

MEMORANDUM OF UNDERSTANDING BETWEEN THE SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE AND THE SAN FRANCISCO POLICE DEPARTMENT REGARDING THE INVESTIGATION OF SERIOUS USES OF FORCE AND IN-CUSTODY DEATHS

I. PREAMBLE

Peace officers perform a vital and often dangerous job in our communities. Situations occur where peace officers must use force, including deadly force. However, such force may be used only when reasonable and necessary under the totality of the circumstances. When peace officers use deadly force or force resulting in serious bodily injury, the San Francisco District Attorney's Office (SFDA) and the San Francisco Police Department (SFPD) (collectively "the Parties") understand the public expects a thorough and impartial examination. To meet that expectation, the Parties understand and agree their respective obligations in such situations to be set forth herein.

II. TERMS AND DEFINITIONS

A. Officers: Any person employed by SFPD who meets the definition set forth in California Penal Code § 830.1.

B. Covered Incidents: Any of the following incidents wherein SFPD officers are acting under color of law or authority: (1) officer-involved shootings; (2) in-custody deaths; and (3) uses of force resulting in serious bodily injury, as outlined below.

1. *Officer-Involved Shooting:* An officer's discharge of a firearm, with or without physical injury or death to a person, or a negligent discharge that results in physical injury or death of a person. For purposes of this MOU, Covered Incidents do not include an officer's discharge of a firearm that is: (1) intended to kill a dangerous or wounded animal; (2) intended to signal help for an urgent purpose; (3) unintended and does not cause injury or death to a person; (4) outside the borders of the City and County of San Francisco; or (5) during a training, sporting, or recreational activity.

The Department of Justice has jurisdiction over all officer-involved shootings resulting in the death of an unarmed civilian, in accordance with California Government Code § 12525.3(b)(1) ("AB 1506").

2. *In-Custody Death:* Any death that occurs when a person is restrained by an on-duty SFPD officer by means of: (1) physical restraints or any use of force, as defined by SFPD policy; (2) detention or confinement in an SFPD vehicle; or (3) detention or confinement in a jail or detention facility while in custody of an SFPD officer.
3. *Uses of Force:* Any uses of force (1) directly causing injury requiring admission to the hospital or (2) upon an SFPD supervisory evaluation, as outlined in [General Order 5.01](#) (Use of Force Policy and Proper Control of a Person), that the use of force appears unreasonable and resulted in serious bodily injury.

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The San Francisco District Attorney's Office ("SFDA") and the San Francisco Police Department ("SFPD") (collectively "the Parties") agree that SFDA personnel will investigate Covered Incidents as defined in Section II.B of this Memorandum of Understanding ("MOU"). The policies and procedures to be followed are set forth in this MOU. ¶

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“Serious bodily injury” is defined in California Penal Code § 243(f)(4) as a serious impairment of physical condition, including, but not limited to, loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, or serious disfigurement.

“Admission to the hospital” occurs when a subject is administratively admitted for inpatient care by a medical professional. It does not include emergency room care or a Welfare & Institutions Code § 5150 hold.

- C. **Parallel Criminal Investigation (Parallel Incident):** A criminal investigation into conduct of a person who is not an SFPD officer. That conduct may occur before, during, or after the Covered Incident or be related to an on-going investigation outside of the Covered Incident.
- D. **Administrative Investigation:** A non-criminal investigation to determine whether any involved SFPD officer violated any general order, regulation, policy, or other workplace rule during the Covered Incident.

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III. SEPARATION OF CRIMINAL AND ADMINISTRATIVE INVESTIGATIONS

SFDA¹ and SFPD² will jointly and cooperatively investigate any Covered and Parallel Incidents. SFDA will lead the investigation and the independent assessment of the Covered Incident, to determine whether SFPD personnel committed any violations of criminal law. SFPD will lead the Parallel Criminal Investigation. SFPD Internal Affairs Division³ (IAD) investigators will conduct administrative investigations. The Parties will coordinate their respective investigations and work cooperatively to ensure that all evidence and investigative results are shared when legally permissible. It is the intent of the Parties to complete their respective investigations as quickly as possible, consistent with the primary goal of conducting thorough and objective reviews of the facts.

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During an administrative investigation, a law enforcement agency may compel its officers to give statements regarding matters that are subject(s) of the administrative investigation. (*Public Safety Officers Procedural Bill of Rights Act* (“POBRA”), Government Code §§ 3300-3313.) However, the law limits the admissibility of such a compelled statement in a criminal prosecution. (*See, e.g., Kastigar v. United States*, 406 U.S. 441, 460 (1972).) In order to

¹ The use of SFDA in this document refers to the SFDA Independent Investigations Bureau (IIB) which is the unit within the SFDA’s Office that responds to the scene, investigates the Covered Incident, and independently evaluates possible criminal conduct by peace officers and prosecutes any Covered Incidents described above.

² The SFPD Investigative Services Division (ISD) is the unit within the SFPD that investigates all peace officer criminal misconduct, Parallel Criminal Investigations described above, and any case as designated by the Chief of Police. This division is independent, walled off from the rest of the SFPD, and falls under the Risk Management Office. ISD is the investigative division that responds to Covered Incidents, is responsible for assisting and coordinating the investigation with IIB into the Covered Incident and investigates the Parallel Investigation.

³ The SFPD Internal Affairs Division (IAD) is the unit within the SFPD that is tasked with administrative investigations of SFPD employees for violations of policy.

safeguard the integrity of the criminal investigation and any potential prosecution, the administrative investigation file will be kept separate from any criminal investigation. Criminal investigators will not be present during any administrative interview. SFPD will not provide SFDA with compelled statements unless done so specifically pursuant to an SFDA request through Penal Code § 832.7(a).

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IV. DEPARTMENT OF POLICE ACCOUNTABILITY

SFDA and SFPD acknowledge that pursuant to Prop D, the Department of Police Accountability (“DPA”) is responsible for “conducting a timely and complete [administrative] investigation of any incident occurring within the City and County of San Francisco in which a member of the uniformed ranks of the San Francisco Police Department discharges a firearm resulting in the physical injury or death of a person, even if the discharge is accidental.” S.F. Admin Code § 96.11. DPA will have access to Evidentiary Materials, for cases defined under San Francisco Administrative Code § 96.11, at the time IAD receives access to the Evidentiary Materials to start its administrative investigation into the Covered Incident, after the conclusion of the criminal investigation.

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DPA has an independent Memorandum of Understanding with the SFDA.

V. INVESTIGATION RESPONSIBILITIES

A. Notification Responsibilities

Upon discovery of a Covered Incident in San Francisco, SFPD shall promptly notify the on-call SFDA Officer-in-Charge. SFPD shall provide the on-call SFDA Officer-In-Charge with a summary of known facts, including but not limited to: the location of the incident, the location of the command post, suggested access routes, and safety concerns. If appropriate under Government Code § 12525.3(b)(1), SFPD shall notify the California Department of Justice.

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Whenever there is a question of whether an incident meets the criteria of this MOU, an SFPD supervisory officer shall consult, as soon as practicable, with the SFPD Commander of the Risk Management Office, who will consult with the on-call SFDA personnel to determine if a Covered Incident investigative response is appropriate.

B. At the Scene

Assistant district attorneys and inspectors from SFDA will respond to the scene and lead the criminal investigation into the Covered Incident, with assistance from the SFPD. The investigation will be conducted in a manner consistent with the laws of evidence in a criminal proceeding. The Parties agree and understand that SFPD will be in command of and direct the activities of all SFPD personnel and SFDA will be in command of and direct the activities of all SFDA personnel. SFDA and SFPD criminal investigative responsibilities at the crime scene locations are as follows:

- 1. SFPD responsibilities:

- a. Secure the scene and, absent exigent circumstances, preserve evidence without moving or changing its final resting place or original condition. SFPD will be responsible for photographing the scene and collecting all physical evidence; thereby maintaining the chain of custody and proper processing of all evidence.
- b. ~~Identify all involved parties and locate all witnesses to the Covered and Parallel Incidents pending the arrival of SFDA personnel.~~
- c. When circumstances allow, on-scene supervisors shall, pursuant to [SFPD Policy](#), obtain a public safety statement from the involved officers.⁴
- d. ~~Direct all SFPD officers directly involved in, or witness to, a Covered Incident not to communicate with each other about the incident to maintain the integrity of their statements. Sequester involved officers at a safe location, where they may have access to counsel. Sequester all witness officers when feasible.~~
- e. ~~Photograph in detail the involved officers at the sequestered location with the officers' equipment and uniform on their person as it was when the Covered Incident occurred.~~
- f. Ensure that SFDA personnel have access to the scene of the Covered Incident once approved by the ranking member of the unit on scene that is responsible for the investigation.
- g. Assign SFPD personnel to participate in all criminal interviews with SFDA.
- h. ~~Brief the ranking member of SFDA of all relevant information known at the time including:~~
 - i. The names and current locations of the officers who were involved in, or witness to, the incident.
 - ii. The names, addresses, and current location of all civilian witnesses to the incident, including witnesses who did not remain at the scene.
 - iii. The statements of the officers, including any public safety statements.
 - iv. The physical evidence discovered, including body-worn camera recordings or other audio or video recordings.
 - v. The medical condition of any injured parties and their locations.

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⁴ A compelled public safety statement must be analyzed pursuant to *Kastigar*, 406 U.S. at 460 and *Lybarger v. City of Los Angeles* 40 Cal.3rd 822 (1985).

- i. Promptly provide SFDA with access to body-worn camera and other video or audio evidence as it becomes available.

2. *SFDA responsibilities:*

- a. Check into the crime scene with the officer maintaining the crime scene log upon arrival and before departure.
- b. Lead all interviews related to the criminal investigation of a Covered Incident. SFPD investigators will participate in and ask questions related to any Parallel Criminal Investigations during such interviews.
- c. When feasible, advise investigative SFPD personnel about criminal legal issues as they relate to either the Covered or Parallel investigation.
- d. Record their observations.
- e. Immediately notify SFPD of witnesses and/or evidence discovered at the scene by SFDA personnel, independent of what SFPD has located and provided to SFDA.
- f. Consult with SFPD investigative personnel regarding the collection of evidence.
- g. Conduct an independent investigation of the facts and circumstances of the Covered Incident, which may include independent analysis of evidence collected and logged by SFPD and witness interviews.

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VI. MEDICAL EVIDENCE

When medical personnel determine an individual will be transported to a medical facility, SFDA and SFPD will attempt to question the medical personnel who treated the individual and make efforts to preserve evidence.

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SFDA personnel will remain at the scene of a fatal shooting or in-custody death until Medical Examiner's personnel arrives and completes their on-scene investigation.

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VII. INTERVIEWS OF CIVILIAN WITNESSES

The Parties will make every attempt to locate, identify, and interview all potential witnesses to the Covered and Parallel Incidents. The Parties shall also inform each other of any witnesses separately discovered.

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SFDA will lead interviews of all civilian witnesses related to the Covered Incident. SFPD will participate in and may ask questions related to the Parallel Investigation during such interviews. SFPD will lead interviews of civilian witnesses related to the Parallel Incident when that portion is not contemporaneous to the Covered Incident, unless the witness can share information that

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logically relates to the use of force in the Covered Incident, in which case SFDA will then lead the interviews.

The Parties will make every effort to jointly interview civilian witnesses. All witnesses will be interviewed separately from other witnesses to maintain the integrity of their statements. All interviews will be electronically recorded by both SFPD and SFDA, unless the civilian witness refuses to be recorded – in which case parties will take notes which will be shared with each other.

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If either SFPD or SFDA interviews a witness alone (*e.g.*, where there are concerns that a located witness may be difficult to track down again for a joint interview) the interviewing Party shall inform the non-participating Party of the existence of the interview and provide a copy of the recording as soon as possible and no later than two business days after the interview, unless the Party designates the interview as Protected Material as outlined below.

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VIII. INTERVIEWS OF SFPD OFFICERS

All SFPD officers who are involved in, or witness to, the Covered Incident will be separately interviewed. The interviews should take place as soon as practicable after the incident and will be electronically recorded. The interviews will take place either at the San Francisco District Attorney’s Office, the San Francisco Police Officers’ Association Office, or the San Francisco Police Department Headquarters.

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A. Criminal Investigations

1. Police officers have the same rights and privileges regarding investigations into Covered Incidents as civilians under investigation.
2. SFPD will not take punitive action against an employee for exercising their constitutional rights.
3. Officers have the right to consult with representatives and/or support personnel prior to interviews and to have their representative present during criminal investigation interviews. Representatives are usually lawyers or union officials, while supporters are usually spouses, family members, co-workers, friends, or clergypersons.
4. SFDA acknowledges that [General Order 10.11](#) (Body Worn Cameras) applies to SFPD officers, so long as General Order 10.11 is in effect and is not superseded by state law.
5. SFDA will lead criminal interviews of all SFPD personnel involved in a Covered Incident, with SFPD participation, when SFPD deems necessary, to conduct any Parallel Criminal Investigation. SFPD will have no more than two investigators question an officer at any given time. SFDA will have one investigator and one attorney present during and participating in the questioning unless circumstances indicate otherwise.

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6. SFDA personnel will advise an officer at the outset of the interview that the interview concerns a criminal matter and is voluntary and the officer is free to leave at any time, consistent with *California v. Beheler*, 463 U.S. 1121 (1983).
7. If the interview is or becomes a custodial interrogation, the officer will be so advised consistent with *Miranda v. Arizona*, 384 U.S. 436 (1966).
8. SFPD IAD investigators shall not be physically present in the interview room during criminal interviews. However, SFPD IAD investigators may monitor criminal interviews, either through visual observation and audible reception of the interview through the glass or through observation or real-time video or closed-circuit transmission of the criminal interview.

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B. Administrative Investigations

1. If an officer chooses not to make a statement in the criminal investigation, the Commander of the Risk Management Office will notify SFDA of JAD's intent to conduct a compelled interview.
2. If an officer is subjected to a compelled interview, the officer will be provided with all rights afforded under the Public Safety Officers' Procedural Bill of Rights Act and the *Lybarger* cases.
3. Administrative interviews will be conducted pursuant to SFPD General Orders, including General Order 10.11 (DGO 10.11) concerning body-worn cameras.

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IX. EVIDENCE/CASE MANAGEMENT SYSTEM

The sharing of information between the Parties is critical to ensuring that anyone, civilian or officer, under criminal investigation who is the subject of a search or arrest warrant or is prosecuted is provided with potential exculpatory evidence collected by either the SFDA or the SFPD during the investigation of the Covered Incident, and during the Parallel Criminal Investigation. All materials or information collected by either Party in the course of investigating the Covered Incident and corresponding Parallel Criminal Investigation that meet the definitions of "Evidentiary Materials," and are relevant to the Covered Incident, are deemed to be under the control of the SFDA, as the lead investigative agency.

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A. DEFINITIONS

1. **Evidentiary Materials:** All evidence collected, received, or otherwise discovered during the investigation. Evidentiary Materials include, but are not limited to, reports, statements, chronological reports, digital recordings (video or audio), photographs, and the identities of witnesses.

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¶ The Parties will maintain and preserve all evidence gathered during their respective investigations and all documentation of such investigation. The Parties shall designate materials as either "Evidentiary" or "Protected," defined as follows:¶

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2. **Protected Materials:** All Evidentiary Material upon which a person or Party has an articulable and reasonable legal basis to claim privilege or protection, or materials which could create a legitimate security risk or risk to subsequent criminal prosecutions if disclosed.

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3. **Privileged attorney work product:** Attorney work product must be limited to “core” work product. (Pen. Code § 1054.6; Code of Civ. Proc. § 2018.030(a).)

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B. “RIGHT TO KNOW, NEED TO KNOW”

Until the SFDA completes the criminal investigation on a Covered Incident, all “Evidentiary Materials,” “Protected Materials,” and “Privileged Work Product” (collectively, Covered Incident Materials) may only be produced on a “right to know, need to know” basis as set forth in this agreement, and as required by law. Covered Incident Materials, including materials gathered during a Parallel Criminal Investigation, will not be shared with any outside organization except in furtherance of the Parallel Criminal Investigation or as required by law. SFPD, however, retains discretion to determine what Evidentiary Materials will be released to the public during a town hall presentation. All information presented at such SFPD town halls is considered public information subject to release.

1. SFPD’s Investigative Services Detail (ISD) only has a “right to know, need to know” with respect to Covered Incident Materials when ISD has an active Parallel Criminal Investigation.
2. SFPD’s Internal Affairs Division (IAD), the Chief of Police, or the Chief’s designee only have a “right to know, need to know” with respect to Covered Incident Materials following any Covered Incident in order to fulfill administrative duties regarding immediate training needs, the Chief of Police’s obligations to render a decision to return involved officers to duty, and to assist with the presentation of preliminary and factual information surrounding the Covered Incident at any SFPD town hall. Access to any Covered Incident Materials not needed for these limited purposes will be prohibited until the criminal investigation of the Covered Incident is complete.

C. CONFIDENTIALITY OF COVERED INCIDENT MATERIALS

The SFDA has determined that Covered Incident Materials accessed by the specific SFPD units pursuant to this MOU, whether provided to SFPD by the SFDA or obtained from another source, shall be held in confidence by those SFPD units to the full extent permitted by law until the SFDA determines that the criminal investigation into a Covered Incident is complete. The SFDA has determined that these confidentiality protections are necessary to enable the SFDA to perform its state law investigative and prosecutorial function with respect to Covered Incident investigations and prosecutions, under California Government Code, section 25303 and related provisions. To the extent consistent with the law, the SFDA finds that Covered Incident Materials are shared with SFPD units pursuant to this MOU as “Official Information” under California Code of Evidence, section 1040, and the SFDA prohibits disclosure of that official information except as expressly permitted in this MOU. The sharing of information consistent

with the terms of this MOU shall not constitute waiver of any privilege or confidentiality protection. The limitations on sharing Covered Incident Materials set forth herein are necessary to foster the type of open and frank discussion between the Parties, and efficient investigative processes, necessary to accomplish the goals of the respective Parties.

D. DOCUMENT IDENTIFICATION SYSTEM

SFDA and SFPD agree upon the following uniform document identification system, case index, and production schedule for Evidentiary Material from the Covered and Parallel investigation:

1. Each side will Bates stamp or numerically identify each item of Evidentiary Material in their respective possession (whether “Protected” or not).
2. Evidentiary Material created, collected, or maintained by the SFPD will be Bates stamped or numerically identified and also contain “SFPD” in the prefix. Evidentiary Material created, collected, or maintained by the SFDA will be Bates stamped or numerically identified and also contain “SFDA” in the prefix. This will ensure each item is clearly identified and can be tracked back to the producing party.
3. Each Party will maintain a running index of the evidentiary items they have Bates stamped and numerically identified. The index will list the Bates numbers of the evidentiary item and a brief description of each set of documents for ease of review.
4. Bates stamps and numerical identification of Evidentiary Material shall occur within 5 business days of either party receiving evidentiary material and shall be simultaneously documented in the index.
5. If either Party asserts that any Evidentiary Material should be “Protected” (and not disclosed) those items will still be Bates stamped, included in the index with a brief description, and the basis for the “Protected” status (e.g. privilege) will be set out in the index. This allows each party to know if materials are being withheld by either side.
6. Unless prohibited by law, copies of all materials provided will be unredacted and unaltered, except for the addition Bates numbers or numerical identifiers. The basis for any redactions will be set out in the index.
7. Disclosable Evidentiary Materials should be produced to each party as soon as possible after information becomes available, and shall be produced no later than 5 business days after Bates stamping and indexing. The production shall include the index of materials produced. This is an ongoing obligation which permits the Covered Incident and Parallel Investigation to proceed simultaneously and will allow either Party to request clarification of reports or conduct any additional investigation if required.

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8. All privileged materials produced by the SFPD to the SFDA pursuant to Penal Code § 832.7 will be prominently watermarked “privileged and confidential 832.7 materials” in addition to the Bates stamping previously described.

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Any requests by SFDA for additional crime scene investigation, forensic analysis, or laboratory tests including retesting of evidentiary items, analysis, and reports by SFPD subject matter experts, will be made in writing (letter via email) to the Commander of the Risk Management Office.⁵

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All requests by the SFDA’s Independent Investigations Bureau (“IIB”) for personnel or background files, or information related to cases that are not part of the Covered or Parallel incident as defined by this MOU will be made in writing (letter via email) to the Commander of the Risk Management Office.

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X. COMPLETION OF INVESTIGATIONS AND MEET AND CONFER

The Parties will attempt to complete the criminal investigations within six (6) months of the Covered Incident. SFDA will notify SFPD, in writing, when it believes the investigation of a Covered Incident will take longer than six months to complete.

Additionally, IIB’s Managing Attorney and the Commander of the Risk Management Office will meet and confer quarterly regarding the status of the Parties’ respective investigations.

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XI. PRESENTATION OF PARALLEL CRIMINAL INVESTIGATION

When seeking prosecution for the Parallel Criminal Investigation, ISD will present its case to the Chief Assistant District Attorney for referral to the appropriate charging unit within the criminal division. ISD will notify IIB of its presentation of the case within twenty-four hours. To ensure a consistent flow of information, IIB will seek a copy of presented case related to the Parallel Criminal Investigation and confer with the SFDA unit that is reviewing the Parallel investigation for filing. This is to ensure that any decision to file a criminal case in the Parallel matter will not detrimentally impact the investigation and independent assessment of the Covered Incident.

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XII. FINAL ACTION

At the conclusion of the investigation of a Covered Incident, SFDA shall review and analyze all the evidence to determine whether the SFPD officer acted unlawfully. SFDA’s policies regarding crime charging are set forth in the 2016 CDAA Professionalism Manual, which states in part:

The prosecutor should [file criminal charges] only if the following four (4) requirements are satisfied:

⁵ The Commander of the Risk Management Office is the person who oversees both ISD and IAD and, as a single point of contact, can ensure that all requests for additional information are handled in a timely manner.

1. There has been a complete investigation and thorough consideration of all pertinent information.
2. There is legally sufficient, admissible evidence of corpus delicti.
3. There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime.
4. The prosecutor has considered the possibility of conviction by an objective fact finder hearing the admissible evidence.

The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor. (See Uniform Crime Charging Standards, CDAA 1989.)

If SFDA declines to file charges, SFDA shall notify the Chief of Police of its findings in writing.

If SFDA decides to file criminal charges, or a grand jury returns an indictment, SFDA shall immediately inform the Chief of Police, or in their absence the Acting Chief of Police, of the decision. If SFDA intends to arrest an officer, SFDA shall notify the Commander of the Risk Management Office. All charging documents will identify the applicable arresting officers. At SFDA's discretion, SFPD may undertake the process for taking the officer into custody and booking. SFPD will diligently undertake the custodial process and update SFDA as circumstances reasonably permit until the process has been completed.

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XIII. JOINT TRAININGS

SFPD and SFDA will conduct at least two joint trainings per year regarding Covered Incidents and other related issues.

XIV. CONFIDENTIAL DISPUTE RESOLUTION

The Parties agree to meet within five (5) business days, to attempt to resolve any disagreement over this MOU or the designation of any Protected Materials. If the Parties are unable to resolve the disagreement, the dispute shall be submitted either to the mutually agreed upon arbitrator for dispute resolution or the Parties may jointly request advice or assistance from the City Attorney's Office.

The Parties shall agree to a retained arbitrator by either mutual agreement or by striking names on a list and consulting with the City Attorney's Office. The order of striking will be determined by lot. On a yearly basis, either party may request a new arbitrator. Arbitration costs shall be borne by both parties. The Parties agree that the resolution process will be confidential to the

extent permitted by law. The arbitrator will be empowered to conduct an *in camera*, confidential review of either party's documents and provide a written advisory opinion regarding the dispute.

XV. DURATION OF MOU

This agreement shall remain in effect for a period of two (2) years.

This agreement may be terminated by the District Attorney or the Chief of Police. Termination may only occur following the dispute resolution process outlined above.

Effective Date: This MOU shall be effective on [DATE].

IN WITNESS WHEREOF, the parties hereto have executed this MOU as indicated below.

_____	_____
Brooke Jenkins , District Attorney	William Scott , Chief of Police
Date:	Date:

