use of force reporting form is still inadequate. We recommend that the form be structured so that discrete information about multiple uses of force by multiple officers in a single incident may be recorded. The form (consistent with policy) should allow officers to provide a detailed narrative description of the incident, beginning with the basis for the initial contact, continuing through the specific circumstances and actions that prompted each use of force, resulting injuries, and medical treatment (if necessary). For this, a narrative, not the current checkbox scheme of reporting, is required. The Versadex form that the APD furnished to us provides only a 50-character text box for remarks. The form should continue to contain check boxes, however, which may support the narrative, where appropriate. The form should also include other information not on the use of force reporting form, such as: the officer's assignment area; the officer's assignment; whether the officer was on or off duty; whether the officer was in uniform; and whether or not the subject alleged excessive force or unlawful law enforcement action.

It is the responsibility of the first-line supervisor to ensure that all uses of force are documented. We recommend that the APD's policy establish a review mechanism to ensure that officers are complying with the reporting procedures and provides for appropriate administrative sanctions or retraining for officers who fail to comply. Supervisors should also report to the scene of all uses of force above unresisted handcuffing. Some supervisors informed us that they already do this; this standard should be memorialized in policy. Supervisors will, therefore, be aware of when use of force occurs and when to expect report forms, and from whom.

### **D. Supervisory Review of Uses of Force**

Supervisory review of officer uses of force is critical to a department's ability to ensure officers are using force in a manner consistent with constitutional standards and the

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filling in a value over zero for firearm or CED shots fired.

department's policies. Use of force reviews may identify both officer training needs and patterns of unauthorized or excessive uses of force. The information regarding each use of force also should be tracked in an Early Warning System ("EWS"), as discussed below in Section VIII of this letter.

### **1. Chain of Command Review**

Like the reporting requirements already discussed, the APD has revised many of the review requirements of the revised Response to Resistance reporting policy which address many of the recommendations our experts made at the conclusions of our on site visits. The APD's prior use of force report form provided to us, included blanks for supervisor comments and signature, but the policy did not give any direction on the necessity or nature of this supervisory review. Rather, the prior use of force policy included a provision for review of use of force report forms only by the APD's training academy.<sup>24</sup> Use of Force General Policy B101.09.<sup>25</sup> According to the policy, then, there was no requirement that supervisors assess whether the officer's reported uses of force were in compliance with the APD's use of force policy. In a separate document generated in response to our request, however, the APD stated that supervisors are to review use of force reports. City of Austin Response to DOJ First Request for Documents and Information, Review of APD Use of Force Incidents, dated July 18, 2007. This informal requirement, however, will not consistently yield effective front-line supervisory reviews of uses of force.

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<sup>24</sup> According to a document titled City of Austin Response to DOJ First Request for Documents and Information, Review of APD Use of Force Incidents, dated July 18, 2007, APD's Training Division no longer enters the use of force report data into a database. Rather the APD's central record's office completes this task. The APD had not revised its policy to reflect this change.

<sup>25</sup> According to the old policy, the APD's training academy was to enter the use of force reports into a database, to return incomplete reports to supervisors for completion, and to perform an annual analysis of the use of force data to identify training needs. Use of Force General Policy B101.09. Even if the academy is no longer the data entry point, academy staff need to perform the qualitative analysis. The subject matter experts for each respective use of force should review the respective use of force reports for both individual training and supervision issues and for systemic use of force issues.

While on site, we encountered a general lack of consistency among APD supervisors on use of force reporting and review requirements. We asked APD supervisors to walk us through use of force incidents and reporting. Despite the lack of clarity in the APD's prior use of force policy, we were informed that, in practice, many front-line supervisors do, in fact, review their officers' use of force reports. However, we were also informed that some of these supervisors (who are to review use of force reports) are not themselves trained in up-to-date, uniform tactics or use of force. If these line-level and mid-level supervisors are not trained in use of force, themselves, then they are not equipped to assess or counsel on their subordinates' use of force.<sup>26</sup> Despite the improvement in the revised Response to Resistance reporting policy, this previously observed lack of training among supervisors impedes effective implementation of use of force reviews.

Some of the lack of clarity regarding supervisory review responsibilities for use of force that existed in the old policy still permeate the revised Response to Resistance reporting policy. For level one and level three use of force investigations, the revised response to resistance reporting policy requires that supervisors prepare and submit supplements to response to resistance reports. Response to Resistance Reporting Policy B101c.05(C) (4), B101c.07(B) (3) (b).<sup>27</sup> For level two reports, though, supervisors are required to prepare an investigation packet, but not a supplement. Response to Resistance Reporting Policy B101c.06(A). The revised policy's

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<sup>26</sup> Similarly, we have been informed that the APD's internal affairs division trained all of the APD's sergeants and lieutenants to handle certain investigations of potential policy violations, including possible excessive force, referred back to the chain of command. If these line-level and mid-level supervisors are not trained in use of force, themselves, then they likewise are not equipped to assess or counsel on their subordinates' use of force.

<sup>27</sup> "Supplements" are additions to the primary employee's Response to Resistance Report. Supplements contain the accounts of involved employees, assisting employees, or, for certain level one investigations, supervisors. Response to Resistance Reporting Policy B101c.01(C). The policy's definition of supplements omits supplements by supervisors for level two and three investigations. Accordingly, the revised policy's definition is inconsistent with the supervisory reporting and review requirements of the policy.



descriptions of these supervisors' review responsibilities do not address the elements of qualitative analysis the supervisors must perform in reviewing their subordinates' uses of force.

The revised policy does include a chain-of-command review for level one and two uses of force that require the chain of command to evaluate for "training, tactical, or equipment issues." Response to Resistance Reporting Policy B101c.04(D) (3). This review, however, is of an already completed investigative package and, therefore, occurs after the front-line supervisors should have completed a qualitative assessment of the use of force. We recommend that the APD revise its policy to require that APD supervisors qualitatively review *all* uses of force, not just some levels. The policy should specify that supervisors should identify uses of force that appear excessive, avoidable, and/or indicative of potentially criminal misconduct. Either on the Response to Resistance form or a separate form, the APD should require that supervisors record their substantive review of use of force. The form should require supervisors to evaluate each use of force used in an incident. Supervisors who review use of force reports must reconcile multiple use of force reports from multiple officers concerning the same event. The supervisors should also check involved officers' training records to determine whether or not those officers are properly certified for the force method used. After these qualitative assessments by front-line supervisors, the review should proceed up the chain of command, as envisioned in the revised policy.

We were informed that the internal affairs division does not perform an audit on use of force reports to ensure that chain of command review is occurring.<sup>28</sup> The APD could utilize the internal affairs division to ensure that the chain of command is performing such reviews of uses of force. The revised Response to Resistance reporting policy also requires internal affairs to track force investigations for level one and level two investigations in a database. Response to Resistance Reporting Policy B101c.04(c). It is unclear, however, who has ultimate responsibility for tracking all use of force reports or why the APD's policy does not require tracking of level three reports.

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<sup>28</sup> We were informed also, however, that the APD previously issued a general order that the APD's internal affairs division should receive all use of force reports, and that the order has not been rescinded. Nonetheless, to ensure uniformity and consistency, APD should ensure that practice follows suit with current policy and any previous, contradictory orders be rescinded.

The APD should revise its policy to provide for tracking of all force reports and then utilize force report data for its EWS.

## **2. Identifying Use of Force Trends**

The APD's prior use of force policy required that the training academy enter use of force reports into a database and review that database to prepare an annual analysis of use of force.<sup>29</sup> Use of Force General Policy B101.09. While there is value in the APD's training academy review, the prior policy's method of review circumvented the chain of command. Consistent with many of the recommendations our experts made at the conclusions of our on site visits, the revised Response to Resistance reporting policy now appropriately places back in the chain of command reviews of use of force. Response to Resistance Reporting Policy B101c.04(D).

Also consistent with many of the recommendations our experts made at the conclusions of our on site visits, the APD has adopted a new force review board policy.<sup>30</sup> Force review Board Policy B101d, issued June 2, 2008. We commend APD for this advancement and recommend certain changes and clarifications to further enhance the new force review board policy:

- The review board policy requires the commander of training to serve as the chairperson of the board. Force Review Board Policy B101d.01(C)(1). We recommend that in order to place appropriate importance on the review board process and give the board authority, that an assistant-chief level command staff member chair the board.
- The review board policy requires the board to consider certain factors in the uses of force it reviews, but does

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<sup>29</sup> As stated, we were advised that the Training Academy no longer enters the reports into the APD's database. City of Austin Response to DOJ First Request for Documents and Information, Review of APD Use of Force Incidents, dated July 18, 2007.

<sup>30</sup> APD currently employs a Critical Incident Review Board for incidents involving death, serious injury, or having a high potential for lethality to the public. Critical Incident review Board General Policy A114, effective April 2, 2000, revised January 31, 2003. As envisioned therein, the critical incident review board should also continue to identify needs for training adjustments. Id.

not include among these the officer's "decision-point analysis," which is a review of the reasonableness of each decision prior to and throughout the officer's use of force, and a determination of whether or not a different decision would have affected the ultimate use of force. Force Review Board Policy B101d.03(C). For example, an officer's initial use of force to stop a subject may be appropriate (e.g., use of chemical spray), but if a subject stops resisting, and officers use force again (another burst of spray) that continued use of force may be inappropriate. Decision point analysis should also look at officers' reactions to subjects' verbal comments that lead to uses of force, and at officers' decisions not to wait for backup resulting in the need for use of force. Decision point analysis looks at each aspect of the officers' and the subjects' action to determine the reasonableness of officers' use of force. Accordingly, we recommend that the APD revise its policy to require the Board to consider the steps leading up to use of force.

- Like the Response to Resistance reporting policy, the review board policy references anticipated use of the internal affairs database. Force Review Board Policy B101d.03(D) (3). We recommend that the APD revise its policy to make clear the requirement to track all uses of force and the need to record all uses of force in the APD's EWS.

### **III. COMPLAINTS OF OFFICER MISCONDUCT**

**The APD should implement a formal, structured, and consistent system for receiving and handling complaints of officer misconduct.**

#### **A. Complaint Procedure**

An open, fair, and impartial process of receiving and investigating citizen complaints serves several important purposes. An appropriate citizen complaint procedure ensures officer accountability and supervision, deters misconduct, and helps maintain good community relations by increasing public confidence and respect for the APD. Improving the current procedure for handling citizen complaints at the APD would maximize these goals.

## **1. Complaint Process Information**

An effective complaint process should allow unfettered access for citizens (or others) to make complaints, and should reinforce the public trust in the integrity of the process. We recommend that the APD better disseminate information to the public about its complaint process, in order to garner more confidence in the process. We recommend that each district police station and APD headquarters have information about the complaint process prominently posted in a visible place in the public reception area. The APD should also make complaint forms available at the City Hall and other public offices. Complaint process information and forms should be posted in multiple languages. The APD should also consider making information about the complaint process available on-line, in multiple languages. Finally, we recommend that the APD institute periodic customer satisfaction surveys, and include feedback questions regarding the public's perception of the complaint process, so that APD has an avenue for addressing any actual or presumed deficiencies.

## **2. Complaint Intake**

An open complaint process contemplates that complaints will not be discouraged. The APD should change aspects of its citizen complaint process that have the potential to discourage the filing of complaints, and to impair effective tracking of complaints.

Under current APD policy, all APD employees (sworn and unsworn) are responsible for accepting complaints against department employees regarding allegations of misconduct or unlawful activity. Internal Affairs General Policy A109.09(A), effective April 2, 2000, reissued May 23, 2006. According to officers with whom we spoke, however, this process is not being followed. We learned that communications personnel, i.e., 911 operators, on many occasions may have discouraged complainants from filing complaints, failed to contact supervisors regarding complaints, and failed to document the calls and the complaints. Such responses to complainants who call 911 may deter would-be complainants who are unable to, or otherwise unwilling to, come to a police station to file a complaint. Further, we were advised that historically some citizens who desired to file a complaint with the APD were directed to file their complaint in person with the Office of the Police Monitor ("OPM"). In these instances, citizens were obliged to travel to the OPM (which was not easily accessible) in order to file complaints. This practice, too, deters the filing of complaints.

The APD should ensure that its practice on acceptance of complaints meets its policy that all police employees are responsible for receiving and documenting public complaints. Additionally, the current policy only requires an employee to contact a supervisor if the employee receives a complaint about him/herself. Internal Affairs General Policy A109.09(A)(1). We recommend that APD adopt a policy that requires all personnel, who receive citizen complaints, to immediately contact a supervisor. If a supervisor is unavailable, the policy should then direct personnel to document the complaint, which includes gathering the complainant's name, nature of complaint, date of complaint, name of the officer involved in the incident, and collecting transient evidence. The APD should train all its personnel, particularly communications staff members, on their responsibility to accept complaints and reporting pertinent complaint information to supervisors. Further, we recommend that the APD consider placing drop boxes in police stations or City Hall so that complainants can easily submit their complaints. The APD would then contact the attributable authors of deposited complaints to initiate the investigation of those complaints. By instituting this new policy, the APD should ensure that all complaints are referred to a supervisor and all complaints are documented.

As soon as the APD receives a complaint, the complaint information should be recorded in Internal Affairs' s ("IA") . Even complaints for which complainants refused to submit written forms or which are submitted anonymously should be listed in this database. The date on which a complaint is initiated should be recorded, and processed for complete investigation.

### **3. Complaint Classification**

According to current APD policy, the IA Division has the primary responsibility for classifying, evaluating, and investigating complaints. Internal Affairs General Policy A109.04. Complaints regarding possible officer misconduct are either formally or informally investigated. We understand that IA classifies complaints as formal if the complainant files a formal complaint affidavit, i.e., Complaint Contact Form. Conversely, IA classifies complaints as informal if the complainant does not file a formal complaint affidavit, regardless of the seriousness of the allegation. Reportedly, IA conducts an initial evaluation of all formal complaints before it determines the classification of investigation.

The APD's current system for complaint classification is needlessly complex and fraught with opportunities to apply subjective judgment. The classification system permits far too much "gray area" in which some serious complaints may be minimized or disposed informally without adequate investigation and resolution. The APD has seven different categories and subcategories of classifying complaints. Specifically, the categories include Class A, B-internal, B-external, C, D, I, and Q complaints.<sup>31</sup> It is unclear what legitimate purpose is served by this extensive multiple categorization scheme.

APD's current process of complaint classification raises concerns because the classification categories are broad, subject to different interpretations, lack uniformity, and lack consistency. The current IA policy lists categories of complaints that should be classified in Class A, but the policy fails to define these categories. Also, under Class A complaints, the policy does not clearly define what constitutes "criminal conduct," "serious violations of policy, rule or regulation," or "conduct that challenges the integrity, good order, or discipline of the Department." As a result, IA detectives are left making subjective determinations about the classification of complaints. This raises concerns not only about bias, but also about the consistency and fairness in the classification process.

Similarly, the classification and disposition of Class B complaints raise concerns because the current policy narrowly lists examples of "less serious violations of Department Policy." We recommend that the APD expand its current list of less serious violations into an exhaustive list of examples that would be consistently applied and that would reduce the probability of subjective judgment. Further, we have concerns with the manner

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<sup>31</sup> Class A complaints (allegations of a serious nature); Class B complaints (allegations of less serious nature); Class C complaints (allegations that do not rise to a policy violation, or complaints that can "best be handled by other departmental process"); Class D complaints (allegations that are not policy violations, allegations that recordings show to be false, and complaints about probable cause); Class I (informal information only complaints); and Class Q (catch-all category). Internal Affairs General Policy A109.04. Class B complaints are further divided into two subcategories: internal and external. Internal Class B complaints are generated by complaints filed by APD personnel. External Class B complaints are generated by complaints filed from outside the APD.

in which investigations are conducted in this complaint category. Specifically, this category is inherently complicated because it allows for two different levels of review within the same complaint class (i.e., external complaints investigated by IA and internal complaints investigated by chain of command). This category is further complicated by allowing the IA commander to remove Class B complaints to Class A where allegations of more serious or complex nature surfaces. The complex and complicated nature of Class B complaints lends itself to confusion, inconsistency, and unfairness in the disposition of less serious violations of Department policy.

Even more concerning were the classification and disposition of Class C complaints. In our discussions with the OPM, we learned that the OPM and the APD frequently disagreed on classification and disposition of this category of complaints. It was reported that many of the complaints lost in this "gray area" were Class C complaints. The subjective manner in which these complaints were classified raised concerns not only about bias, but also about fairness and consistency in the classification process. For example, this category contained complaints that command staff determined should be handled through other department process (i.e., grievance, performance improvement plan (PIP), training, and employee's chain of command). As a result, these complaints typically were minimized and never investigated before they were administratively closed. According to our expert consultants, this category was an "escape valve" used to minimize officers' misconduct.

Similarly, categorization of complaints as I or Q complaints served as "escape valves" that can minimize officers' misconduct. The APD's policy requires IA to record informal complaints on its tracking system. Internal Affairs General Policy A109.04(F). But, the policy actually directs that informal complaints can only be recorded "as 'Information (sic)' only," and cannot be used for disciplinary purposes. Id. IA personnel identified category "Q" as a catch-all in the IA tracking system. The IA policy, however, also fails to address how this category is used. This implies that this complaint category receives no formal review. APD personnel reported that the IA did not fully investigate category I and Q complaints.

We recommend that the APD investigate to the extent possible all complaints against officers, regardless of the source of the complaint, and that the APD record all findings in an EWS. We recommend that the APD create only two distinct categories of complaints: those to be fully investigated by IA, and those to be investigated and resolved through the chain of command. The

APD should apply consistent, objective criteria in the assignment of complaints to IA or the chain of command. The following are the objective criteria that we recommend the APD consider using in categorizing complaints for IA investigations: (1) all allegations which, if true, involve serious policy violations, including, but not limited to, all violations involving use of force; (2) all allegations involving use of deadly force; (3) all allegations involving failure to provide medical treatment; (4) all allegations involving potentially criminal conduct; (5) all allegations involving purported unlawful police action, e.g., unlawful arrest; and (6) evidence of discriminatory policing. Complaints that do not meet the objective criteria for investigation by IA would belong to the second category: those to be investigated and resolved through the chain of command.

The APD may develop other objective criteria for the assignment of complaints to IA. Whatever criteria the APD ultimately uses, the criteria should be promulgated in policy and, therefore, known to all personnel and complainants. The use of such criteria is not intended to eliminate the exercise of discretion in the assignment of complaints. Rather, the use of identifiable criteria should make the assignment of complaints more consistent and objective. Objective criteria should also instill in complainants a sense of confidence in the complaint system and among personnel a sense of fairness. Objective criteria would also permit quality control in later audits of the assignment system by IA supervisors and the OPM, as discussed below in Section V.

Once a complaint is classified, we recommend that the APD contact the complainant in writing to provide the complainant with the name and contact information of the IA investigator or chain of command supervisor who is assigned the complaint investigation. This notice should include the name of the complainant, the unique IA number assigned to the complaint, the date of the incident, the name of the officers involved, and the summary of the allegation. In lengthy investigations, the APD should update the complainants on the status of the investigations. At the conclusion of the investigations, the APD should notify all relevant parties, including the complainants, of the final dispositions. If a complainant's allegation is sustained, the letter should also indicate whether remedial action will be or has been taken.

#### **4. Chain of Command Investigations**

We recommend that subject officers' chains of command investigate all complaints not investigated by IA. As discussed,



IA currently refers to a subject officer's chain of command all Class B internal, and Class C and D complaints. These are administratively closed and do not receive the benefit of an investigation. Because these complaints are administratively closed, the APD fails to produce findings that could be useful data for the APD's EWS. Not every complaint will merit a complete IA investigation, but every complaint deserves the level of investigation merited by the circumstances of the complaint. If it is readily apparent from the chain of command's review of the assigned complaint that the complaint is without foundation, then the complaint should be deemed as unfounded. If, during the course of any chain of command investigation, the chain of command supervisor determines a complaint meets the objective criteria for internal affairs investigation, the case should be referred back to IA for investigation. The chain of command should reach a finding after investigation of all complaints it receives. All findings of potential policy violations should then be reviewed by second-level supervisors before findings are submitted to the IA Commander for final approval.

To ensure that the chain of command staff is equipped to investigate and resolve complaints (particularly citizen complaints) referred to them, we recommend that the APD provide appropriate training, with an emphasis on interpersonal skills. Further, we recommend that APD provide training on appropriate burdens of proof, i.e., preponderance of the evidence, to supervisors who are responsible for investigating and deciding the outcome of a complaint, and the factors to consider when evaluating complaint or witness credibility (to ensure that their recommendations regarding dispositions are unbiased, uniform, and legally appropriate). We also suggest that APD implement a policy regarding complaint disposition that requires all complaints to be recorded in an EWS.

Finally, we recommend that the APD implement a uniform system for recording all complaints resolved through the chain of command. During our site visit, we interviewed several sergeants who used different methods of recording resolved informal complaints. Several supervisors wrote memoranda that remained in officers' files while other supervisors were unable to identify any documentation of informally resolved complaints. We recommend that the APD uniformly require that officers' personnel files include a record of all complaints resolved through the officers' chain of command. We also recommend that APD implement oversight, e.g., an audit or quality assurance mechanism, to review a sampling of chain of command complaints investigations to ensure that complaints are properly classified and appropriately resolved.

## 5. Outside Referral of Potentially Criminal Allegations

The APD and the Travis County District Attorney's ("DA") should work cooperatively when they investigate APD employees for potentially criminal conduct. When an incident or complaint of officer misconduct indicates the possibility of criminal conduct by the officer, the APD should refer the matter to the DA's office and support, as needed, a criminal investigation. An ongoing criminal investigation, however, should not foreclose the APD's ability to conduct a parallel administrative investigation. The APD administrative investigation should proceed on a concurrent track to the extent it is able without interfering with the criminal investigation.

The APD's current policies and procedure allow for the completion of a criminal investigation before the commencement of an administrative investigation or the imposition of disciplinary action. Internal Affairs General Policy A109.07(B). Although the Chief has the authority to supercede this protocol, we learned during our site visit that the APD generally defers to prosecutors' requests to delay administrative investigations until final disposition of criminal investigations. The apparently unintended consequence of delaying the APD's IA investigations has been that the APD may be foreclosed from disciplining officers that the APD eventually finds committed policy violations. Under local government code, the Chief has 180-days from the occurrence of an incident to take disciplinary action against an officer. Tex. Local Govt. Code § 143.1017(h).<sup>32</sup> For complaints involving conduct that is also potentially criminal in nature, that 180-day deadline runs from the reporting of the incident. We learned during our tour that there were situations in which the final dispositions of cases were not completed by the 180-day deadline. As a result, the Chief was unable to impose discipline and officer conduct was not reported in the Guidance Advisory Program ("GAP") system.<sup>33</sup> The OPM

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<sup>32</sup> This 180-day deadline can be extended; however, it appears that such an extension is rarely used. If the Chief believes that he may terminate the subject officer, the Chief may then provide notice that the deadline is extended beyond the 180-day deadline. Internal Affairs General Policy A109.07(C).

<sup>33</sup> The GAP system is a data analysis program developed by the APD. The system was intended to operate as an early warning system to identify officers who may be at risk for behavior inconsistent with policy. The self-developed program by the APD

reported to us that in a sampling of 146 IA investigations, 24.3% were not completed by the expiration of the 180-day deadline. This raises concerns because the 180-day deadline should not negate officer discipline or reporting to the GAP system. The APD should apply the recommended policy revisions for parallel investigations to ensure that investigations are conducted in a complete, thorough, and timely manner before the 180-day deadline.

Additionally, we recommend that APD modify its policies and procedure to clarify the rights of officers who may be the subject of a misconduct investigation. During an administrative investigation, officers suspected of potentially criminal misconduct should be informed of their rights under Miranda v. State of Arizona, 384. U.S. 436 (1966), before questioning, including their rights against self-incrimination and to have counsel present during questioning. Likewise, the APD policy should provide clear guidance to investigators regarding procedures for when and how to compel statements from officers for the purposes of an administrative investigation in conformity with Garrity v. New Jersey, 385 U.S. 493 (1967).

#### **IV. INTERNAL AFFAIRS**

The internal affairs component of a law enforcement agency should seek to ensure that the integrity of the department is maintained through a system of internal discipline (or corrective action) where fairness and justice are attained by objective and impartial investigations. The APD should acknowledge and

the behavior of police officers for misconduct, while maintaining its objectivity and autonomy.

##### **A. Staffing and Training**

We understand that APD has no policy defining criteria for its selection of IA officers. Training and staffing are critical to the success of IA and the APD. We recommend that the APD develop articulable selection criteria for all IA positions. Such criteria should include an evaluation of the applicant's performance, including complaint and disciplinary histories to ensure that only officers with unquestioned integrity and ethics

APD should also take measures to assign officers with extensive

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was not fully functional during our review. See "Early Warning System," below in Section VI.

investigative skills to IA. We also recommend that APD remove investigators whose conduct while serving as IA officers would have disqualified them from selection for IA.

We also understand that APD has no formal IA policies for training, witness interviewing, nor advance level supervision training. We recommend that APD implement policies, procedures, and training for IA personnel, specifically to address the above-mentioned areas. According to APD personnel we interviewed, the only training in IA that they ever received was "on the job." Moreover, we learned that supervisors and managers have never received any advanced level training regarding supervising and managing an internal affairs unit. To ensure consistency and investigative integrity, we recommend that all APD officers responsible for investigating internal affairs complaints receive specialized training in internal affairs investigations, interviewing and interrogation skills, ethics, and APD administrative and disciplinary procedure. We also recommend that APD provide its IA supervisors with training in internal affairs management from a certified police internal affairs training program. We suggest that the APD provide continuing law enforcement training to both IA detectives and supervisors, concentrating on IA-specific topics. Additionally, IA should provide in-service training to first-line supervisors regarding their roles in the complaint process and IA investigations. As discussed later in this letter, like other supervisors, IA supervisors should receive training before assuming supervisory responsibilities.

## **B. Investigative Process**

Any revision to APD's IA policy should clearly define the nature and scope of IA investigations. In the course of our investigation, we heard complaints that the current complaint procedure can be erratic and irregular. For example, OPM personnel informed us that when additional policy violations are discovered during complaint investigations, IA will charge some APD personnel with those violations, but will not charge others due to an interest in not "stacking" charges against officers. Also, citizens informed us that IA did not always investigate their complaints, or that some complainants were told to return to the IA office numerous times before IA would accept a complaint. Moreover, whereas the current IA policy explicitly sets forth the categorizations of citizen complaints, as

investigations. Moreover, the current policy for IA

subject officers, but says very little about what is actually to

be done to investigate. Internal Affairs General Policy A109.10. The lack of formal, structured, and consistent policies poses difficulties to the complainants as well as the involved officers. Both complainants and involved officers are entitled to know in advance what their rights and responsibilities are in the course of an IA investigation.

In defining the scope and nature of IA investigations, the APD policy should provide that any investigation include an interview with the complainant and all relevant witnesses, citizens, or police. The policy should require that the APD obtain and analyze all available forensic (such as bullets) evidence. The policy should require that supervisors or IA personnel on the scene of an incident take pictures, collect evidence, and conduct interviews. The policy should require all subject and witness officers to produce all statements, reports, and notes completed in the course of duty that are related to the investigation. IA investigators should keep all of these items in the investigative file, along with the IA investigator's notes. We recommend that the policy require audio or video recording of all interviews for IA investigations.

We also recommend that the investigation of complaints be governed by defined time lines set forth in a modified policy. Each step of the investigation should have a policy-specific deadline. For example, we recommend that the APD's policy require that, absent exigent circumstances, the IA investigation be completed in 90 days. Further, the time lines should be subject to adjustment only when approved in writing by IA supervisory personnel. Each investigative file should have a chronology log attached to it on which to list daily investigative activity or notes associated with the investigation. The log should also list the location of

As discussed with respect to the classification system, we recommend that IA advise complainants of the status of the investigation of their complaints. If a complainant requests to withdraw his or her complaint, we recommend that IA continue its investigation to determine whether or not a violation of policy occurred. It is inappropriate for a complainant to unilaterally terminate a complaint without an investigation. Ultimately, if IA finds no policy violation occurred, the record of the investigation should include a written acknowledgment executed by the complainant agreeing to the resolution of the complaint. This would evidence that the APD has not pressured complainants for lesser forms of resolution or withdrawal of their complaints. We recommend that, at the conclusion of every investigation, IA

notify all relevant parties, including the complainant, of the final disposition of the complaint. If the complainant's allegation is sustained, the letter should also indicate whether the APD will take remedial action.

If, during the course of an IA investigation, collateral misconduct is discovered, IA should institute investigation of such misconduct. The IA policy should be clear that if a policy violation is uncovered, IA will identify that violation and investigate or refer it as appropriate. Likewise, the policy should state that any criminal conduct uncovered will also lead to a referral for criminal investigation.

If a complaint is ultimately sustained, the APD should go back to the documentation regarding the incident from which the complaint was generated to assess supervisory and management accountability. The APD should review these documents to ensure proper supervisory review of the incident and reporting of any identifiable policy violations for IA investigation. If the subject officer's supervisor failed to report a known policy violation, for example, he or she should then be held responsible for failure to report.

### **C. Proactive Investigations**

We learned during our tour that the APD self-describes its IA actions as reactive, rather than proactive. Solely reactive Proactive IA investigation should include both integrity tests and record reviews to identify potential IA issues.

During our tour, we also learned that IA was not randomly reviewing use of force reports to ensure that supervisors were reports. We recommend that the APD's IA act proactively in reviewing records to identify potential misconduct issues. We also recommend that the APD review use of force reports on a quarterly basis to identify whether a basis exists to investigate any reported uses of force for potential violations of policy or for referral, if necessary, for criminal investigation. Additionally, many other similarly sized police departments routinely have their IA unit perform an annual check of state driving records for violations or suspended licenses. IA could also perform annual checks of local court dockets for civil suits that may have bearing on officers' behavior on duty. The APD also should consider having a formalized process to solicit from the DA and City Attorney's office information on APD officers' performance in judicial proceedings, e.g., showing up for court,

successful motions to suppress based on officers' conduct, or perceived truthfulness of officers' court or deposition testimony.

The APD should consider developing a system to monitor, evaluate, and conduct affirmative investigations using targeted integrity tests. The integrity tests should be targeted to determine whether or not evidence of criminal misconduct that violate policy exists when there is an accusation or reason to believe that the subject officer may violate APD law and policy. Any such system should be memorialized in a policy to provide clear guidance regarding the proper and appropriate use of integrity tests.

#### **V. OFFICE OF THE POLICE MONITOR/CITIZEN REVIEW PANEL**

The OPM is a city department independent from the APD, but it works closely with the APD to monitor, in a limited fashion, the conduct of IA. Though, as described, the IA policy provides for the intake of complaints through all APD personnel, the OPM routinely handles the intake of citizen complaints. The OPM office has become the primary, but not exclusive, location for

We learned that citizens typically must go to the OPM's office during business hours in order to file complaints. We further learned that citizens encountered difficulty traveling to OPM's remote office. In order to facilitate citizens' desired contact with legitimate OPM, we recommend that the OPM conduct more community outreach by appearing at community forums and keep extended hours, even if on limited days, at accessible community locations so that the process for accepting complaints can be made readily accessible.<sup>34</sup> We also recommend that the OPM make its website bilingual for the convenience and use of members of the community who cannot read English.

OPM typically conducts initial complainant interviews, then forwards all complaints to IA for initial evaluation and complaint classification. Depending upon IA's classification of the complaint, either IA or the chain of command should then investigate the complaint. The OPM does not conduct its own

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<sup>34</sup> We understand that the APD's contract with the APA forbids the OPM from soliciting citizen complaints. Provided that there is no change in this agreement, establishing community locations for the collection of complaints should not rise to the level solicitation of complaints by the OPM.

investigations of allegations of misconduct. Instead, the OPM reviews the completed investigations conducted by IA.

In order for the OPM to assist citizens in the complaint process and for OPM to have legitimate oversight of the complaint process, the OPM needs access to information from the APD. Our interviews with OPM personnel revealed that the OPM did not have access to incident reports or police reports during the initial stage of the complaint process, which limited the OPM's ability to assist citizens in the complaint process. Similarly, the OPM reported to us that IA frequently does not respond to the OPM's requests for information. The OPM has even institutionalized the expectation that IA will not respond to the OPM: the OPM's intake process flowchart includes two separate steps in the process for IA's failure to respond to the OPM's correspondence on informal complaints.

To provide oversight over the APD's complaint process and to aid in ensuring that complaints are handled in an objective and thorough manner, we recommend that APD allow the OPM access to police reports and incident reports at the inception of all investigations. To ensure integrity of the IA process as we have suggested herein, we recommend that the APD implement policies and procedures for the OPM to routinely review all aspects of the APD complaint process, including assignment of complaint, classification of complaints, and completeness and sufficiency of investigations. The APD can then use this audit process to improve accountability, address issues regarding classification, and evaluate the performance of its officers and investigators. We also recommend that the OPM be used to review IA investigations and track records from an outside perspective for the benefit of the community. This would aid in ensuring that citizen complaints are handled in an objective and thorough manner, and provide an independent, informed report to the community.

Finally, the Police Monitor also chairs the Citizen Review Panel ("CRP"). The CRP is a group of citizens assembled to review police complaint incidents referred to them after the IA process concludes. The CRP also makes recommendations to IA. Either a complainant may refer his or her complaint to the CRP within 30 days of the notice of the outcome of the IA investigation, or the OPM may refer complaints to the CRP within five days if complaints involve certain types of allegations, e.g., critical incidents or bias-based misconduct. Internal Affairs General Policy A109.14. The policy contains no requirement that the APD respond to any recommendations by the CRP. The OPM has informed us that IA responded to only 15 of 24



recommendations from the CRP or OPM, i.e., a 37.5% failure to respond rate. We recommend that the APD's policies should clearly set forth the expectations for the use of the CRP and the response the APD is required to undertake. Specifically, we recommend that the IA commander report to the Chief on all responses to CRP recommendations. A written copy of this response should be furnished to the CRP through the OPM.

## **VI. DISCIPLINE**

We understand that the APD is currently considering the implementation of a discipline matrix.<sup>35</sup> The APD informed us that stake holders will be involved in the process of developing the matrix. The OPM was not familiar with the planned implementation of the matrix. We recommend that the APD complete the development of a discipline matrix. Community and OPM support are important to this process but should not delay implementation of a matrix. Such a matrix should detail the levels of discipline available -- e.g., retraining, verbal counseling, letters of counseling, forfeiture of leave time, suspension, demotion, and termination -- to address violations of policy. The matrix should specify for each type of policy violation what level of discipline shall be utilized for sustained violations of policy in the first instance, second instance, etc., and what factors may mitigate or aggravate levels of discipline to be imposed. It is critical that the APD have a transparent and fair disciplinary system and that officers are clearly informed of potential consequences of various actions.

## **VII. SUPERVISORY OVERSIGHT**

**The APD should ensure that clear chain of command supervision and direction is provided to APD personnel.**

### **A. Direct Supervision of Line Officers**

We have frequently been informed by APD personnel of their perception that with the current management system, supervisors abrogated to IA the line supervisors' responsibility to supervise officers. Many at both the supervisory and the line officer level identified "management by IA" as a concern. APD supervisors should be empowered to take ownership of their

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<sup>35</sup> A discipline matrix is a formal schedule for disciplinary actions, specifying both the presumptive action to be taken for each type of misconduct and any adjustment to be made based on an officer's previous disciplinary record.

supervisory role in order to ensure accountability for supervision up the chain of command.

In addition to the previously discussed recommendations that APD supervisors go on site and review all use of force incidents (above unresisted handcuffing), we recommend that the APD implement policies and procedures for APD supervisors to routinely review all aspects of APD officer conduct. APD supervisors should review the following for officers under his or her command: (1) all uses of force, as set forth above; (2) probable cause for arrests and the appropriateness of charges filed; (3) reasonable suspicion for stops and searches that do not result in an arrest; and (4) a minimum sample of mobile video recording devices ("MVR") recordings each month. APD policy should require supervisors to review and approve all arrest reports and search-and-seizure reports, and to record their approval on the arrest or incident reports by handwritten or electronic signature. We also have been informed that sergeants spend much of their time inside. Even with the daunting tasks of review of line officer's reports, sergeants need to go to the field to: (1) supervise first hand; and (2) investigate uses of force on their own. Accordingly, front-line supervisors must take ownership of their supervisory role and this ownership should likewise flow up the chain of command.

We further recommend that senior supervisors meet annually with every APD officer to discuss positive aspects of his or her police work, his or her complaint history, if any, and to discuss any problems or concerns officers may have concerning the department.

## **B. Supervision of Specialized Units**

During our investigation, we learned that the APD has several specialized units, including Street Response Units ("SRUs"). The APD's supervision of specialized units is largely outside of the normal chain of command for patrol units. We also discussed the APD's SRUs with both APD personnel and citizens. The APD provided us with the order under which SRUs operates. Street Response Standard Operating Procedure ("SOP"), June 13, 2006. The SOP gives broad latitude regarding the duties of the SRUs, without identifying specific tasks. APD personnel informed us that the SRUs have been used for crime sweep efforts, serving warrants, and other high risk police procedures. It is not surprising, then, the APD officers reported to us that SRUs may encounter situations calling for the use of force more frequently than conventional patrol assignments. Given the SRUs'

high risk tasks and potential for use of force, the APD should be keenly aware of the supervision of SRUs.

Supervision of SRUs is not clear, however. The SOP directs that SRUs are to "support Area Commands," but fails to define what specific tasks the SRUs are authorized to do. The SOP does not set forth who -- SRUs or the area commands -- determines what support SRUs should give. We understand that SRU sergeants, among other things, are to approve and coordinate search and arrest warrants, and brief support lieutenants on the SRUs' activities. The SOP does not specify any duties for support lieutenants. The supervision of SRUs is, therefore, truncated at the sergeant level. The sergeants set the tone for SRUs rather than direction coming from above on the chain of command.

The SRUs' sergeants also select who may become a member of the SRUs. The SOP does not set forth objective selection criteria for membership on SRUs, e.g., acceptable disciplinary history. The SOP requires only "complaint history acceptable to the area command staff." The specialized units should not select its own members. Nor should any single member stay in the same specialized units for too great a period of time. We recommend that the APD command develop objective selection criteria for membership in SRUs or other specialized units, including a requirement that applicants not have any sustained findings, minimally on use of excessive force, within the preceding 24 months. Similarly, substantiated findings should subject officers already in specialized units to exclusion from those units for 24 months.

We also recommend the APD develop a clear chain of command for SRUs. At the time of our on site visits, SRUs operated within each of the APD's geographic area commands. We have been informed, however, that the APD plans to consolidate the command of SRUs from each area to a central command. We are also informed that SRUs will remain stationed in the geographic regions they now serve but will answer to a centralized chain of command. This plan does not yet appear to address the potential for disagreement between area commanders and SRUs that will share the same command area but not the same chain of command.

### **C. Preparation for Supervisory Roles**

The APD appears to be undergoing a period of transition. Much of the APD's command staff is largely new to their current roles. Through interviews with command staff, we learned that it appears to be routine practice for high level supervisors to rotate frequently one to one and one half years of on average to

different commands. These positions are critical and having continuity is important. We noted that there were no formal policies governing senior command training prior to reassignment to new commands, including IA. Most supervisors reported having received on-the-job training. Some supervisors had received formalized supervisory training, and some had not. Formalized supervisory training for all supervisors would enhance effective management and communications. We recommend that new commanders, at the time of promotion, receive training on the management of the division before assuming leadership of the division. Command staff should be permitted the opportunity to attend appropriate supervisory training from outside organizations, when needed. Shifts between command assignments should include a transition plan between the outgoing and incoming commanders. We also recommend that the APD establish a more formal process for the selection of command staff. This should include articulable criteria for promotion and assignment.

Like command staff, mid-level managers would benefit from preparation for leadership roles. We have been informed that the APD has considered a plan to mentor its sergeants. We recommend that the APD bring such a plan to fruition. Similarly, support lieutenants could be set up in leadership roles to prepare for promotion.

#### **VIII. EARLY WARNING SYSTEM<sup>36</sup>**

**APD command staff should examine and review officer conduct on a regular basis as a proactive measure to minimize and detect misconduct, and to identify training and policy issues.**

We understand the APD has been developing its own EWS. The APD's EWS is known as the Guidance Advisory Program ("GAP") system. The GAP is an formal data collection and analysis system designed to monitor certain officer conduct. The GAP focuses on six performance indicators: internal affairs complaints; number

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<sup>36</sup> An EWS is a data-based police management tool designated to identify potentially problematic behavior and allow early intervention to correct misconduct and assist in identifying deficiencies in supervision, management, and policies. Police departments typically use EWS data regularly and affirmatively to promote best professional police practices, accountability and proactive management; to manage the risk of police misconduct and potential liability; to evaluate and audit the performance of officers and units; and to identify, manage, and control at-risk officers, conduct, and situations.

of use of force reports compared to number of arrests; officer as victim reports; sick leave issues; collisions; and pursuits. Through our conversations with APD Command Staff and officers, we learned that the APD recognizes that the GAP needs improvement. We also are aware that the APD is currently attempting to redesign, adjust, and improve the GAP. As currently constructed, the GAP does not adequately identify problematic officer behavior. Moreover, the APD inadequately uses the GAP to detect problematic trends in officer behavior. The APD is therefore unable to effectively use the GAP to aid in intervention and correction of officers as needed.

The GAP is divided into two main components: management reports and predictive modeling alerts. The management reports component gathers information from several APD or City databases, including the City's human resources data system, IA, computer aided dispatch records, use of force reports, and pursuit reports. The GAP uses an automated process to identify data points, which are then analyzed and placed in a management chart. The management chart serves as a graphical display of each officer's measure of the six main criteria categories and their work units. The predictive-modeling-alerts component analyzes data to identify current officers whose data show similar work patterns to officers who have either been disciplined or terminated. According to the predictive modeling alerts, officers who are identified in need of early intervention are supposed to be contacted by the officer's chain of command.

We learned that neither component of the GAP functions as the APD anticipated. The components neither set precise thresholds for identifying officer conduct nor ensure effective officer management review. We also learned that there was no specific threshold that the APD was using that would trigger a review of an officer's conduct. The APD informed us that the current system accumulated scores of confusing data, which limited supervisory review. Last, we learned that the system was initially created as a computer-based information system, but now APD staff is manually gathering information for review, which lends itself to likely human error in assessment.

Based on information shared with us, the current GAP did not serve as an effective risk management tool for the APD. Supervisors informed us that most had not used the GAP to identify potential risk management issues with officers under their command. Therefore, supervisors did not routinely use GAP as a management tool. The APD informed us that historically the GAP system had returned the names of only three officers, one of whom had already been terminated. Even the APD's command

questioned the accuracy of this number identified in its GAP system. Accordingly, the GAP was ineffective as a predictive modeling tool.

We recommend that the APD implement policies and procedures to collect data on individual officers for the purpose of maintaining, integrating, and retrieving information necessary for effective supervision and management of APD personnel. The GAP should contain information on all investigations and complaints, including non-sustained complaints and complaints prior to final disposition, discipline and other supervisory corrective measures, uses of force, arrests and charges, searches and seizures, service calls, training, awards and commendations, sick leave, civil lawsuits, and other items relevant to an officer's conduct. The effective gathering of data will require the support of other City departments. The City law office should report to the APD when an officer is named in a civil complaint relating to policing work or risk factors. Similarly, the DA's office should report to the APD on any matters relating to an officer's integrity or credibility.

To use the GAP effectively as a management tool, the APD should then use the data gathered for the GAP regularly and proactively. APD supervisors should use the GAP to: (1) promote best professional police practices; (2) improve accountability and management; (3) manage the risk of police misconduct and potential liability; (4) evaluate and audit the performance of all levels of the APD, its members, and its units on an ongoing basis; and (5) evaluate and assess the effectiveness of training and policy. We recommend that the APD require supervisors, including command staff, to review this data for every officer they supervise on a regular, predetermined basis, such as during reviews. When supervisors review their subordinates' GAP data, we recommend that the APD utilize comparisons to peers. Supervisors should compare their subordinates' data concerning complaints, use of force reports, and other pertinent information about a particular officer with the same categories of information from other officers on the same patrol team or shift. Similarly, command staff should review the GAP data for the units they command and compare these data with peer units. In addition, the policy should provide explicit guidance to supervisory officers reviewing reports to ensure that patterns of possible misconduct are identified, analyzed, and addressed properly by command staff. The aim of this process is to give supervisors valuable information that, if received early, could identify potential problem officers before misconduct actually develops.

To use the GAP effectively as a predictive model tool, the GAP must have defined triggers for management intervention. The policy implementing these recommendations should also establish guidelines regarding specific events that will trigger an additional supervisory review, such as a specific number of uses of force or citizen complaints within a discrete period. Once an officer has been selected for this additional review, a report should be prepared for his or her supervisor that details all use of force reports, formal and informal complaints, calls for service, sick leave, counseling reports, civil lawsuits, and commendations pertaining to the officer over an appropriate time . The officer's immediate supervisor and command staff should then meet to discuss the report and determine if any corrective action is warranted. The supervisor's and command staff's recommendations should then be forwarded to the appropriate Assistant Chief for his or her timely review and implementation. The effectiveness of the implemented recommendations should be determined by monitoring the officer and drafting written reports on the officer's conduct on a monthly basis. The officer's supervisor should retain the supervisory recommendations and the written monthly report in his or her supervisory file.

## **IX. OFFICER TRAINING**

**The APD should develop comprehensive ongoing training programs for current APD officers.**

### **A. Policy Re-Training**

Much of the technical assistance offered in this letter calls for the creation of new policy or revision of existing policy. We recommend that as the APD updates or creates each new policy, the APD re-train all APD personnel, including command staff, on each new policy and its effects. Such training should be comprehensive to cover all aspects of the change in policy so that APD personnel are aware of what would no longer be within policy, as well as what new material would then be included in the APD's revised policies.

Policy re-training should be competency-based. Accordingly, once trained, each APD member should demonstrate competency of his or her knowledge of the new subject matter through performance or examination. Each member of the APD, including command staff, should be required to pass competency-based performance or examination for each new policy.

## **B. Ongoing Training**

One of the most frequent comments we received from APD personnel was the need for in-service training.<sup>37</sup> We were advised repeatedly that officers and supervisors had not received training on perishable skills<sup>38</sup> and use-of-force scenarios in many years. The APD also identified the need for training to address issues with officers' driving and frequency of traffic collisions. In conversations with APD command staff, our expert consultants have stressed the APD's need to focus training on low frequency but high liability practices, e.g., use of firearms. Use of force and pursuit driving are such areas of high liability.

We recommend that the APD's training for firearm qualification not focus only on skills in shooting. That training time also should include review of applicable case law. A frequent comment we received from many citizen was a perceived poor communication between citizens and APD officers leading to escalation and, ultimately, use of force. Accordingly, we recommend that the APD ensure that its officers are trained in verbal de-escalation (e.g., verbal judo). We received positive comments on the APD's prior street tactics class in particular. We were informed, however, that only one third of the APD's officers received this training. Reinstating this training on perishable skills that affect use of force will benefit APD officers.

Like the street tactics course that the APD had previously begun, we also encourage the APD to bring to fruition its plan to use current field training officers ("FTOs") as adjunct trainers for their units. The APD had not fully developed, but should, the concept of using its corporals as trained trainers, as well. These adjunct trainers should utilize standardized lesson plans. Also, the APD units who work together should have the benefit of through more formalized classes.

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<sup>37</sup> The recommendations on training are not intended as an exhaustive analysis of all of the APD's voluminous training materials provided to us. We will continue to work with the APD to provide feedback on the APD's training materials.

<sup>38</sup> With respect to policing, perishable skills include, but are not limited to: handcuffing, hand-to-hand combat, self defense, and restraint holds.



We also recommend that the APD retain, as needed, consultation for the review of policy and curriculum to further develop the APD's ongoing in-service training. When engaging in commanders, as well as rank and file, in assessing the needs for in-service training.

We note that one potential resource for the APD in establishing and improving in-service and field training officer programs may be the longstanding training and grant programs administered by other components of the Department of Justice, such as the Office of Justice Programs. While these programs are separate and independent of the Civil Rights Division's investigations, we would be pleased to provide you with contact information for exploring the possibility of such assistance.

#### **X. COMMUNITY RELATIONS**

The APD has already undergone significant changes in its community relations in the past year. In addition to the other steps the APD has taken, some of which are mentioned in this

its mission statement and statement of citizen rights in multiple languages in the public spaces in APD buildings.

We also note that we were informed that the APD received accreditation but did not appear to have a completed strategic plan at the time. We recommend that the APD complete its strategic plan and make the document open to public comment. We recommend that the APD's planning efforts include identification of, and plans for, tracking quantifiable performance measures. The APD should report on these measures to the community annually. The APD should use such measures to target services in need of improvement.

**XI. CONCLUSION**

The APD has made a number of advances during our investigation, particularly under the leadership of Chief Acevedo. We strongly urge the APD to consider and adopt these technical assistance recommendations as it revises its policies and procedures. We look forward to working with you and the department as our investigation proceeds. If you have any questions, please do not hesitate to contact me at (202) 514-0195, Jonas Geissler at (202) 353-8866, or Corey Sanders at (202) 305-3229.

Sincerely,

*/s/ Shanetta Y. Cutlar*

Shanetta Y. Cutlar  
Chief  
Special Litigation Section

cc: Johnny Sutton  
United States Attorney  
for the Western District of Texas