



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Mayor Sam Liccardo

SUBJECT: SEE BELOW

DATE: December 12, 2022

Approved

Date: 12/12/2022

SUBJECT: REPORT ON THE INVESTIGATIONS OF POLICE MISCONDUCT IN SAN JOSE BY MOEEL LAH FAKHOURY, LLP.

RECOMMENDATION

Accept the memoranda and recommendations from the City Manager and Independent Police Auditor (IPA), with the following modifications:

1. Accept the report on the Investigations of Police Misconduct in San Jose by Moeel Lah Fakhoury, LLP (MLF), but as amended to strike any language in the consultant's report suggesting that either:
 - a. The IPA lacks the legal authority under the City Charter to independently investigate allegations of misconduct (e.g., on p. 8 of the consultants' report) as directly rebutted by prior public pronouncements of our City Attorney's Office (e.g., on August 4, 2020, as discussed below), or
 - b. The San Jose Police Officers' Association (SJPOA) must agree prior to any grant of investigatory duties to the IPA (e.g., p. 60 of the consultant's report), as that subject lies within the exclusive province of the City Attorney to advise this Council.
2. Direct the City Attorney to determine whether the grant of investigatory authority to the IPA constitutes a "change to officers' working conditions," requiring negotiation with the SJPOA. If so, then direct the City Manager to commence union negotiations, consistent with the side letter in the current and pending collective bargaining agreement with SJPOA to discuss police reforms.
3. Upon resolution of any SJPOA negotiation requirements, the City Manager and IPA shall move forward generally with MLF's recommendation to implement a "Hybrid" model, but with variations on details as deemed appropriate by the City Manager, IPA, and Council. Specifically, the IPA and City Manager should:
 - a. Hire a limited number of investigators (Recommendations 1.2 and 2.1) for an initial phase of implementation, contingent on Council budgetary authorization, and:
 - i. Explore and provide analysis to Council how hiring of IPA investigators may provide cost savings for the City with expansion of SJPD

- enforcement capacity, insofar as IPA investigator hiring could facilitate redeployment of SJPd officers from IA to patrol and other duties;
 - ii. Explicitly engage the Council in considering whether to hire experienced and professional law enforcement investigators, either sworn or non-sworn, for IPA investigatory roles.
 - iii. Ensure uniformity of investigatory training for IA and IPA investigators
 - iv. Grant IPA investigators the ability to make findings including, but not limited to, sustained, not sustained, exonerated, and unfounded.
 - v. All discipline will remain within the authority of the Chief of Police and the City Manager's Office.
- b. Define the initial scope of IPA investigatory authority, identify misconduct cases by allegation type for a three-year phase of implementation (Recommendation 9.1), with:
- i. A recognition that the scope may change with the benefit of experience and iterative adjustment;
 - ii. A coordinated process that mitigates risk of parallel, conflicting, wasteful, or unduly burdensome investigations addressing the same misconduct allegation (pp.47-48)
- c. Enable the IPA to have access to needed investigatory tools (Recommendations 1.4 and 11.1), including access to IAPro and evidence.com, SJPd records, and a grant of subpoena power.
- i. Should the IPA be unable to employ sworn investigators, consider a formal agreement between the City Manager and IPA that authorizes the SJPd's IA to file affidavits for search warrants or other investigatory tools upon request by the IPA.
- d. Review both the IA and the IPA oversight structure, processes, and outcomes every three years (Recommendations 3.1 and 3.2) to learn and make adjustments.
- e. Honor all employment protections under existing law and under the City's collective bargaining agreement with the SJPOA. (p. 55)
4. As the IPA urges (December 2, 2022 IPA report p.4), decline to accept any recommendation that might implicitly or explicitly limit the IPA's ability to appeal a decision by the Chief of Police (MLF Report p.54), and continue the current model whereby the IPA may appeal first to the Chief of Police and then, if warranted, to the City Manager.
5. Refer the proposed hybrid workplan to the Public Safety, Finance and Strategic Support (PSFSS) Committee meeting in April 2023, and upon approval of an initial workplan, return to PSFSS in one year with their results in a report that will be cross-referenced to the full City Council.

BACKGROUND

I thank the team of Moeel Lah Fakhoury, LLP (MLF), the City Manager's Office, the Office of the Independent Police Auditor, the City Attorney, the SJPd, and all other staff that worked on the report regarding the investigations of Police Misconduct in San Jose.

As the MLF report concluded, the "transparency, rigor and legitimacy that the IPA investigative Unit would confer to the public and other stakeholders regarding SJPd's oversight outweighs the attendant costs." (p. 60). The IPA's report adds that "the use of such personnel to investigate police misconduct is a practice currently being implemented in increasing jurisdictions throughout the state and the nation." (p. 4)

Some two-and-a-half years have transpired since Vice Mayor Jones, Councilmember Carrasco, and I co-authored a memo directing staff to begin allocating investigatory authority over police misconduct cases to the IPA. In a couple of weeks, six councilmembers will depart from this Council—including a police officer, a former criminal prosecutor, and five councilmembers of color—who all experienced the civil unrest and the consequent vetting of police reforms in memorable detail. This Council has already given direction to move forward with reforms empowering the IPA to take on investigatory authority. We need not wait longer—let's move forward.

Limitations of the Current Model

While much about the current model of police oversight works, much work remains. IPA annual reports repeatedly raise concerns about IA's failures to interview subject officers or key witnesses, or about the seeming exhibition of bias by IA investigators. The State of California Auditor's Office has noted defects in IA investigations of bias-based policing that included over-reliance on officers' post-event denials regarding bias. (MLF Report p. 36, n. 28) The DA's office has expressed concern about a lack of transparency regarding potential criminal use-of-force cases (MLF Report p. 47, n. 34). The IPA and consultants both bemoan the rapid turnover of IA investigators (every two years) and their supervisors (not much longer), making for diminished institutional memory and short learning curves.

Charter Authority

The report oddly seems to suggest that any grant of investigatory authority to the IPA might require a change in the City Charter (see e.g., page 8), and then suggests the opposite elsewhere (p. 60). The City Attorney, however, has clearly and publicly stated that the Council may authorize IPA investigation without another ballot measure. For example, at an August 4, 2020 Council meeting, when the Council considered placing Measure G on the ballot (Item 3.5 that day), then-Assistant City Attorney Ed Moran's responded on the record to my questions. I specifically asked Mr. Moran whether anything in the Charter would otherwise prohibit the enactment of a municipal code provision that would empower the IPA with investigative authority if the contemplated Measure G passed. Mr. Moran answered unequivocally that no such barrier existed. To the extent the law allows, let's move ahead.

HONORABLE CITY COUNCIL

November 29, 2022

Subject: Amendment to Title 20 (Zoning Ordinance or Zoning Code)

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Brown Act

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.