



CITY AND COUNTY OF SAN FRANCISCO

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January 11, 2024

Chief William Scott
San Francisco Police Department
1245 3rd Street, 6th Floor
San Francisco, CA 94158
Email: William.Scott@sfgov.org

Electronically delivered

Dear Chief Scott,

Thank you for sharing the briefing submitted to the Police Commission by the San Francisco Police Department (SFPD) and the Department of Police Accountability (DPA).

I agree with both the SFPD response and the analysis of the City Attorney's Office. I also want to identify several other key points of issue in this dispute.

First, I must be clear that the Police Commission has no jurisdiction to order production of SFDA's investigative files and has no authority to overrule the SFDA's invocation of its privilege against disclosure. DPA clearly attempts to subvert SFDA's privilege assertions by seeking to have the Police Commission instruct SFPD to disclose investigative materials over SFDA objections and therefore violate the terms of our MOU.

Additionally, in its attempt to circumvent SFDA's privilege, DPA has yet to ever explain factually or legally, why they need the information in dispute on a sooner timeline than that proscribed by the MOU, rather than at the conclusion of the SFDA criminal investigation.

Finally, DPA completely ignores the very real threat that premature administrative investigations pose to criminal investigations of related conduct, a risk that I outline clearly below.

I. DPA's Failure to explain the need for materials prior to conclusion of the SFDA criminal investigation.

While there is no dispute that both SFDA and DPA are tasked with investigating misconduct by SFPD officers, the criminal investigation conducted by SFDA must, and always does, take precedence over the administrative investigation conducted by DPA.



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DPA has no authority to investigate or prosecute criminal cases. DPA's role is limited to investigating and then only **recommending** administrative consequences relating to the subject officer's employment with SFPD. Criminal prosecutions are the domain of the District Attorney and, in rare cases, the Attorney General.¹

California law and the San Francisco Charter make clear that criminal investigations take precedence over administrative investigations. Both the California Government Code and the Charter provision that created the DPA make clear that DPA's role is not intended to, and cannot, interfere with the duties of the District Attorney.² California law explicitly provides that the time limit for administrative discipline against peace officers does not begin to run until after the completion of criminal proceedings.³ Notably, the legislature did not provide tolling of any criminal statute of limitations during the pendency of an administrative investigation or proceeding. These provisions clearly indicate that administrative investigations are intended to take place *after* the conclusion of a criminal investigation and/or prosecution.

Indeed, the MOU entered into between DPA and SFDA five years ago explicitly provided that SFDA would not turn over "Evidentiary Materials" until "after declination of criminal charges or completion of all prosecutions relating to the investigation, whichever is later...".⁴ "Evidentiary Materials" are defined as "[a]ll evidence collected, received, or otherwise discovered during the course of the investigation."⁵ Thus, "Evidentiary Materials" governs precisely the materials that DPA now seeks to obtain from SFPD. DPA's contractual agreement that it would receive these materials after the conclusion of the criminal investigation and/or prosecution is directly contrary to the position it now takes before the Commission.

Given this legal and contractual framework, it is remarkable that DPA has offered no factual support for its position that it must conduct its administrative investigation concurrently with SFDA's criminal investigation. DPA has pointed to no administrative investigation that has been harmed by waiting for the conclusion of criminal proceedings; and has provided no example of a situation which compliance with the SFDA/DPA MOU has hindered DPA's work.

It is also notable that neither Paul Henderson, the Director of DPA and a signatory to the SFDA/DPA MOU, nor any of his staff, have ever reached out to SFDA to alter or renegotiate the SFDA/DPA MOU. Nor has Director Henderson ever reached out to SFDA to discuss SFDA's invocation of its privilege against disclosure in connection with DPA's on-going dispute with

¹ Cal. Gov. Code Secs. 25303 and 26500; San Francisco City Charter Sec. 6.103, District Attorney.

² San Francisco City Charter Sec. 4.136(j), Department of Police Accountability.

³ Cal. Gov. Code Sec. 3304(d)(1) and (2)(A).

⁴ SFDA/DPA MOU at 3.

⁵ *Id.* at 2.



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SFPD over these documents. Director Henderson seems more committed to making a public spectacle of this dispute through public Police Commission hearings and the press.⁶

II. DPA completely ignores the very real threat that premature administrative investigations pose to criminal investigations of related conduct.

DPA incorrectly asserts that SFPD and SFDA “can only speculate about possible unlikely hypothetical scenarios” wherein DPA’s administrative investigation could hamper SFDA’s criminal investigation and/or prosecution.⁷ In fact, there is abundant state and federal case law regarding the very real risks to criminal prosecutions as a result of compelled statements arising from administrative investigations.⁸

DPA, as an administrative agency, has the power to compel SFPD officers to give interviews in connection with DPA investigations *even where the officer invokes his or her right to remain silent under the Fifth Amendment*.⁹ Because such compelled statements would be otherwise violative of the officer’s right to remain silent, such statements cannot be used against the officer in a criminal prosecution.¹⁰ This restriction applies not only to the compelled statement, but to “any information directly or indirectly derived” from it.¹¹

In any case where an officer (or other person subject to a criminal investigation) is compelled to provide inculpatory statements, there is a risk that the existence of the compelled statement can “taint” or otherwise hinder a related criminal prosecution.¹² Indeed, where the subject of a criminal investigation is compelled to provide a statement, the government then has an “affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”¹³ Failure to prove the independence of government evidence can result in sanctions ranging from exclusion of evidence, to recusal of prosecutors, to dismissal of criminal charges.¹⁴

⁶ The Standard, 12/13/2023 “San Francisco Police Watchdog Says D.A. Obstructing Shooting Investigations,” Jonah Lamb.

⁷ DPA Memorandum, 9/22/23, at pg. 3.

⁸ See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967) and subsequent cases.

⁹ San Francisco City Charter Sec. 4.136(j), Department of Police Accountability.

¹⁰ *Lybarger v. City of Los Angeles*, (1985) 40 Cal.3d 822, *U.S. V. Stringer*, (2008) 535 F.3d 929, 938.

¹¹ *Lybarger*, at 828.

¹² See, e.g., *People v. Gwillim*, 223 Cal.App.3d 1254, 1269 (“So long as administrative and criminal investigations proceed simultaneously...victims and witnesses will necessarily carry a “taint” into the criminal arena.”).

¹³ *Kastigar*, 406 U.S. 441, 460; *Gwillim*, 223 Cal.App.3d at 1266.

¹⁴ See generally, *Gwillim*, 223 Cal.App.3d at 1270-73 (citing cases).



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And this concern is not remote. In a current case pending in Marin County, *People v. Nail and Mazareigos*, two former San Rafael police officers are being prosecuted for multiple felonies arising out of their on-duty use of force. Despite the pending criminal charges, numerous documents from the City of San Rafael’s administrative investigation, including compelled interviews of the defendant officers, were recently made public.¹⁵ Recent media coverage of the case included attorney discussion of the risks involved with compelled statements in criminal prosecution.¹⁶

The risk of “taint” from compelled witness statements is not the only harm to a criminal investigation that can result from a simultaneous administrative investigation. As noted in the *Rivero* decision, “potential witnesses could be easily dissuaded from coming forward,” without an assurance of continuing confidentiality.¹⁷ Similarly, witnesses in recent IIB investigations have expressed frustration at being repeatedly interviewed by both criminal and administrative investigators. Finally, physical evidence that is gathered as part of an administrative investigation may become unavailable to criminal investigators, or the usefulness of such evidence could be hampered by problems with the chain-of-custody of the evidence while it is outside the control of law enforcement personnel.

III. SFDA’s position on this issue is consistent with the position of previous SFDA administrations.

As noted above, the SFDA/DPA MOU, which provided for DPA access *after* the conclusion of the criminal case, was signed by DA George Gascon in 2018. During the administration of DA Chesa Boudin in 2020, attorneys and investigators in the SFDA’s Independent Investigation Bureau (IIB) discussed the concern of Lateef Gray, then the Managing Attorney of IIB, that DPA “want[ed] to be treated like the IIB unit,” by obtaining access to the scene of shooting incidents and to related interviews.

In response to Gray, attorneys and investigators expressed concern with DPA’s position, with one investigator noting that, “[h]istorically, units that investigate criminal matters have been kept separate from civil/administrative investigative units” in order to “maintain the integrity of the evidence and its collection for possible criminal prosecution.” The investigator further noted the danger that “evidence gleaned from compelled administrative statements could/would taint the criminal case.” Another IIB attorney noted that “[o]n-scene of any call

¹⁵ [San Rafael releases investigative reports on police use of force | Pacific Sun](#); Nikki Silverstein, 9/27/2023.

¹⁶ [Defense attorney dies, leaving uncertainty in police use of force case | Pacific Sun](#); Nikki Silverstein, 10/10/23.

¹⁷ *Rivero v. Superior Court*, (1997) 54 Cal. App. 4th 1048, 1058.



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out we have never coordinated with DPA nor shared any information with them.” He further explained to MA Gray that “[w]e have gone about our IIB investigations without considering DPA’s administrative timeline or availability to participate in civilian interviews.” The attorney further explained that:

“We clearly serve two different functions and have different limitations and investigative goals. DPA can compel statements which are harmful to our investigations and I’d be concerned that aligning [with] the DPA in anyway, would discourage officers from providing voluntary statements and/or create an unnecessary legal hurdle if we decide to charge a case.”

Consistent with the concerns discussed above, the SFDA/SFPD 2021 MOU expressly discusses the potential for compelled statements of officers, the inadmissibility of such statements in criminal cases, and the resultant need for “the administrative investigation [to] be separate from the criminal investigation.”¹⁸ Although DPA now criticizes SFDA’s role as lead investigator with regard to officer involved shootings, the U.S. Department of Justice cited this approach as consistent with collaborative reform objectives in its 2021 Collaborative Reform Completion Memorandum.¹⁹

I hope that this makes clear the factual concerns and legal basis for our position. Please do not hesitate to contact me regarding any of the issues raised in this letter. I look forward to our continuing partnership in these critically important investigations.

Sincerely,

A handwritten signature in blue ink that reads "Brooke Jenkins".

Brooke Jenkins
San Francisco District Attorney

¹⁸ Memorandum of Understanding Between the San Francisco District Attorney’s Office and the San Francisco Police Department, signed by DA Chesa Boudin and SFPD Chief William Scott on 7/27/21 (SFDA/SFPD 2021 MOU) at 3.

¹⁹ [Microsoft Word - Hillard Heintze Phase III Report for SFPD CRI - 02-10-2022 v7 mlw.docx \(ca.gov\)](#).