

Office of the Director
of Police Accountability

REVISED AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: September 28, 2021

Item Number: 31

Item Description: Approval of Interim Regulations for the Police Accountability Board and Office of the Director of Police Accountability for Handling Complaints Against Sworn Officers of the Police Department

Submitted by: Katherine J. Lee, Interim Director of Police Accountability.

Non-substantive corrections to both versions of the proposed Interim Regulations are shown on the attached, as redlines to the clean copies included with the original item (Attachments 3 and 4).

Revisions are as follows:

1. Numerous citations to the Charter and PRC Regulations are deleted; they were included for reference during the review process and not intended to be permanent.
2. Cross-references to sections within the document are corrected in four places.
3. In three instances, a missing “the” is inserted.
4. “Complaint” is corrected to “complainant.”
5. A stray reference to the PRC is deleted.

Police Accountability Board
Office of the Director of Police Accountability

**Interim Regulations for Handling Complaints Against Sworn Officers of the
Police Department under City Charter Article XVIII, Section 125 (Measure II)**

Preamble

These interim regulations for handling complaints against sworn members of the Berkeley Police Department are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II establishes a Police Accountability Board (Board) and a Director of Police Accountability (Director), and is intended to promote public trust by providing for prompt, impartial and fair investigations of complaints by members of the public against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.

Under Resolution No. 69,531 N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council. In order for the Director to accept and investigate complaints filed against sworn members of the Police Department beginning July 1, 2021, interim regulations are needed until such time as the Board adopts permanent regulations and the Council ratifies them.

These interim regulations reflect the procedures for handling complaints against police officers as set forth in Measure II as well as the provisions of the PRC Regulations for Handling Complaints Against Members of the Police Department (effective April 4, 2018) that are not in conflict with Measure II. They shall apply to all complaints that were pending with the PRC as of July 1, 2021, and all complaints filed with the Office of the Director of Police Accountability on and after July 1, 2021. Applicability of permanent regulations to these pending cases will be determined later.

I. GENERAL PROVISIONS

A. Definitions

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential personnel hearing is held.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.

Section I.A.

4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.
7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: A member of the public who files a complaint with the Office of the Director of Police Accountability.
9. Days: Means calendar days unless otherwise specified.
10. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
11. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
12. Hearing Panel: Three Board members impaneled to conduct a confidential personnel hearing.
13. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODP.
14. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
15. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
16. Review Panel: Three Board members impaneled to conduct a review of a BPD investigative record.
17. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
18. Witness Officer: A sworn employee of the Berkeley Police Department who has personal knowledge of events described in a complaint, but is not a subject officer.

~~(PRC Reg. Sec. II.B., modified.)~~

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley

Section I.B.

Police Department personnel. ODPa staff will likewise have access to such confidential information. It is vitally important to the integrity of the complaint process under Measure II that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law. ~~(PRC Reg. Preamble.)~~

2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. ~~(Art. XVIII, Sec. 125(20)(b).)~~ In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated. ~~(PRC Reg. Sec. IV.A.)~~
3. Closed hearings; effect on public records. All confidential personnel hearings and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. Records of these investigations are confidential and will not be disclosed to members of the public. However, any public records included in, or attached to, investigative reports shall remain public records. ~~(PRC Reg. Sec. 1.A.)~~
4. Handling confidential information. For any proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. ~~(PRC Reg. Sec. IV.B.2.)~~ For any proceeding in which electronic copies of confidential information are distributed to Board members, each Board member shall delete all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so. ~~(NEW)~~
5. Effect of violation. A Board member who violates confidentiality before or during a confidential personnel hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of confidentiality for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. ~~(PRC Reg. VI.D.3.)~~

Section II.A.

II. COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY**A. Initiating a complaint**

1. Complaint form. A complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. ~~(Art. XVIII, Sec. 125(18)(a)(1); PRC Reg. Secs. I.B.7, II.A.1.)~~ Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath." Complaints shall be signed by the complainant, except for complaints initiated by the Board. ~~(PRC Reg. Sec. II.A.1.)~~
2. Who may file. Aggrieved parties, as well as eyewitnesses to alleged police misconduct, may file a complaint. Complaints may also be initiated by the Board upon a vote of five Board members to authorize an investigation. ~~(PRC Reg. Secs. I.B.2., II. A.3.)~~
3. Filing period. A complaint must be filed within 180 days of the alleged misconduct, except that the 180 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.~~(PRC Reg. Sec. II.A.2.)~~
4. Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be submitted by the Director to the Board for administrative closure at the next regular meeting that allows the complainant to be provided at least 5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2. ~~(PRC Reg. Sec. II.A.4.a.)~~

Section II.A.

5. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPa is notified that a complainant or subject officer is represented, then the ODPa shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives. ~~(PRG Reg. Sec. II.A.5.)~~

B. Mediation

1. Election

- a. ODPa staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. ~~GE~~.1 below.
- b. If the complainant elects mediation, ODPa staff shall notify the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before the mediation session begins.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and to proceed to a confidential personnel hearing, unless the subject officer withdraws from mediation.

2. Completion

After receiving notice from the mediator that a mediation has concluded, ODPa staff shall close the case and inform the Board.

~~(Art. XVIII, Sec. 125(18)(a)(2); PRG Reg. Sec. II.B., modified)~~

C. Complaint investigation

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies ~~(Art. XVIII, Sec. 125(18)(e))~~, except:
 - a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPa shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be

Section II.C.

tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPA shall contact the District Attorney's Office to determine the status and anticipated resolution of the criminal proceeding (~~PRC Reg. Sec. III.C.3.~~)

- b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.~~MO.~~
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed. (~~Art. XVIII, Sec. 125(18)(g).~~)
3. Notice of Complaint and Allegations. Within 28 days of a complaint filing or the acceptance of a late-filed complaint, the ODPA shall prepare and send a Notice of Complaint and Allegations by hard copy or electronically to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complain~~ant~~ requests mediation, or the Director recommends administrative closure. (~~PRC Reg. Sec. III.B.1, modified.~~)
4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPA staff with the schedules of all sworn employees of the Police Department. (~~PRC Reg. Sec. VII.A.1.~~)
5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence. (~~PRC Reg. Sec. III.C.1.~~)
6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, without redaction or limitation, unless required by state or federal law. (~~Art. XVIII, Sec. 125(20)(a).~~)
 - a. The Director may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (~~Art. XVIII, Sec. 125(20)(c).~~)
 - b. Whenever an ~~PRC~~-investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
 - I. The original Communications Center tapes relevant to the complaint.

Section II.C.

- II. All police reports, records, and documentation, including body-worn camera video.
 - III. Names, addresses, telephone numbers, and statements of all witnesses. ~~(PRC Reg. Sec. II.E.2.)~~
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. ~~(Art. XVIII, Sec. 125(20)(c); PRC Reg. Exhibit A.)~~ ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability. ~~(PRC Reg. Sec. III.D.2.)~~
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. ~~(PRC Reg. Sec. III.D.1.)~~ While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint. ~~(PRC Reg. Sec. III.D.3.)~~

D. Pre-hearing complaint disposition.

1. Administrative Closure

a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. Request for closure by complainant.
- iii. Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.

¹ Government Code Sec. 3300 et seq.

Section II.E.

- iv. Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- vi. Failure of ODPa staff to timely complete its investigation, as set forth in Section II.C.1.

- b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 7 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

- c. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

~~(PRC Reg. Sec. V.A.)~~

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.~~GE~~.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them. ~~(PRC Reg. Sec. V.B., modified)~~

E. Initial submission and consideration of investigative findings and recommendations.

- 1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a confidential personnel hearing if the Board requests it. ~~(Art. XVIII, Sec. 125(18)(i).)~~ This deadline may be extended as provided under Section II.~~OM~~.

Section II.E.

2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.” ~~(Art. XVIII, Sec. 125(18)(c).)~~
 3. Categories of Findings
 - a. If the evidence shows that the alleged act did not occur, the finding shall be “Unfounded.”
 - b. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be “Not Sustained.”
 - c. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be “Exonerated.”
 - d. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be “Sustained.”
- ~~(PRC Regs., Sec. VIII.B.)~~
4. Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline. ~~(Art. XVIII, Sec. 125(18)(i).)~~
 5. Board decision. Upon reviewing the Director’s investigative findings, the Board must then decide whether to hold a confidential personnel hearing.
 - a. If the Board agrees with the Director on all findings and recommendations, (i.e., no need for hearing), the Director shall send the findings and recommendations to the Chief of Police. The findings and recommendations must be sent within 195 days of the City’s discovery of alleged misconduct, except if extended as provided under Section II.M.2.
 - b. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential personnel hearing.

~~(Art. XVIII, Sec. 125(18)(i).)~~

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

1. Time. If the Board decides to move forward with a confidential personnel hearing, it must be held within 60 days of the date the ODPa has completed its investigation. ~~(Art. XVIII, Sec. 125(18)(i).)~~

Section II.F.

2. Scheduling hearing. ODPa staff shall determine the availability of subject officers before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on the same complaint do not share a common day on duty. ~~(PRC Reg. Sec. VII.A.1.)~~
3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential personnel hearing. A Hearing Panel shall consist of three Board members, except that in death cases and any cases in which six Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel. ~~(PRC Reg. Sec. VI.A.)~~
4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. ~~(PRC Reg. Sec. VI.B.1.)~~ If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing and constitutes good cause for continuing the hearing. ~~(PRC Reg. Sec. VI.B.2.)~~
5. Effect of continuance. If a hearing is rescheduled due to unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened. ~~(PRC Reg. Sec. VI.B.3)~~
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel. ~~(PRC Reg. Sec. VII. A.2)~~
7. Hearing Packet. The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation ~~(Art. XVIII, Sec. 125(18)(i))~~, at least 14 days before the hearing date. The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command Officer, and the Police Chief. The complainant shall receive a Hearing Packet without documents containing confidential investigatory materials or findings and recommendations. Witness officers and civilian witnesses shall receive a copy of only their interview transcript. ~~(PRC Reg. Sec. VII.B., modified.)~~

Section II.G.

G. Board member impartiality; recusals; challenges

1. Conduct.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential personnel hearings, they shall hear all viewpoints. ~~(Art. XVIII, Sec. 125(8)(b).)~~
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint. ~~(PRC Reg. Sec. VI.D.2.)~~
 - c. A Board member who violates Section G.1.b above, before or during a confidential personnel hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. ~~(PRC Reg. VI.D.3.)~~
2. Recusal; disclosure of ex parte contacts. Board members recused for a conflict of interest must do so immediately when an item is taken up. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing. ~~(Art. XVIII, Sec. 125(8)(b)(2).)~~
3. Challenges to Hearing Panel member
 - a. Basis for Challenge. A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:
 - i. a familial relationship or close friendship with the complainant or subject officer;
 - ii. witnessing events material to the inquiry;
 - iii. a financial interest in the outcome of the inquiry;
 - iv. a bias for or against the complainant or subject officer.

Section II.G.

b. Procedure

- i. No later than 7 days of the date of mailing of the Hearing Packet, which includes the names of the Board members constituting the Hearing Panel, the complainant or the subject officer(s) may file a written challenge for cause to any Board member. Such challenge must specify the nature of the conflict of interest.
 - ii. The Director shall contact the challenged Board member as soon as possible after receipt of the challenge.
 - iii. If the Board member agrees to recuse themselves, the Director shall ask another Board member to serve.
 - iv. If the Board member disagrees that the challenge is for good cause, they shall state their reasons in writing, and the Director shall make this determination. If the Director finds good cause for the challenge, the Director shall inform the challenged Board member and ask another to serve.
 - v. If the Director rejects a challenge to a Board member and the Board member serves, the written challenge and the Board member's written response shall be made part of the hearing record.
- c. Replacement of Board member. Any Board member who is unable to serve for any reason shall be replaced by another Board member, except in cases involving a death.

~~(PRC Reg. Sec. VI.C., modified.)~~

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i). ~~(PRC Reg. Sec. VII.C.4., modified)~~
2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODP staff no later than 14 days before the

Section II.H.

scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. ODPa staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODPa staff shall notify both the complainant and the subject officer of the Hearing Panel's decision. ~~(PRC Reg. Sec. VII.C.1.)~~

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date. Procedural issues can include, without limitation, expiration of the 1-year limitation period under Government Code section 3304, or whether an officer should testify. ~~(PRC Reg. Sec. VII.C.2.)~~

I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director and Investigator may be present during the entirety of the hearing. The Duty Command Officer may be present for all but the Board members' deliberations. ~~(PRC Reg. VII.D.1.)~~ The complainant and the subject officer shall be present to answer questions from Board members, subject to state law. ~~(Art. XVIII, Sec. 125(18)(i).)~~ An attorney or other representative for the complainant or the subject officer may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for ensuring their representative's presence at the hearing. ~~(PRC Reg. VII.D.2.)~~
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative. ~~(PRC Reg. Sec. VII.D.3.)~~
3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained. ~~(PRC Reg. Sec. VII.D.4.)~~
4. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous. ~~(PRC Reg. Sec. VII.D.5.)~~

Section II.I.

5. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing. ~~(PRC Reg. Sec. VI.A.)~~
6. Taking testimony at the hearing.
 - a. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officers and their representatives may be present during their testimony. The complainant or their representative may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) The complainant or the complainant's representative may ask questions; b) Board members may ask questions; c) the subject officer or his or her representative may ask questions; d) Board members may ask follow-up questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement. ~~(PRC Reg. Sec. VII.D.7., modified)~~
 - b. The subject officers and any witness officers will be called into the hearing room to testify separately. The complainant and their representative may be present during their testimony. Subject officer representatives may be present for all testimony. Each subject officer may make a statement or choose to rely on the interview statements. Questioning will then proceed as follows: 1. Subject officers' representatives may ask questions. 2. Board members may ask questions. The officer may then be questioned by 2 Board members unless the officer waives this requirement. 3. Complainant or their representatives may ask questions. 4. Board members may ask follow up questions. After questioning is completed, each subject officer will have up to 15 minutes to provide a summary of their case and a closing statement.
 - c. All except Board members and staff will then be excused from the hearing room.
7. Subpoenas. The Board may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. ~~(Art. XVIII, Sec. 125(20)(c).)~~
8. Maintaining order. No person at the hearing shall become subject of undue harassment, personal attack, or invective. If the chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient. ~~(PRC Reg. Sec. VII.D.10.)~~

Section II.J.

J. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be taken in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, they may be called and examined as if under cross-examination.;
 - b. Oral evidence shall be taken only under oath.
 - c. The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d. The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e. The Chairperson will conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPa staff will answer Board members' questions on the evidence, points of law, and procedure.
 - f. The City Attorney's opinion will be sought whenever the interpretation of a City Ordinance or the City Charter is contested and pivotal to the case, or when a case raises substantial legal issues of first impression.
 - g. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h. If either party requests that the hearing be continued to consider motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

~~(PRC Reg. Sec. VII.E.)~~

Section II.K.

K. Deliberation and Findings

1. Deliberation. After the hearing has concluded, the Hearing Panel deliberates outside the presence of everyone except ODPA staff. The Hearing Panel shall not consider any information not received in the hearing packet or during the hearing. ~~(PRC Reg. Sec. VIII.A.)~~
2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(j).) All action of the Hearing Panel shall be by majority vote of those Board members present. ~~(PRC Reg. Sec. VIII.B.)~~
3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing ~~(Art. XVIII, Sec. 125(18)(j))~~, unless extended as provided under Section II.M.2. ~~(Art. XVIII, Sec. 125(18)(m).)~~
4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision. ~~(Art. XVIII, Sec. 125(18)(j).)~~
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning ~~(PRC Reg. Sec. VIII.B.)~~, unless the dissenter agrees with the Director's finding and recommendation.
~~(NEW)~~

L. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.E.5.a. above, or from the Hearing Panel under Section II.K.3.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision to the Director and the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.

Section II.L.

3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.

~~(Art. XVIII, Sec. 125(18)(k).)~~

4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.M.2. ~~(Art. XVIII, Sec. 125(18)(m).)~~

M. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. ~~(Art. XVIII, Sec. (125)(18)(d).)~~
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days. ~~(Art. XVIII, Sec. 125(18)(m).)~~

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT.**A. Application**

1. This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code. ~~(Art. XVIII, Sec. 125(19)(d).)~~
2. If a finding is "not sustained," "unfounded," or "exonerated," the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief's determination to the Director. ~~(Art. XVIII, Sec. 125(19)(e).)~~The

Section III.B.

Director, if appropriate, may request to review all files, transcripts, and records related to the complaint. ~~(Art. XVIII, Sec. 125(19)(e)(1).)~~

3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene a Review Panel to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.

~~(Art. XVIII, Sec. 125(19)(e)(1); Review Panel added.)~~

4. If the Director decides that the Board will conduct a review, ODPa staff shall secure a Review Panel of three Board members to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Review Panel members and ODPa staff will be present. A Duty Command Officer may be present.
 - b. The Review Panel shall evaluate the investigative record to determine whether the complainant's objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief's decision is not supported by the evidence in the record.
 - c. All action of the Review Panel must be by majority vote.

~~(NEW. Details not in Charter and no counterpart in PRC procedures.)~~

5. The Review Panel must, within 45 days of the date the Director accepts an objection:
 - a. Dismiss the complainant's objection; or
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Review Panel finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.

~~(Art. XVIII, Secs. 125(19)(f), 125(19)(g).)~~

6. Within 15 days of receiving a Review Panel's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections. ~~(Art. XVIII, Sec. 125(19)(g).)~~

Section III.B.

7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief, and send a final determination with a written explanation to the Director, the Board, and the Chief. ~~(Art. XVIII, Sec. 125(19)(g).)~~
8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. ~~(Art. XVIII, Sec. 125(19)(i).)~~

IV. INFORMAL COMPLAINTS

- A. An informal complaint is a communication from a member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features, and alleges any act of misconduct pertaining to the manner in which the officer performs their duties. Such complaints shall be treated confidentially.
- B. ODPA staff shall contact the complainant to explain the policy complaint and formal individual complaint processes.
- C. Informal complaints will be agendaized for a closed session at the next regular Board meeting and distributed to the Board in closed session, with notice to the named officer(s).
- D. The Board shall consider the informal complaint and recommend what additional action, if any, the Director of Police Accountability should take.

~~(Adopted by the PRC Jan. 8, 2020.)~~

V. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A. These Interim Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPA staff shall furnish them to any person requesting a copy.
- B. Amendments to these Interim Regulations require a majority vote of the Board and ratification by the City Council.

~~(PRC Reg. Sec. IX, modified.)~~

Police Accountability Board
Office of the Director of Police Accountability

**Interim Regulations for Handling Complaints Against Sworn Officers of the
Police Department under City Charter Article XVIII, Section 125 (Measure II)**

Preamble

These interim regulations for handling complaints against sworn members of the Berkeley Police Department are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II establishes a Police Accountability Board (Board) and a Director of Police Accountability (Director), and is intended to promote public trust by providing for prompt, impartial and fair investigations of complaints by members of the public against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.

Under Resolution No. 69,531 N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council. In order for the Director to accept and investigate complaints filed against sworn members of the Police Department beginning July 1, 2021, interim regulations are needed until such time as the Board adopts permanent regulations and the Council ratifies them.

These interim regulations reflect the procedures for handling complaints against police officers as set forth in Measure II as well as the provisions of the PRC Regulations for Handling Complaints Against Members of the Police Department (effective April 4, 2018) that are not in conflict with Measure II. They shall apply to all complaints that were pending with the PRC as of July 1, 2021, and all complaints filed with the Office of the Director of Police Accountability on and after July 1, 2021. Applicability of permanent regulations to these pending cases will be determined later.

I. GENERAL PROVISIONS**A. Definitions**

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential personnel hearing is held.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.

Section I.A.

4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.
7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: An aggrieved party who files a complaint with the Office of the Director of Police Accountability.
9. Days: Means calendar days unless otherwise specified.
10. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
11. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
12. Hearing Panel: Three Board members impaneled to conduct a confidential personnel hearing.
13. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODP.
14. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
15. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
16. Review Panel: Three Board members impaneled to conduct a review of a BPD investigative record.
17. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
18. Witness Officer: A sworn employee of the Berkeley Police Department who has personal knowledge of events described in a complaint, but is not a subject officer.

~~(PRC Reg. Sec. II.B., modified.)~~

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley

Section I.B.

Police Department personnel. ODPa staff will likewise have access to such confidential information. It is vitally important to the integrity of the complaint process under Measure II that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law. ~~(PRC Reg. Preamble.)~~

2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. ~~(Art. XVIII, Sec. 125(20)(b).)~~ In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated. ~~(PRC Reg. Sec. IV.A.)~~
3. Closed hearings; effect on public records. All confidential personnel hearings and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. Records of these investigations are confidential and will not be disclosed to members of the public. However, any public records included in, or attached to, investigative reports shall remain public records. ~~(PRC Reg. Sec. 1.A.)~~
4. Handling confidential information. For any proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. ~~(PRC Reg. Sec. IV.B.2.)~~ For any proceeding in which electronic copies of confidential information are distributed to Board members, each Board member shall delete all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so. ~~(NEW)~~
5. Effect of violation. A Board member who violates confidentiality before or during a confidential personnel hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of confidentiality for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. ~~(PRC Reg. VI.D.3.)~~

Section II.A.

II. COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY**A. Initiating a complaint**

1. Complaint form. A complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. ~~(Art. XVIII, Sec. 125(18)(a)(1); PRC Reg. Secs. I.B.7, II.A.1.)~~ Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath." Complaints shall be signed by the complainant, except for complaints initiated by the Board. ~~(PRC Reg. Sec. II.A.1.)~~
2. Who may file. Only an "aggrieved party" may file a complaint, except that if no complainant is available to initiate a complaint, and in any case involving a death, 5 Board members may vote to authorize an investigation or take other such action they deem appropriate. ~~(PRC Reg. Secs. I.B.2., II. A.3.)~~
3. Filing period. A complaint must be filed within 90 days of the alleged misconduct, except that the 90 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.
~~(PRC Reg. Sec. II.A.2.)~~
4. Late-filed complaints. Complaints filed between 91 and 180 days of the alleged misconduct must be reviewed by the Police Accountability Board in a closed session meeting. Six Board members must find good cause for the late filing, by clear and convincing evidence, to accept the complaint. A complaint filed after 180 days after the alleged misconduct will not be accepted. ~~(PRC Reg. Sec. II.A.2.a)~~
5. Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be submitted by the Director to the Board for administrative closure at the next regular meeting that allows the complainant to be provided at least

Section II.A.

5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2. ~~(PRC Reg. Sec. II.A.4.a.)~~

6. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPa is notified that a complainant or subject officer is represented, then the ODPa shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives. ~~(PRC Reg. Sec. II.A.5.)~~

B. Mediation

1. Election

- a. ODPa staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. ~~EG~~.1 below.
- b. If the complainant elects mediation, ODPa staff shall notify the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before the mediation session begins.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and to proceed to a confidential personnel hearing, unless the subject officer withdraws from mediation.

2. Completion

After receiving notice from the mediator that a mediation has concluded, ODPa staff shall close the case and inform the Board.

~~(Art. XVIII, Sec. 125(18)(a)(2); PRC Reg. Sec. II.B., modified)~~

C. Complaint investigation

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's

Section II.C.

discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies ~~(Art. XVIII, Sec. 125(18)(e))~~, except:

- a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPa shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPa shall contact the District Attorney's Office to determine the status and anticipated resolution of the criminal proceeding ~~(PRC Reg. Sec. III.C.3.)~~.
 - b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.MQ.
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed. ~~(Art. XVIII, Sec. 125(18)(g).)~~
 3. Notice of Complaint and Allegations. Within 28 days of a complaint filing or the acceptance of a late-filed complaint, the ODPa shall prepare and send a Notice of Complaint and Allegations by hard copy or electronically to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complainant requests mediation, or the Director recommends administrative closure. ~~(PRC Reg. Sec. III.B.1, modified.)~~
 4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPa staff with the schedules of all sworn employees of the Police Department. ~~(PRC Reg. Sec. VII.A.1.)~~
 5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence. ~~(PRC Reg. Sec. III.C.1.)~~
 6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, without redaction or limitation, unless required by state or federal law. ~~(Art. XVIII, Sec. 125(20)(a).)~~
 - a. The Director may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. ~~(Art. XVIII, Sec. 125(20)(c).)~~

Section II.C.

- b. Whenever an ~~an PRC~~ investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
- I. The original Communications Center tapes relevant to the complaint.
 - II. All police reports, records, and documentation, including body-worn camera video.
 - III. Names, addresses, telephone numbers, and statements of all witnesses. ~~(PRC Reg. Sec. II.E.2.)~~
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. ~~(Art. XVIII, Sec. 125(20)(c); PRC Reg. Exhibit A.)~~ ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability. ~~(PRC Reg. Sec. III.D.2.)~~
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. ~~(PRC Reg. Sec. III.D.1.)~~ While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint. ~~(PRC Reg. Sec. III.D.3.)~~

D. Pre-hearing complaint disposition.

1. Administrative Closure

a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. Request for closure by complainant.

¹ Government Code Sec. 3300 et seq.

Section II.D.1.

- iii. Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.
- iv. Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- vi. Failure of ODPa staff to timely complete its investigation, as set forth in Section II.C.1.

b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 7 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

c. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

~~(PRC Reg. Sec. V.A.)~~

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.~~GE~~.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them. ~~(PRC Reg. Sec. V.B., modified)~~

E. Initial submission and consideration of investigative findings and recommendations.

1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a

Section II.E.

confidential personnel hearing if the Board requests it. ~~(Art. XVIII, Sec. 125(18)(i).)~~ This deadline may be extended as provided under Section II.O.M.

2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.” ~~(Art. XVIII, Sec. 125(18)(c).)~~
3. Categories of Findings
 - a. If the evidence shows that the alleged act did not occur, the finding shall be “Unfounded.”
 - b. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be “Not Sustained.”
 - c. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be “Exonerated.”
 - d. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be “Sustained.”
- ~~(PRC Regs., Sec. VIII.B.)~~
4. Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline. ~~(Art. XVIII, Sec. 125(18)(i).)~~
5. Board decision. Upon reviewing the Director’s investigative findings, the Board must then decide whether to hold a confidential personnel hearing.
 - a. If the Board agrees with the Director on all findings and recommendations, (i.e., no need for hearing), the Director shall send the findings and recommendations to the Chief of Police. The findings and recommendations must be sent within 195 days of the City’s discovery of alleged misconduct, except if extended as provided under Section II.M.2.
 - b. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential personnel hearing.

~~(Art. XVIII, Sec. 125(18)(i).)~~

Section II.F.

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

1. Time. If the Board decides to move forward with a confidential personnel hearing, it must be held within 60 days of the date the ODPa has completed its investigation. ~~(Art. XVIII, Sec. 125(18)(i))~~
2. Scheduling hearing. ODPa staff shall determine the availability of subject officers before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on the same complaint do not share a common day on duty. ~~(PRC Reg. Sec. VII.A.1.)~~
3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential personnel hearing. A Hearing Panel shall consist of three Board members, except that in death cases and any cases in which six Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel. ~~(PRC Reg. Sec. VI.A.)~~
4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. ~~(PRC Reg. Sec. VI.B.1.)~~ If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing and constitutes good cause for continuing the hearing. ~~(PRC Reg. Sec. VI.B.2.)~~
5. Effect of continuance. If a hearing is rescheduled due to unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened. ~~(PRC Reg. Sec. VI.B.3)~~
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel. ~~(PRC Reg. Sec. VII. A.2)~~
7. Hearing Packet. The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation ~~(Art. XVIII, Sec. 125(18)(i))~~, at least 14 days before the hearing date. The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command

Section II.F.

Officer, and the Police Chief. The complainant shall receive a Hearing Packet without documents containing confidential investigatory materials or findings and recommendations. Witness officers and civilian witnesses shall receive a copy of only their interview transcript. ~~(PRC Reg. Sec. VII.B., modified.~~

G. Board member impartiality; recusals; challenges

1. Conduct.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential personnel hearings, they shall hear all viewpoints. ~~(Art. XVIII, Sec. 125(8)(b).)~~
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint. ~~(PRC Reg. Sec. VI.D.2.)~~
 - c. A Board member who violates Section G.1.b above, before or during a confidential personnel hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. ~~(PRC Reg. VI.D.3.)~~
2. Recusal; disclosure of ex parte contacts. Board members recused for a conflict of interest must do so immediately when an item is taken up. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing. ~~(Art. XVIII, Sec. 125(8)(b)(2).)~~
3. Challenges to Hearing Panel member
 - a. Basis for Challenge. A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:

Section II.G.

- i. a familial relationship or close friendship with the complainant or subject officer;
 - ii. witnessing events material to the inquiry;
 - iii. a financial interest in the outcome of the inquiry;
 - iv. a bias for or against the complainant or subject officer.
- b. Procedure
- i. No later than 7 days of the date of mailing of the Hearing Packet, which includes the names of the Board members constituting the Hearing Panel, the complainant or the subject officer(s) may file a written challenge for cause to any Board member. Such challenge must specify the nature of the conflict of interest.
 - ii. The Director shall contact the challenged Board member as soon as possible after receipt of the challenge.
 - iii. If the Board member agrees to recuse themselves, the Director shall ask another Board member to serve.
 - iv. If the Board member disagrees that the challenge is for good cause, they shall state their reasons in writing, and the Director shall make this determination. If the Director finds good cause for the challenge, the Director shall inform the challenged Board member and ask another to serve.
 - v. If the Director rejects a challenge to a Board member and the Board member serves, the written challenge and the Board member's written response shall be made part of the hearing record.
- c. Replacement of Board member. Any Board member who is unable to serve for any reason shall be replaced by another Board member, except in cases involving a death.

~~(PRC Reg. Sec. VI.C., modified.)~~

Section II.H.

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i). ~~(PRC Reg. Sec. VII.C.4., modified)~~

2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODP staff no later than 14 days before the scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. ODP staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODP staff shall notify both the complainant and the subject officer of the Hearing Panel's decision. ~~(PRC Reg. Sec. VII.C.1.)~~

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date. Procedural issues can include, without limitation, expiration of the 1-year limitation period under Government Code section 3304, or whether an officer should testify. ~~(PRC Reg. Sec. VII.C.2.)~~

I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director and Investigator may be present during the entirety of the hearing. The Duty Command Officer may be present for all but the Board members' deliberations. ~~(PRC Reg. VII.D.1.)~~ The complainant and the subject officer shall be present to answer questions from Board members, subject to state law. ~~(Art. XVIII, Sec. 125(18)(i).)~~ An attorney or other representative for the complainant or the subject officer may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for

Section II.I.

- ensuring their representative's presence at the hearing. (~~PRC Reg. VII.D.2.~~)
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative. (~~PRC Reg. Sec. VII.D.3.~~)
 3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained. (~~PRC Reg. Sec. VII.D.4.~~)
 4. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous. (~~PRC Reg. Sec. VII.D.5.~~)
 5. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing. (~~PRC Reg. Sec. VI.A.~~)
 6. Taking testimony at the hearing.
 - a. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officers and their representatives may be present during their testimony. The complainant or their representative may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) Board members may ask questions; b) the subject officer or his or her representative may ask questions; c) Board members may ask follow-up questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement. (~~PRC Reg. Sec. VII.D.7.~~)
 - b. The complainant and their representative, and civilian witnesses will each be excused from the hearing room after their testimony or representation is completed. (~~PRC Reg. Sec. VII.D.8.~~)
 - c. The subject officers and any witness officers will be called into the hearing room to testify separately. Subject officer representatives may be present for all testimony. Each subject officer may make a statement or choose to rely on the interview statements. Each subject officer will be questioned by their representative first, after which the officer may be questioned by 2 Board members, unless the officer waives this requirement. After questioning is completed,

Section II.I.

each subject officer will have up to 15 minutes to provide a summary of their case and a closing statement.

- d. The subject officers and witness officers will each be excused from the hearing room after their testimony is completed. ~~(PRC Reg. Sec. VII.D.9.)~~
7. Subpoenas. The Board may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. ~~(Art. XVIII, Sec. 125(20)(c).)~~
8. Maintaining order. No person at the hearing shall become subject of undue harassment, personal attack, or invective. If the chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient. ~~(PRC Reg. Sec. VII.D.10.)~~

J. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be taken in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, they may be called and examined as if under cross-examination.;
 - b. Oral evidence shall be taken only under oath.
 - c. The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d. The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e. The Chairperson will conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPA staff will answer Board members' questions on the evidence, points of law, and procedure.
 - f. The City Attorney's opinion will be sought whenever the interpretation of a City Ordinance or the City Charter is contested

Section II.K.

and pivotal to the case, or when a case raises substantial legal issues of first impression.

- g. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h. If either party requests that the hearing be continued to consider motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

~~(PRC Reg. Sec. VII.E.)~~

K. Deliberation and Findings

- 1. Deliberation. After the hearing has concluded, the Hearing Panel deliberates outside the presence of everyone except ODPa staff. The Hearing Panel shall not consider any information not received in the hearing packet or during the hearing. ~~(PRC Reg. Sec. VIII.A.)~~
- 2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(j).) All action of the Hearing Panel shall be by majority vote of those Board members present. ~~(PRC Reg. Sec. VIII.B.)~~
- 3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing ~~(Art. XVIII, Sec. 125(18)(j))~~, unless extended as provided under Section II.M.2. ~~(Art. XVIII, Sec. 125(18)(m).)~~
- 4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision. ~~(Art. XVIII, Sec. 125(18)(j).)~~
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning ~~(PRC Reg. Sec. VIII.B.)~~, unless the dissenter agrees with the Director's finding and recommendation.
~~(NEW)~~

Section II.L.

L. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.E.5.a. above, or from the Hearing Panel under Section II.K.3.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision to the Director and the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.
3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.

~~(Art. XVIII, Sec. 125(18)(k).)~~

4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.M.2. ~~(Art. XVIII, Sec. 125(18)(m).)~~

M. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. ~~(Art. XVIII, Sec.(125)(18)(d).)~~
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days. ~~(Art. XVIII, Sec.125(18)(m).)~~

Section III.

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT.**A. Application**

1. This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code. ~~(Art. XVIII, Sec. 125(19)(d).)~~
2. If a finding is “not sustained,” “unfounded,” or “exonerated,” the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief’s determination to the Director. ~~(Art. XVIII, Sec. 125(19)(e).)~~ The Director, if appropriate, may request to review all files, transcripts, and records related to the complaint. ~~(Art. XVIII, Sec. 125(19)(e)(1).)~~
3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene a Review Panel to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.~~(Art. XVIII, Sec. 125(19)(e)(1); Review Panel added.)~~
4. If the Director decides that the Board will conduct a review, ODPa staff shall secure a Review Panel of three Board members to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Review Panel members and ODPa staff will be present. A Duty Command Officer may be present.
 - b. The Review Panel shall evaluate the investigative record to determine whether the complainant’s objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief’s decision is not supported by the evidence in the record.
 - c. All action of the Review Panel must be by majority vote.

Section III.

~~(NEW. Details not in Charter and no counterpart in PRC procedures.)~~

5. The Review Panel must, within 45 days of the date the Director accepts an objection:
 - a. Dismiss the complainant's objection; or
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Review Panel finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.

~~(Art. XVIII, Secs. 125(19)(f), 125(19)(g).)~~

6. Within 15 days of receiving a Review Panel's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections. ~~(Art. XVIII, Sec. 125(19)(g).)~~
7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief, and send a final determination with a written explanation to the Director, the Board, and the Chief. ~~(Art. XVIII, Sec. 125(19)(g).)~~
8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. ~~(Art. XVIII, Sec. 125(19)(i).)~~

IV. INFORMAL COMPLAINTS

- A. An informal complaint is a communication from a member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features, and alleges any act of misconduct pertaining to the manner in which the officer performs their duties. Such complaints shall be treated confidentially.
- B. ODPa staff shall contact the complainant to explain the policy complaint and formal individual complaint processes.
- C. Informal complaints will be agendaized for a closed session at the next regular Board meeting and distributed to the Board in closed session, with notice to the named officer(s).

Section IV.

- D. The Board shall consider the informal complaint and recommend what additional action, if any, the Director of Police Accountability should take.

~~(Adopted by the PRC Jan. 8, 2020.)~~

V. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A. These Interim Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPa staff shall furnish them to any person requesting a copy.
- B. Amendments to these Interim Regulations require a majority vote of the Board and ratification by the City Council.

~~(PRC Reg. Sec. IX, modified.)~~



Office of the Director
of Police Accountability

ACTION CALENDAR

October 12, 2021

(Continued from September 28, 2021)

To: Honorable Mayor and Members of the City Council

From: Police Accountability Board and
Office of the Director of Police Accountability

Submitted by: Katherine J. Lee, Interim Director of Police Accountability

Subject: Approval of Interim Regulations for the Police Accountability Board and Office
of the Director of Police Accountability for Handling Complaints Against
Sworn Officers of the Police Department

RECOMMENDATION

Approve Interim Regulations to be used by the Police Accountability Board and Director of Police Accountability for Handling Complaints Against Sworn Officers of the Police Department under City Charter Article XVIII, Section 125 (Measure II). The City Council is asked to choose between the Board's modified proposal, conditioned upon City Attorney approval, or the Interim Director's preferred version.

SUMMARY

Ballot Measure II, passed in November 2020, amended the City Charter to establish a Police Accountability Board (Board) and Director of Police Accountability (Director) to perform civilian oversight of the Berkeley Police Department. (Measure II was codified as City Charter Article XVIII, Section 125 [Attachment 1].) The Board and the Office of the Director of Police Accountability became operational in July 2021, and need procedures in place to receive and process complaints from members of the public alleging misconduct against Berkeley police officers. Because establishing a permanent set of policies and procedures will take several months, Interim Regulations are needed so that complaint processing may continue. Under Section 125(13)(c) of the City Charter, the City Council must ratify rules of conduct governing the Board's conduct of business.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

Several complaints alleging police misconduct have been filed with the Office of the Director of Police Accountability since it began operations on July 1, 2021. Despite the fact that no regulations have been adopted, the Berkeley Police Department and its

sworn members were cooperating with the Office of the Director in good faith in the handling of these complaints. The BPD has responded, and continues to respond, to requests for police reports and body-worn camera footage related to the incidents in question. However, DPA Investigator interviews of subject officers and witness officers have been suspended.

To ensure that Interim Regulations were formalized as quickly as possible, the Interim Director agendaized for the first meeting of the Police Accountability Board the establishment of a Regulations Subcommittee. The Subcommittee was formed, and had time to meet once to consider Interim Regulations proposed by the Interim Director. The Subcommittee modified the proposed draft in significant ways, however. The Board approved the Subcommittee's proposal with a modification to one provision.

Subsequently, the City and the Berkeley Police Association began the meet-and-confer process as provided for under the Meyers-Milias-Brown Act for those matters that affect wages, hours, and other conditions of employment.

BACKGROUND

Overview

The purpose of the Charter amendment creating the Police Accountability Board and Director of Police Accountability is promote public trust through independent, objective, civilian oversight of the Berkeley Police Department, provide for community participation in setting and reviewing Police Department policies, practices, and procedures, and to provide a means for prompt, impartial and fair investigation of complaints brought by members of the public against sworn employees of the Berkeley Police Department. The Board replaced the Police Review Commission and created a new position, the Director of Police Accountability.

The Charter amendment language was the culmination of a lengthy meet-and-confer process between City staff and the Berkeley Police Association, who bargained in good faith over the impacts of the proposed Charter amendment.

Under the Charter amendment, the functions of the new Board and Director were to go into operation no later than January 1, 2022. Under Resolution No. 69,531-N.S., the City Council directed that the functions, duties, and responsibilities of the Board and Director be implemented by July 1, 2021, six months earlier than the timeline set forth in the Charter amendment. The Office of the Director of Police Accountability became operational on July 1, 2021, with Police Review Commission staff serving as interim staff of the new Office. The Mayor and City Councilmembers appointed Police Accountability Board members on June 1, 2021, and appointed the Interim Director on June 29, 2021. The Board held its first meeting on July 7, 2021.

Interim Regulations Proposed by Interim Director of Police Accountability

Under Section 125(18)(a) of the Charter amendment, the Director and Board shall adopt regulations for handling complaints filed by any member of the public alleging misconduct by sworn employees of the Police Department. However, it will take time for the Board to develop permanent regulations due to their detailed nature. For this reason, the Interim Director developed proposed Interim Regulations so that the Office of the Director of Police Accountability could expeditiously commence investigations on complaints filed before a complete set of permanent regulations is finalized. [Attachment 2, before redlines.]

The Interim Director's proposal implements the new provisions and procedures put into place by the Charter amendment. Among the most significant are:

- **Timeframe.** The time to complete investigations and notify a sworn officer of discipline is 240 days, instead of the previous 120-day limit.
- **Standard of proof.** The standard of proof applied in determining whether a sworn officer can be charged with committing misconduct is "preponderance of the evidence," rather than the more stringent "clear and convincing evidence."
- **Findings and recommendations; hearings.** For cases filed with the Office of the Director of Police Accountability, following an investigation, the Director will present to the Board investigative findings and, if warranted, disciplinary recommendations; in certain cases, a recommendation on the level of discipline will be made. The Board then decides whether to accept the Director's recommendation or hold a confidential personnel hearing. The findings and recommendations of the Director or the Board are sent to the Chief of Police, who may agree or disagree. If the Chief disagrees, a process for the Director to request City Manager review follows.
- **Review of Internal Affairs (IA) investigative record if complainant objects.** For cases filed with the Berkeley Police Department and not the Office of the Director, a complainant may contest a finding other than a "sustained" finding on a misconduct allegation to the Director. The Director may dismiss the objection or convene a review panel of the Board to review IA's investigative record. The Board may dismiss the case, agree with IA's decision, or disagree with IA on certain grounds. If the Board disagrees with IA, the Chief may send a report to the City Manager, who will make a final decision.

As the Charter amendment does not address many of the details of the process for handling complaints from the public, the Interim Director recommends for the most part that many of the provisions of the former Police Review Commission's Regulations be used, to the extent they are not inconsistent with the Charter amendment. The PRC Regulations are the product of periodic negotiations with the Berkeley Police Association over many years.

Police Accountability Board Revisions

At its first meeting, the Police Accountability Board established a Regulations Subcommittee. This Subcommittee met on July 28, 2021, to consider the Interim Regulations proposed by the Interim Director. [Attachment 2. Redlines show Board's changes to Interim Director's proposal.] In addition to her proposed draft, the Interim Director submitted to the Subcommittee a memorandum with an overview of her work [Attachment 5] and a copy of the Police Review Commission Regulations, annotated for reference [Attachment 6]. The Subcommittee approved the recommended Interim Regulations in large part, but decided to enact three significant changes. The full Board, at its August 4, 2021 meeting, accepted the Subcommittee's recommendations, except that it modified one of the changes. Other, minor changes were made for clarity, as were the Interim Director's corrections to her own erroneous cross-references.

The Board's major changes to the proposed Interim Regulations are as follows:

1. Expanding who may file a complaint. Formerly limited to "aggrieved parties" – those directly affected by alleged police misconduct, the Board proposes that eyewitnesses to alleged misconduct be allowed to file complaints. The Board further expanded their own ability to initiate an investigation, to do so upon a vote of five Board members. Previously the Board could initiate an investigation only in cases involving a death or if no complainant was available to file a complaint. (Interim Regs., Sections I.A.8 and II.A.2.)
2. Extending the filing deadline. The proposed Interim Regulations provide for a 90-day time limitation for filing complaints and a late-filing period, for those who can show good cause for not filing earlier, for complaints filed between 91 and 180 days. The Board instead proposes a 180-day filing period, with no provision for filing after that date. (Interim Regs., Section II.A.3.)
3. How testimony is taken at hearings. The procedures the Interim Director proposed adhere to the process used by the Police Review Commission. At hearings, the complainant must answer questions from the Board and the subject officer or their representative, but is then excused from the hearing. The complainant and their representative are not allowed to question the subject officer or even to be present while the subject officer testifies and is questioned by the Board. These provisions were enacted as a result of the Berkeley Police Association's successful lawsuit against the City (*Berkeley Police Association v. City of Berkeley* (2008) 167 Cal.App.4th 385) that required the PRC's investigative records and hearing process to comport with the Public Safety Officers Procedural Bill of Rights Act ("POBRA") and confidentiality provisions of Penal Code section 832.5, 832.7, and 832.8.

The Board revised the Interim Director's proposal to place the complainant and subject officers on equal footing with respect to asking questions and being present during the hearing. (Interim Regs., Section II.I.6.) However, the Board understands that the City Attorney's opinion is needed regarding whether the Board's proposal comports with state law and case law. The Interim Director has sought the City Attorney's legal advice on this matter, which may be completed by the time Council is considering this item.

The Board voted unanimously at its August 4, 2021 meeting to recommend that the Council approve the Interim Regulations as shown on Attachment 3, with its recommendation of the changes in how testimony is taken conditioned on the City Attorney's opinion that they are lawful. M/S/C (Calavita/Leftwich): Ayes – Calavita, Chang, Harris, Leftwich, Levine, Mizell, Moore, Owens, and Ramsey; Noes – None; Abstentions – None; Absent – None. The Board was prepared to modify the language regarding the taking of testimony at its September 8, 2021 meeting consistent with the City Attorney's opinion, but the legal analysis was not yet final.

The Interim Director respectfully disagrees that the above three major changes should be approved at this time, and accepts all other modifications to the draft that were approved by the Board. The Interim Director's proposed version is shown in Attachment 4.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

No environmental or climate impacts.

RATIONALE FOR RECOMMENDATIONS

Board's rationale

Regarding expanding the group of people who may file, the Board points out that other civilian oversight agencies allow eyewitnesses to misconduct to file complaints. Additionally, this is a "best practice" according to the National Association for Civilian Oversight of Law Enforcement (NACOLE).

As for the timeline for filing complaints, the Board believes that 90 days is too short, and referenced a 180-day timeline typical in the federal system. The Board also believes that the current 91- to 180-day deadline for a "late-filed" complaint, which the Board may accept upon the complainant's showing of good cause for filing late, is virtually a de facto 180-day deadline, save for the obligation to explain the reason for the lateness.

Finally, with respect to complainants' presence throughout the hearing and ability to question the subject officer, the Board feels strongly that maintaining the former Police Review Commission process is lopsided and unfair to complainants, and that state law and case law could be interpreted differently than they were in 2007 and 2008.

Overall, the Board believes that, as a new body created with overwhelming support of Berkeley voters, it need not be beholden to the rules of the body it replaced, and should instead be responsive to the community's desires without delay.

Interim Director's rationale

The Interim Director does not disagree with the sentiment behind the three major changes proposed by the Board, and understands the eagerness to make the process more accessible and friendly to complainants. However, if any of the major changes are subject to meet-and-confer with the Berkeley Police Association, that will delay adoption of Interim Regulations, and could cause a delay or temporary suspension of investigations of pending and future complaints filed with the Office of the Director.

ALTERNATIVE ACTIONS CONSIDERED

Two alternatives are being presented for Council's consideration.

CONTACT PERSON

Katherine J. Lee, Interim Director, Office of the Director of Police Accountability
(510) 981-4950

Attachments:

- 1: City Charter, Article XVIII, Section 125
- 2: Proposed Interim Regulations, redlined
- 3: Proposed Interim Regulations, clean, Board version
4. Proposed Interim Regulations, clean, Interim Director version
- 5: July 20, 2021 Memorandum from Interim Director Lee to Police Accountability Board Regulations Subcommittee, Lt. Dan Montgomery (BPD), and Sgt. Scott Castle (BPA) regarding Draft Interim Regulations
- 6: Annotated PRC Regulations, dated April 4, 2018.

**CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII**

**ARTICLE XVIII
POLICE ACCOUNTABILITY BOARD AND DIRECTOR OF POLICE
ACCOUNTABILITY**

Section 125. Police Accountability Board and Director of Police Accountability

(1) Establishment and purpose.

A Police Accountability Board is hereby established in the City of Berkeley. The purpose of the Police Accountability Board is to promote public trust through independent, objective, civilian oversight of the Berkeley Police Department, provide community participation in setting and reviewing Police Department policies, practices, and procedures, and to provide a means for prompt, impartial and fair investigation of complaints brought by members of the public against sworn employees of the Berkeley Police Department.

The Office of the Director of Police Accountability is hereby established. The purpose of the Director of Police Accountability is to investigate complaints filed against sworn employees of the Berkeley Police Department, to reach an independent finding as to the facts and recommend corrective action where warranted. The Director of Police Accountability may also serve as the Secretary to the Police Accountability Board and assist the Board in carrying out the duties prescribed herein.

(2) Definitions.

The following definitions apply to this Article:

(a) "Commissioners' Manual" refers to the most current manual adopted by the City Council that consists of the policies and procedures regarding the service of board members and commissioners, board and commission procedures, and conduct of meetings.

(b) "Complainant" shall refer to a member of the public that files a complaint with either the Director of Police Accountability, Police Accountability Board, or the Police Department.

(c) "Director of Police Accountability" or "DPA" refers to an individual fulfilling the police oversight role established pursuant to section 1 of this Article.

(d) "Effective Date" shall be the date that the Secretary of State accepts and files this Article.

(e) "Police Accountability Board" or "Board" refers to the Police Accountability Board established in Section 1 of this Article, which shall be the successor agency to the Berkeley Police Review Commission in accordance with Section 27.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(f) Except as otherwise specifically provided, all references in this Article to California code sections shall refer to such Code sections as they may be amended or re-codified from time to time.

(3) Police Accountability Board powers and duties.

(a) The Police Accountability Board has the following powers and duties:

(1) To advise and make recommendations to the public, City Council, and City Manager regarding the operation of the Berkeley Police Department, including all written policies, practices, and procedures in relation to the Berkeley Police Department;

(2) Review and recommend for City Council approval all agreements, letters, memoranda of understanding, or policies which express terms and conditions of mutual aid, information sharing, cooperation and assistance between the Berkeley Police Department and all other local, state and federal law enforcement, intelligence, and military agencies or private security organizations;

(3) To receive and consider the findings and recommendations of the Director of Police Accountability regarding complaints filed by members of the public against sworn employees of the Police Department and to recommend if discipline is warranted when misconduct is found and, pursuant to Section 18, the level of discipline for sustained findings of misconduct;

(4) To participate in the hiring of the Chief of Police as set forth in Section 22;

(5) To access records of City Departments, compel attendance of sworn employees of the Police Department, and exercise the power of subpoena as necessary to carry out its functions;

(6) To adopt rules and regulations necessary for the conduct of its business; and

(7) Any other powers and duties as the City Council may assign it by Ordinance.

(b) Nothing in this chapter granting powers and duties to the Police Accountability Board shall limit the City Council's, Chief of Police's or City Manager's authority derived from other provisions of this Charter to act on policing matters, unless explicitly stated.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(c) The Police Accountability Board, Director of Police Accountability and their respective agents, assigns, employees and representatives shall have no authority to restrict, modify, supersede, negate, supplant or contravene the authority granted to the City Manager and/or Chief of Police by way of the City Charter or operation of state or federal law to engage in collective bargaining activities or enter into agreements or understandings with the designated bargaining unit representative or representatives of the sworn employees of the Police Department unless such agreements or understandings contravene this Article.

(d) The Police Accountability Board, Director of Police Accountability and their respective agents, assigns, employees and representatives shall not undertake nor sanction any actions which would:

(1) Restrict, violate, or abridge the collective bargaining rights of the designated bargaining unit representative of the sworn employees of the Police Department or their individual members;

(2) Restrict, violate or abridge the terms and conditions of a collective bargaining agreement, understanding or practice with the designated bargaining unit representative of the sworn employees of the Police Department, except for those provisions provided for in this Article; and

(3) Restrict, violate or abridge any legal rights of individual sworn employees of the Police Department, including but not limited to those set forth in the Public Safety Officers' Procedural Bill of Rights Act ("POBRA"), Government Code section 3300 et seq., and sworn employees' right to maintain the confidentiality of their personnel file information (including, but not limited to Penal Code §§ 832.7, 832.8.), except as required under Section 20 of Article XVIII of the City Charter.

(4) Independent agency; budget authority and allocation.

(a) Notwithstanding Article VII of the Charter, and except as provided in section 14(b), 14(i) or 14(k), the Police Accountability Board, its staff and the Director of Police Accountability shall be independent of the City Manager.

(b) The Board is authorized to propose a budget to the City Council for its operations, and the City Council may allocate to the Police Accountability Board and Director of Police Accountability, as the City Council determines resources allow, a budget sufficient to provide for a process that protects the rights of complainants and sworn employees of the Police Department, for the Board and its staff to carry out the investigative and policy responsibilities stated herein, and to ensure the independence of the Board.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(5) Composition of Police Accountability Board; eligibility.

(a) The Police Accountability Board shall be composed of nine (9) Board members selected by the Mayor and City Council. Each member of the Board must:

- (1) Be a resident of the City;
- (2) Be at least 18 years old;
- (3) Not be an employee, officer, or contractor with the City, a current sworn police officer from any agency, or a current employee, official, or representative of an employee association representing sworn police officers; and
- (4) Be fair minded and objective with a demonstrated commitment to community service.

(b) Desirable qualities of a Board member are familiarity with human resources, law, police procedures, police oversight, or involvement in civil rights or community organizations.

(c) All appointees to the Board shall be subject to background checks before final appointment.

(6) Board member selection.

(a) Candidates for the Board must complete and file with the City Clerk an application form and an affidavit of residency required by Berkeley Municipal Code Section 2.04.145. Board vacancies shall be widely advertised and publicly posted. The Mayor and each City Councilmember shall nominate one candidate from an applicant pool at a meeting of the City Council. Each individual nominee must be approved by a majority vote of the City Council.

(b) The City Council shall endeavor to establish a Board that is broadly inclusive and reflective of race, ethnicity, age, gender identity, sexual orientation, economic status, neighborhoods, and various communities of interest in the City. Toward that end, in soliciting applications for the position of Board member, the Director of Police Accountability shall reach out to civic, community, and civil rights organizations, among others.

(7) Terms; term limits.

(a) Board member terms end four years after appointment, or upon the expiration of the nominating City Councilmember's term, whichever is earlier. Board members are limited to serving eight consecutive years and may be reappointed following a break in service of at least two years.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(b) To the extent not in conflict with subsection (a) above, the provisions of Berkeley Municipal Code Section 3.02.040, regarding Board member term limits and the effect of interruption in service, apply.

(8) Conflicts of interest and Avoiding Bias.

(a) Board members shall be subject to the requirements of the California Political Reform Act and other state and local conflict of interest codes.

(b) Board members shall maintain basic standards of fair play, impartiality, and avoid bias and the appearance of bias. In instances where the Board acts in a quasi-judicial capacity, as in a confidential personnel hearing, as described below, Board members have the responsibility to hear all viewpoints. To ensure that all parties are afforded an opportunity to be heard, Board members shall observe the following:

(1) Board members recused for a conflict of interest must do so immediately when an item is taken up.

(2) Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing. Board members shall also submit a report of such contacts in writing prior to the commencement of the hearing. Ex parte contacts include, but are not limited to, any contact between a Board member and any party involved in the complaint prior to the public hearing.

(3) Board members shall be recused from taking any action on or participating in a matter before the Police Accountability Board if they are related to a party to, advocate for, or represent a member of the public who has a pending or anticipated claim of any kind arising out of alleged misconduct of a sworn employee of the Police Department. For the purpose of this subsection, "related to" shall include a spouse, child, sibling, parent or other person related to the complainant or the complainant's spouse within the third degree of relationship.

(9) Expiration of term; termination; leaves of absence; removal.

(a) A Board member whose term has expired may continue to serve until a successor Board member is appointed, unless the sitting Board member's term expires due to term limits, as provided in Section 7.

(b) The term of a Board member who fails to remain eligible to serve on the Board (e.g., by moving out of the City of Berkeley, or becoming an employee of the City) expires automatically as of the date the reason for ineligibility arises.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(c) The provisions of Berkeley Municipal Code Section 3.02.020, establishing a termination procedure for absence from meetings, Section 3.02.030, leaves of absence, and Section 3.02.035, regarding alternate Board members, apply to the Police Accountability Board.

(d) A Board member may either be replaced by the City Council if their term has expired or may be removed during their term as provided in Section 12.

(10) Board Chairperson and Vice-Chairperson.

(a) The Board shall elect one of its members as chairperson and one as vice-chairperson, whose terms shall be one year each, or until their successor is elected. No chairperson is eligible to serve more than two consecutive terms, or portions thereof.

(b) Following election of the initial chairperson and vice-chairperson, the Board shall elect subsequent officers each January.

(11) Board member stipends.

(a) Each Board member is entitled to receive a stipend of \$100.00 for each regular and special Board meeting attended, and \$20.00 per hour for each hour of training attended as provided in Section 12 and each subcommittee meeting attended as a member of a subcommittee. Excluding participation in trainings, the total stipend paid may not exceed \$300.00 per month per Board member.

(b) Board member stipends and the total monthly stipend paid may be adjusted from time to time by the City Council. Adjustments to Board member stipends shall occur no more than once in a fiscal year and in no event shall an increase in Board member stipends exceed the change in the cost of living for the San Francisco Bay Area as measured by official United States economic reports.

(12) Board member training; At will Status; Oath of Maintaining Confidentiality.

(a) The Director of Police Accountability shall establish mandatory training requirements for Board members. Within the first six (6) months of appointment, at a minimum, each Board member shall receive forty (40) hours of training on the following:

- (1) Quasi-judicial duties and obligations of the Board;
- (2) Constitutional rights and civil liberties;
- (3) Fundamentals of procedure, evidence and due process;
- (4) The Public Safety Officers Procedural Bill of Rights Act;

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(5) Police Department operations, policies, practices, and procedures;
and

(6) Duties, responsibilities, procedures and requirements associated with all ranks and assignments.

The Director of Police Accountability shall develop training provided to Board members. The Chief of Police and a representative from the Berkeley Police Association shall have input on training provided to Board members and shall have the opportunity to attend all training provided.

(b) All Board members shall serve at the pleasure of the City Council and may be removed by a two-thirds vote of the City Council for any reason, including but not limited to misconduct or violations of state and federal confidentiality laws.

(c) Board members shall, upon appointment, take an oath to abide by and maintain the confidentiality of the personnel files of sworn employees of the Police Department and all other matters that are confidential pursuant to state and federal law.

(13) Board meetings; quorum; rules of procedure; subcommittees.

(a) At the beginning of each calendar year, the Board shall establish a regular meeting schedule consisting of at least eighteen (18) meetings. Special meetings may be called by the chairperson of the Board or by a majority of the Board.

(b) A majority of appointed Board members constitutes a quorum to conduct business and take any action.

(c) The Board shall establish rules of procedure governing the conduct of its business, which shall be subject to ratification by the City Council.

(d) The Board may establish policy subcommittees that it deems necessary to carry out its functions. The Chairperson shall appoint policy subcommittee members at a Board meeting. Policy subcommittees may include non-voting members of the public who express an interest in the business of the subcommittee. Members of the public that are appointed to a policy subcommittee shall serve in an advisory capacity without compensation. The Board may establish further rules and procedures for the appointment and removal of members of the public to policy subcommittees. Policy subcommittee members shall not have access to confidential personnel file information or any other confidential information.

(e) Unless otherwise specified in this Article, rules of procedure governing the conduct of the Board, or Ordinance, the Board shall comply with the Commissioners' Manual.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(14) Office of the Director of Police Accountability.

(a) To the extent possible, the City Manager shall recommend three (3) candidates for consideration by the City Council. The City Council shall appoint the Director of Police Accountability at a noticed public meeting.

(b) The Director of Police Accountability shall carry out the work of the Board as described herein, which may include the day-to-day operations of the Board office and staff, and performance appraisals and discipline of all subordinate employees of the Board. All such individuals, to the extent that they are employees of the City of Berkeley, shall be subject to the personnel rules governing City of Berkeley employees.

(c) Within the first six (6) months of appointment, the Director of Police Accountability shall receive training on the following:

- (1) Quasi-judicial duties and obligations of the Board;
- (2) Constitutional rights and civil liberties;
- (3) Fundamentals of procedure, evidence and due process;
- (4) The Public Safety Officers Procedural Bill of Rights;
- (5) Police Department operations, policies, practices, and procedures;

and

(6) Duties, responsibilities, procedures and requirements associated with all ranks and assignments.

(d) By majority vote, the Police Accountability Board may recommend removal for cause of the Director of Police Accountability to the City Council.

(e) The City Council may remove the Director of Police Accountability by a two-thirds vote either on its own motion or based on the recommendation of the Police Accountability Board.

(f) In addition to the duties prescribed, upon receipt of a complaint by the Police Accountability Board, the Director of Police Accountability shall ensure a timely, thorough, complete, objective and fair investigation into the complaint.

(g) The Director of Police Accountability shall assess the conduct of the sworn employee of the Police Department in light of the facts discovered through the investigation, state and federal law, and the policies, practices, procedures, and personnel rules of the City and Berkeley Police Department.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(h) The Director of Police Accountability shall present the results of their investigative findings and recommendations to the Police Accountability Board who shall make a recommendation to the Chief of Police regarding the specific complaint.

(i) The Director of Police Accountability may hire a Chief Investigator and, when there is a conflict of interest pursuant to Section 15, outside legal counsel, subject to receiving budgetary authority from the City Council.

(j) Subject to the budgetary authority of the City Council, the provisions of the City's charter related to personnel, the City's personnel rules, state and federal law, the Director of Police Accountability shall have the authority to hire and dismiss consultants and additional investigators. Subject to City Council approval, the Director of Police Accountability may also enter into contracts for investigative services, provided, however, that with respect to the procurement of supplies and services, the Director of Police Accountability shall comply with the Charter and City purchasing policies and procedures

(k) The powers in this Section 14 are conferred notwithstanding Article VII, Sections 28(b) and (c) and Article XVI, Section 119 of this Charter.

(l) The Board and Director of Police Accountability shall use the City's Human Resources Department for all human resource matters including, but not limited to hiring, performance evaluation, discipline, and removal of employees.

(m) The Director of Police Accountability shall meet periodically with stakeholders, including but not limited to employee organizations representing officers, organizations promoting civil rights and liberties, and organizations representing communities of color, and solicit from them input regarding the work of the Police Accountability Board and the Office of the Director of Police Accountability.

(15) Legal counsel.

(a) The Board and the Director of Police Accountability shall use the services of the City Attorney's Office for legal advice.

(b) In the event the City Attorney has a prohibited conflict of interest under the California Rules of Professional Conduct with regard to a specified matter, the City Attorney shall provide the Director of Police Accountability with separate legal counsel. Pursuant to Section 14, when the City Attorney has determined that a conflict of interest exists, the Director of Police Accountability may engage legal counsel other than the City Attorney for legal advice regarding a specific case or matter.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(16) Board reports.

(a) All Board reports shall maintain the confidentiality of personnel file information and other confidential information as required by state and federal law.

(b) The Director of Police Accountability shall prepare an annual report to the public, including but not limited to the following:

- (1) A description of the Board's activities during the year, including:
 - i. A summary of the number, type, and disposition of complaints filed with the Board;
 - ii. A summary of the number, type, and disposition of complaints filed with the Police Department by members of the public;
 - iii. Policy complaints undertaken; and
 - iv. Other such information that the Board or City Council has requested.

- (2) The Department's and the Board's processes and procedures for investigating alleged misconduct, and for determining whether or not discipline is warranted and / or the level of discipline, for sustained findings of misconduct.

- (3) Training and education, and any early warning system utilized by the Department.

- (4) Training and/or policy issues that arise during the investigations of complaints by the Department, Director of Police Accountability, or Police Accountability Board.

- (5) Trends and patterns in vehicle and pedestrian stops, citations, arrests, searches and seizures or other patterns by the Berkeley Police Department. Statistical data shall include the demographics of the complainant, reason for the stop, purpose of the stop and disposition, and location of stop, in compliance with policies, practices, and procedures of the City and Police Department, and the Police Department General Order on Fair and Impartial Policing.

- (6) Trends and patterns regarding use of force and officer-involved shootings.

(c) This annual report shall be presented to the Board for approval. Upon adoption by the Board, it shall be presented to the Mayor and City Council, City Manager, and the Chief of Police at a City Council meeting, and shall include, where appropriate, recommendations for changes in the processes and procedures that were reviewed.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(d) Prior to being made available to any member of the public, all Board reports shall be subject to the review of the City Attorney to ensure compliance with all applicable state and federal confidentiality laws.

(17) Policy review and approval.

(a) The Chief of Police shall submit all newly adopted Departmental policies and revisions to the Board within thirty (30) days of implementation. The Board may review policies, practices, and procedures of the Police Department in its discretion or at the request of a member of the public, due to a policy complaint, or due to a complaint from a member of the public against an officer.

(b) If the Police Department and the Board are unable to reconcile their differences about a policy within sixty (60) days from the date that the Chief of Police submits a policy to the Director of Police Accountability, the policy shall be sent to the City Manager for a final decision which shall be reported to the City Council. Nothing in this section shall limit the authority of the City Council under this Charter to enact legislation within its Charter authority or direct the City Manager to implement adopted City Council policy.

(18) Complaints filed with the Director of Police Accountability.

(a) The Director of Police Accountability and Board shall adopt regulations for handling complaints filed with the Director of Police Accountability by any member of the public alleging misconduct by sworn employees of the Police Department and undertake investigations of complaints as they deem warranted. The regulations shall include the following:

- (1) What constitutes a complaint; and
- (2) A provision for voluntary mediation of complaints in lieu of an investigation.

(b) The Police Accountability Board shall hear and decide findings on allegations of misconduct, at which subject sworn employees of the Police Department must appear to testify and answer questions consistent with their rights pursuant to state and federal law.

(c) In determining whether a sworn employee of the Police Department has committed misconduct, the standard of proof for the Board shall be "preponderance of the evidence". The investigation and decision on findings shall be fair, unbiased, and evidence based.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(d) The time limit for investigations and notification of discipline shall be two hundred and forty (240) days from the date of the City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct, unless a Government Code section 3304(d) exception applies.

(e) Investigation of all complaints filed with the Director of Police Accountability shall begin immediately and proceed as expeditiously as possible. The time limit for completion of an investigation shall be one hundred and twenty (120) days of the City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct, unless a Government Code section 3304(d) exception applies.

(f) No City employee, officer, official or member of the Police Accountability Board shall attempt to interfere or undermine the work of the Director of Police Accountability or any employee of the Office of the Director of Police Accountability in the performance of the duties and responsibilities set forth in this Charter or by Ordinance.

(g) Complaints accepted by the Director of Police Accountability shall be sent in hard copy or electronically to the Chief of Police and Police Department Internal Affairs, members of the Police Accountability Board, and to each identified sworn employee of the Police Department against whom the complaint has been filed.

(h) For complaints being investigated by the Police Department, the Director of Police Accountability shall not participate in the Police Department's Board of Review or any subsequent internal process established by the Police Department to review a complaint filed by any member of the public.

(i) Within sixty (60) days of completing the investigation into allegations of misconduct by sworn employees of the Police Department, the Director of Police Accountability shall submit and present investigative findings to the Police Accountability Board and, if warranted, the Board may agree to hold a personnel hearing which shall be confidential. The Director of Police Accountability shall provide the Board with all evidence and documentation obtained or produced during the course of the investigation to enable its review of the complaint. At said meeting, both the sworn employee of the Police Department who is the subject of the investigation and the complainant shall be present to answer questions from Board members, subject to applicable state and federal law. In addition to submitting and presenting investigative findings to the Police Accountability Board in a confidential personnel hearing, the Director of Police Accountability shall include a recommendation of whether disciplinary action is warranted. For only those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421 on January 1, 2019, and any other classes of police conduct added in any subsequent amendment to, or successor provision, the Director of Police Accountability shall recommend the level of discipline, if warranted.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(j) Within fifteen (15) days of the confidential personnel hearing, the Board may affirm, modify or reject the findings and recommendation of the Director of Police Accountability.

(1) Should the Police Accountability Board agree with the findings and recommendation of the Director of Police Accountability, the Director of Police Accountability's findings and recommendations shall be submitted to the Chief of Police.

(2) If the Board modifies or rejects the findings and recommendations of the Director of Police Accountability, it shall issue a written explanation for its decision and shall forward it to the Chief of Police.

(k) Within ten (10) days of receiving the findings and recommendation of the Director of Police Accountability or Police Accountability Board, if the Chief of Police and Director of Police Accountability or Police Accountability Board are in accord, the Chief of Police shall issue a final decision. If the Chief of Police disagrees with the findings and/or recommendation of the Director of Police Accountability or the Police Accountability Board, the Chief of Police shall issue a tentative decision, which shall be forwarded to the Director of Police Accountability and Police Accountability Board. Within ten (10) days of receipt of that tentative determination, the Director of Police Accountability may request that the Chief of Police submit the decision to the City Manager or City Manager's Designee who shall make the final determination along with a written explanation to the Director of Police Accountability, Police Accountability Board, and Chief of Police within twenty-five (25) days.

(l) In any conflict between the provisions of this Article and the disciplinary appeal process in an applicable collective bargaining agreement, the collective bargaining agreement shall prevail; provided, however, that no City official is authorized to enter into a collective bargaining agreement or an extension of a collective bargaining agreement that contains provisions contrary to this Article after its Effective Date. Except as expressly provided herein, nothing shall limit the authority of the Chief of Police or City Manager to conduct investigations, make findings, and impose discipline or corrective action, or of an arbitrator charged with adjudicating disciplinary appeals, based upon such standards as each may apply consistent with and subject to the Charter, Ordinance, and personnel rules, the collective bargaining agreement, due process requirements, state labor laws, and Police Department policies and procedures.

(m) Except for the time limit set forth in Section 18(d), the timelines set forth in this section are advisory, and may be adjusted by the Director of Police Accountability after consulting with the City Manager and Chief of Police, to ensure that all investigations and notifications are completed in accordance with the limits of Section 18(d). In the event that the timeline set forth in Section 18(e) is extended, it shall not exceed 195 days.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(19) Review of complaints filed with the Berkeley Police Department.

(a) The Police Department shall ensure that any member of the public that files a complaint with the Police Department shall be provided written information and instructions on how to file a complaint with the Director of Police Accountability and Board.

(b) For all complaints filed with the Police Department by any member of the public, the time limit for investigations and notification of discipline shall be two hundred and forty (240) days from the date of the City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct, unless a Government Code section 3304(d) exception applies.

(c) Investigation of all complaints filed with the Police Department shall begin immediately and proceed as expeditiously as possible. The time limit for completion of the initial investigation shall be one hundred and twenty (120) days of the City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct, unless a Government Code section 3304(d) exception applies.

(d) Upon completion of the Chief of Police's investigation, the Chief of Police shall issue a letter of disposition to the sworn employee of the Police Department. On all complaints initiated by a member of the public, at the conclusion of the Department's internal affairs investigation, the Chief of Police shall also notify the Director of Police Accountability in writing of the disposition. In addition, the Chief of Police shall notify the complainant of the disposition of the complaint in accordance with the Penal Code.

(e) In cases where the finding is "not sustained", "unfounded" or "exonerated", within twenty (20) days after notification to the complainant is mailed or provided by other reasonable means as specified by complainant, the complainant shall have the option to contest the Chief of Police's determination to the Director of Police Accountability.

(1) If a complainant contests the Chief of Police's determination, the Director of Police Accountability, if appropriate, may request to review all files, transcripts and records related to the complaint. Within fifteen (15) days of either receiving an objection from a complainant or notice from the Chief of Police that a complainant has filed an objection, the Director of Police Accountability may, in the exercise of the Director of Police Accountability's discretion:

i. Notify the complainant that the objection has been accepted and that the Police Accountability Board will convene to conduct a review based upon the investigative record provided by the Department; or

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

ii. Notify the complainant that the objection has been dismissed. If the Director of Police Accountability dismisses an objection filed by a complainant, the Director of Police Accountability must provide written notice to the Board within thirty (30) days following the Director of Police Accountability's notification to complainant that the objection was dismissed.

(f) Within forty five (45) days of when the Director of Police Accountability notifies the complainant that the objection has been accepted, the Board may dismiss the complainant's objection, issue a report agreeing with the Chief of Police's determination or issue a report disagreeing with the Chief of Police's determination if (1) the Department failed to proceed in a manner required by state and federal law, or (2) the Chief of Police's decision is not supported by the evidence in the record.

(g) If the Police Accountability Board disagrees with the Chief of Police's determination, it shall submit its report to the Chief of Police and the City Manager. The Chief of Police may prepare a report for the City Manager within fifteen (15) days of receiving the Police Accountability Board's recommendation addressing any concerns or objections. Within twenty five (25) days of receiving the report from the Chief of Police, the City Manager or City Manager's Designee, considering the reports of both the Board and Chief of Police, shall make a final determination along with a written explanation to the Director of Police Accountability, Police Accountability Board, and Chief of Police.

(h) The Chief of Police's determination shall not become final, and no discipline shall be administered in any case in which the complainant has contested the Chief of Police's determination until the objection is dismissed or otherwise concluded; provided, however, that a final determination in all cases shall be rendered by the Chief of Police or City Manager not later than two hundred and forty days (240) days, unless a Government Code section 3304(d) exception applies.

(i) Except for the time limit set forth in Sections 19(b) and 19(c), the timelines set forth in this section are advisory, and may be adjusted to ensure that all investigations are completed in accordance with the limits of Section 19(b) and 19(c), and by mutual agreement between the City Manager, Director of Police Accountability, and the Chief of Police, as applicable.

CHARTER OF THE CITY OF BERKELEY

Section 125, Article XVIII

(20) Access to records of City departments; compelling testimony and attendance.

(a) Notwithstanding Article VII, Section 28 of this Charter, all departments, officers, and employees of the City shall cooperate with and assist the Director of Police Accountability, Police Accountability Board and its staff and, unless prohibited by state or federal law, produce all records and written and unwritten information, documents, materials and evidence the Board or its staff requests for the purpose of carrying out its duties and functions. Unless otherwise required by state and federal law, the records and information include without redaction or limitation:

- (1) Records relevant to Police Department policies, practices, or procedures;
- (2) Personnel and disciplinary records of sworn employees of the Police Department; and
- (3) Police Department investigative records.

Responding departments or employees of the City shall maintain the confidentiality of any records and information provided consistent with state or federal law governing such records or information and comply promptly, but in no event later than ten (10) business days from the date of request, unless additional time is needed to locate or review records. If additional time is needed to comply, the responding departments, officers or employees shall specify how much time up to thirty (30) additional business days is needed and explain the reasons for delay in producing the necessary records and information.

(b) The Director of Police Accountability, Police Accountability Board and its staff, and their agents and representatives shall maintain the confidentiality of any records and information it receives consistent with state or federal law governing such records or information.

(c) The Director of Police Accountability and Police Accountability Board may issue subpoenas to compel the production of books, papers, and documents, and the attendance of persons to take testimony, as needed to carry out its duties and functions. The testimony of any sworn employee of the Police Department is subject to the due process and confidentiality provisions of applicable state and federal law.

(21) Advice regarding Police Department budget.

The Board is empowered to review and make recommendations to the City Council regarding the Police Department budget. The Chief of Police shall submit a final budget proposal to the Board for review and recommendations, but the Board's failure to complete that review and make recommendations in a timely manner shall not delay the budget process.

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(22) Hiring of Chief of Police.

Notwithstanding Article VII, Section 28 of this Charter, upon the notice of vacancy of the position of Chief of Police, the City Manager shall consult with the Police Accountability Board (or subcommittee of the Board) on the job requirements, application process, and evaluation of candidates for the Chief of Police.

(23) Chief of Police or command staff to attend Board meetings.

To the maximum extent possible, the Chief of Police shall attend at least one regular Board meeting per month, for each month a regular meeting is held and attend a minimum of twelve (12) meetings per year. The Chief of Police shall send a member of the Police Department's command staff to any regular Board meeting that the Chief of Police does not attend.

(24) Berkeley Police Department written reports to the Board.

The Chief of Police shall submit reports to the Board on such subjects and at such intervals as the Board, in consultation with the Chief of Police, may prescribe. At least one report per year shall provide information on all use of force statistics, and the number of complaints filed with Internal Affairs, the allegations in each complaint, and the disposition of closed complaints, including any discipline imposed.

(25) Contract negotiations.

The City Manager shall inform the Police Accountability Board of any changes agreed in contract negotiations and adopted by City Council that may directly affect the work, duties, or responsibilities of the Board.

(26) Commendation program.

The Board shall establish a regular means of recognizing sworn employees of the Police Department for instances of outstanding service to members of the public, the community at large, or the Department.

(27) Transition from Police Review Commission to Police Accountability Board.

(a) The Police Review Commission established by Ordinance No. 4,644-N.S., as amended, shall continue in existence until its functions are transferred to the Police Accountability Board, but no later than January 3, 2022

CHARTER OF THE CITY OF BERKELEY
Section 125, Article XVIII

(b) To assist in an orderly transition between the Police Review Commission and the Police Accountability Board established by this Article, Police Review Commission staff shall serve as interim Police Accountability Board staff until the City hires a Director of Police Accountability.

(c) The Police Review Commission staff shall transfer all Police Review Commission files, records, books, publications, and documents of whatever kind to, and for the use and benefit of, the newly created Police Accountability Board.

(28) Review of processes.

The Board shall conduct a review of its processes every two years after the Effective Date in order to ascertain the efficacy of its processes.

(29) Enabling Legislation.

The Board may make recommendations to the City Council for enacting legislation or regulations that will further the goals and purposes of Article XVIII of this Charter. The City Council may, based on such recommendations or on its own initiative, enact ordinances that will further the goals and purpose of this Article.

The Board shall have forty-five (45) business days to submit its comments to the City Council, such time to be extended only by agreement of the City Council.

(30) Repeal of Ordinance No. 4,644-N.S., as amended.

Ordinance No. 4,644-N.S., all amendments thereto, and all rules and regulations promulgated pursuant thereto, shall cease to be operative and are repealed as of the date of the first meeting of the Police Accountability Board established by this Article.

(31) Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Article, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Article, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The People of the City of Berkeley declare that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Article, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

Police Accountability Board
Office of the Director of Police Accountability

**Interim Regulations for Handling Complaints Against Sworn Officers of the
Police Department under City Charter Article XVIII, Section 125 (Measure II)**

Preamble

These interim regulations for handling complaints against sworn members of the Berkeley Police Department are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II establishes a Police Accountability Board (Board) and a Director of Police Accountability (Director), and is intended to promote public trust by providing for prompt, impartial and fair investigations of complaints by members of the public against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.

Under Resolution No. 69,531 N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council. In order for the Director to accept and investigate complaints filed against sworn members of the Police Department beginning July 1, 2021, interim regulations are needed until such time as the Board adopts permanent regulations and the Council ratifies them.

These interim regulations reflect the procedures for handling complaints against police officers as set forth in Measure II as well as the provisions of the PRC Regulations for Handling Complaints Against Members of the Police Department (effective April 4, 2018) that are not in conflict with Measure II. They shall apply to all complaints that were pending with the PRC as of July 1, 2021, and all complaints filed with the Office of the Director of Police Accountability on and after July 1, 2021. Applicability of permanent regulations to these pending cases will be determined later.

I. GENERAL PROVISIONS

A. Definitions

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential personnel hearing is held.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.

Section I.A.

4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.
7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: ~~An aggrieved party~~ A member of the public who files a complaint with the Office of the Director of Police Accountability.
9. Days: Means calendar days unless otherwise specified.
10. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
11. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
12. Hearing Panel: Three Board members impaneled to conduct a confidential personnel hearing.
13. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODP.
14. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
15. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
16. Review Panel: Three Board members impaneled to conduct a review of a BPD investigative record.
17. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
18. Witness Officer: A sworn employee of the Berkeley Police Department who has personal knowledge of events described in a complaint, but is not a subject officer.

(PRC Reg. Sec. II.B., modified.)

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley Police Department personnel. ODP staff will likewise have access to

Section I.B.

such confidential information. It is vitally important to the integrity of the complaint process under Measure II that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law. (PRC Reg. Preamble.)

2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. (Art. XVIII, Sec. 125(20)(b).) In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated. (PRC Reg. Sec. IV.A.)
3. Closed hearings; effect on public records. All confidential personnel hearings and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. Records of these investigations are confidential and will not be disclosed to members of the public. However, any public records included in, or attached to, investigative reports shall remain public records. (PRC Reg. Sec. 1.A.)
4. Handling confidential information. For any proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. (PRC Reg. Sec. IV.B.2.) For any proceeding in which electronic copies of confidential information are distributed to Board members, each Board member shall delete all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so. (NEW)
5. Effect of violation. A Board member who violates confidentiality before or during a confidential personnel hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of confidentiality for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)

Section II.A.

II. COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY

A. Initiating a complaint

1. Complaint form. A complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(a)(1); PRC Reg. Secs. I.B.7, II.A.1.) Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath." Complaints shall be signed by the complainant, except for complaints initiated by the Board. (PRC Reg. Sec. II.A.1.)
2. Who may file. ~~Only an "aggrieved party"ies, as well as eyewitnesses to alleged police misconduct,~~ may file a complaint, ~~except that if no complainant is available to initiate a complaint, and in any case involving a death, 5 Board members may vote to authorize an investigation or take other such action they deem appropriate.~~ Complaints may also be initiated by the Board upon a vote of five Board members to authorize an investigation. (PRC Reg. Secs. I.B.2., II. A.3.)
3. Filing period. A complaint must be filed within ~~180~~90 days of the alleged misconduct, except that the ~~180~~90 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.
 (PRC Reg. Sec. II.A.2.)
- ~~4. Late-filed complaints. Complaints filed between 91 and 180 days of the alleged misconduct must be reviewed by the Police Accountability Board in a closed session meeting. Six Board members must find good cause for the late filing, by clear and convincing evidence, to accept the complaint. A complaint filed after 180 days after the alleged misconduct will not be accepted. (PRC Reg. Sec. II.A.2.a)~~
- ~~5.4.~~ Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be

Section II.A.

submitted by the Director to the Board for administrative closure at the next regular meeting that allows the complainant to be provided at least 5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2. (PRC Reg. Sec. II.A.4.a.)

6-5. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPa is notified that a complainant or subject officer is represented, then the ODPa shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives. (PRC Reg. Sec. II.A.5.)

B. Mediation

1. Election

- a. ODPa staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. G.1 below.
- b. If the complainant elects mediation, ODPa staff shall notify the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before mediation session begins.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and to proceed to a confidential personnel hearing, unless the subject officer withdraws from mediation.

2. Completion

After receiving notice from the mediator that a mediation has concluded, ODPa staff shall close the case and inform the Board.

(Art. XVIII, Sec. 125(18)(a)(2); PRC Reg. Sec. II.B., modified)

C. Complaint investigation

Section II.C.

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies (Art. XVIII, Sec. 125(18)(e)), except:
 - a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPA shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPA shall contact the District Attorney's Office to determine the status and anticipated resolution of the criminal proceeding (PRC Reg. Sec. III.C.3.).
 - b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.O.
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed. (Art. XVIII, Sec. 125(18)(g).)
3. Notice of Complaint and Allegations. Within 28 days of a complaint filing or the acceptance of a late-filed complaint, the ODPA shall prepare and send a Notice of Complaint and Allegations by hard copy or electronically to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complaint requests mediation, or the Director recommends administrative closure. (PRC Reg. Sec. III.B.1, modified.)
4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPA staff with the schedules of all sworn employees of the Police Department. (PRC Reg. Sec. VII.A.1.)
5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence. (PRC Reg. Sec. III.C.1.)
6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, without redaction or limitation, unless required by state or federal law. (Art. XVIII, Sec. 125(20)(a).)
 - a. The Director may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)

Section II.C.

- b. Whenever a PRC investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
 - I. The original Communications Center tapes relevant to the complaint.
 - II. All police reports, records, and documentation, including body-worn camera video.
 - III. Names, addresses, telephone numbers, and statements of all witnesses. (PRC Reg. Sec. II.E.2.)
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. (Art. XVIII, Sec. 125(20)(c); PRC Reg. Exhibit A.) ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability. (PRC Reg. Sec. III.D.2.)
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. (PRC Reg. Sec. III.D.1.) While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint (PRC Reg. Sec. III.D.3.)

D. Pre-hearing complaint disposition.

1. Administrative Closure

a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. Request for closure by complainant.

¹ Government Code Sec. 3300 et seq.

Section II.D.1.

- iii. Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.
- iv. Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- vi. Failure of ODPa staff to timely complete its investigation, as set forth in Section II.C.1.

b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a regularly-scheduled meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 7 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

c. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

(PRC Reg. Sec. V.A.)

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.G.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them. (PRC Reg. Sec. V.B., modified)

E. Initial submission and consideration of investigative findings and recommendations.

1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a confidential personnel hearing if the Board requests it. (Art. XVIII, Sec.

Section II.E.

125(18)(i.) This deadline may be extended as provided under Section II.O.

2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.” (Art. XVIII, Sec. 125(18)(c).)
 3. Categories of Findings
 - a. If the evidence shows that the alleged act did not occur, the finding shall be “Unfounded.”
 - b. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be “Not Sustained.”
 - c. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be “Exonerated.”
 - d. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be “Sustained.”
- (PRC Regs., Sec. VIII.B.)
4. Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline. (Art. XVIII, Sec. 125(18)(i).)
 5. Board decision. Upon reviewing the Director’s investigative findings, the Board must then decide whether to hold a confidential personnel hearing.
 - a. If the Board agrees with the Director on all findings and recommendations, (i.e., no need for hearing), the Director shall send the findings and recommendations to the Chief of Police. The findings and recommendations must be sent within 195 days of the City’s discovery of alleged misconduct, except if extended as provided under Section II. ~~OM.2~~.
 - b. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential personnel hearing.

(Art. XVIII, Sec. 125(18)(i).)

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

1. Time. If the Board decides to move forward with a confidential personnel hearing, it must be held within 60 days of the date the ODPa has completed its investigation. (Art. XVIII, Sec. 125(18)(i).)

Section II.F.

2. Scheduling hearing. ODPa staff shall determine the availability of subject officers before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on same complaint do not share a common day on duty. (PRC Reg. Sec. VII.A.1.)
3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential personnel hearing. A Hearing Panel shall consist of three Board members, except that in death cases and any cases in which six Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel. (PRC Reg. Sec. VI.A.)
4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. (PRC Reg. Sec. VI.B.1.) If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing and constitutes good cause for continuing the hearing. (PRC Reg. Sec. VI.B.2.)
5. Effect of continuance. If a hearing is rescheduled due to unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened. (PRC Reg. Sec. VI.B.3)
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel. (PRC Reg. Sec. VII. A.2)
7. Hearing Packet. The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation (Art. XVIII, Sec. 125(18)(i)), at least 14 days before the hearing date. The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command Officer, and the Police Chief. The complainant shall receive a Hearing Packet without documents containing confidential investigatory materials or findings and recommendations. Witness officers and civilian witnesses shall receive a copy of only their interview transcript. (PRC Reg. Sec. VII.B., modified.)

Section II.G.

G. Board member impartiality; recusals; challenges

1. Conduct.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential personnel hearings, they shall hear all viewpoints. (Art. XVIII, Sec. 125(8)(b).)
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint. (PRC Reg. Sec. VI.D.2.)
 - c. A Board member who violates Section G.1.b above, before or during a confidential personnel hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendaize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)
2. Recusal; disclosure of ex parte contacts. Board members recused for a conflict of interest must do so immediately when an item is taken up. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing. (Art. XVIII, Sec. 125(8)(b)(2).)
3. Challenges to Hearing Panel member
 - a. Basis for Challenge. A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:
 - i. a familial relationship or close friendship with the complainant or subject officer;
 - ii. witnessing events material to the inquiry;
 - iii. a financial interest in the outcome of the inquiry;
 - iv. a bias for or against the complainant or subject officer.

Section II.G.

b. Procedure

- i. No later than 7 days of the date of mailing of the Hearing Packet, which includes the names of the Board members constituting the Hearing Panel, the complainant or the subject officer(s) may file a written challenge for cause to any Board member. Such challenge must specify the nature of the conflict of interest.
 - ii. The Director shall contact the challenged Board member as soon as possible after receipt of the challenge.
 - iii. If the Board member agrees to recuse themselves, the Director shall ask another Board member to serve.
 - iv. If the Board member disagrees that the challenge is for good cause, they shall state their reasons in writing, and the Director shall make this determination. If the Director finds good cause for the challenge, the Director shall inform the challenged Board member and ask another to serve.
 - v. If the Director rejects a challenge to a Board member and the Board member serves, the written challenge and the Board member's written response shall be made part of the hearing record.
- c. Replacement of Board member. Any Board member who is unable to serve for any reason shall be replaced by another Board member, except in cases involving a death.

(PRC Reg. Sec. VI.C., modified.)

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i). (PRC Reg. Sec. VII.C.4., modified)
2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODP staff no later than 14 days before the scheduled hearing date, with an explanation as to why the evidence or

Section II.H.

witnesses could not have been discovered earlier and its significance. ODPa staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODPa staff shall notify both the complainant and the subject officer of the Hearing Panel's decision. (PRC Reg. Sec. VII.C.1.)

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date. Procedural issues can include, without limitation,: expiration of the 1-year limitation period under Government Code section 3304, or whether an officer should testify. (PRC Reg. Sec. VII.C.2.)

I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director and Investigator may be present during the entirety of the hearing. The Duty Command Officer may be present for all but the Board members' deliberations. (PRC Reg. VII.D.1.) The complainant and the subject officer shall be present to answer questions from Board members, subject to state law. (Art. XVIII, Sec. 125(18)(i).) An attorney or other representative for the complainant or the subject officer may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for ensuring their representative's presence at the hearing. (PRC Reg. VII.D.2.)
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative. (PRC Reg. Sec. VII.D.3.)
3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained. (PRC Reg. Sec. VII.D.4.)
4. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous. (PRC Reg. Sec. VII.D.5.)
5. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing. (PRC Reg. Sec. VI.A.)

Section II.I.

- ~~6. Presentation of findings and recommendations. The Director shall, outside of the presence of the complainant, complainant's representative, and witnesses, present the investigative findings and a recommendation of discipline, if any; and the level of discipline in appropriate cases. (Derived from Art. XVIII, Sec. 125(18)(i).)~~
- ~~7.6.~~ Taking testimony at the hearing.
- a. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officers and their representatives may be present during their testimony. The complainant or their representative may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) The complainant or the complainant's representative may ask questions; b) Board members may ask questions; ~~b~~c) the subject officer or his or her representative may ask questions; ~~e~~d) Board members may ask follow-up questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement. (PRC Reg. Sec. VII.D.7., modified)
 - b. ~~The complainant and their representative, and civilian witnesses will each be excused from the hearing room after their testimony or representation is completed. (PRC Reg. Sec. VII.D.8.)~~
 - c. The subject officers and any witness officers will be called into the hearing room to testify separately. The complainant and their representative may be present during their testimony. Subject officer representatives may be present for all testimony. Each subject officer may make a statement or choose to rely on the interview statements. Questioning will then proceed as follows: 1. Subject officers' representatives may ask questions. 2. Board members may ask questions. The officer may then be questioned by 2 Board members unless the officer waives this requirement. 3. Complainant or their representatives may ask questions. 4. Board members may ask follow up questions. Each subject officer will be questioned by their representative first, after which the officer may be questioned by 2 Board members, unless the officer waives this requirement. After questioning is completed, each subject officer will have up to 15 minutes to provide a summary of their case and a closing statement.
 - d. ~~The subject officers and witness officers will each be excused from the hearing room after their testimony is completed. (PRC Reg. Sec. VII.D.9.) All except Board members and staff will then be excused from the hearing room.~~
- ~~8-7.~~ Subpoenas. The Board may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)

Section II.I.

9-8. Maintaining order. No person at hearing shall become subject of undue harassment, personal attack, or invective. If the chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient. (PRC Reg. Sec. VII.D.10.)

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Section II.J.

J. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be taken in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, they may be called and examined as if under cross-examination.;
 - b. Oral evidence shall be taken only under oath.
 - c. The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d. The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e. The Chairperson will conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPa staff will answer Board members' questions on the evidence, points of law, and procedure.
 - f. The City Attorney's opinion will be sought whenever the interpretation of a City Ordinance or the City Charter is contested and pivotal to the case, or when a case raises substantial legal issues of first impression.
 - g. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h. If either party requests that the hearing be continued to consider motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

(PRC Reg. Sec. VII.E.)

Section II.K.

K. Deliberation and Findings

1. Deliberation. After the hearing has concluded, the Hearing Panel deliberates outside the presence of everyone except ODPa staff. The Hearing Panel shall not consider any information not received in the hearing packet or during the hearing. (PRC Reg. Sec. VIII.A.)
2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(j).) All action of the Hearing Panel shall be by majority vote of those Board members present. (PRC Reg. Sec. VIII.B.)
3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing (Art. XVIII, Sec. 125(18)(j)), unless extended as provided under Section II.~~OM.2~~. (Art. XVIII, Sec. 125(18)(m).)
4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision. (Art. XVIII, Sec. 125(18)(j).)
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning (PRC Reg. Sec. VIII.B.), unless the dissenter agrees with the Director's finding and recommendation. (NEW)

L. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.~~GE~~.5.a. above, or from the Hearing Panel under Section II.~~MK~~.3.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision to the Director and the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.

Section II.L.

3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.

(Art. XVIII, Sec. 125(18)(k).)

4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.OM.2. (Art. XVIII, Sec. 125(18)(m).)

M. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec.(125)(18)(d).)
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days. (Art. XVIII, Sec.125(18)(m).)

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT.**A. Application**

1. This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code. (Art. XVIII, Sec. 125(19)(d).)
2. If a finding is "not sustained," "unfounded," or "exonerated," the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief's determination to the Director. (Art. XVIII, Sec. 125(19)(e).) The Director, if appropriate, may request to review all files, transcripts, and records related to the complaint. (Art. XVIII, Sec. 125(19)(e)(1).)

Section III.B.

3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene a Review Panel to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.(Art. XVIII, Sec. 125(19)(e)(1); Review Panel added.)
4. If the Director decides that the Board will conduct a review, ODPa staff shall secure a Review Panel of three Board members to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Review Panel members and ODPa staff will be present. A Duty Command Officer may be present.
 - b. The Review Panel shall evaluate the investigative record to determine whether the complainant's objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief's decision is not supported by the evidence in the record.
 - c. All action of the Review Panel must be by majority vote.(NEW. Details not in Charter and no counterpart in PRC procedures.)
5. The Review Panel must, within 45 days of the date the Director accepts an objection:
 - a. Dismiss the complainant's objection; or
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Review Panel finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.(Art. XVIII, Secs. 125(19)(f), 125(19)(g).)
6. Within 15 days of receiving a Review Panel's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections. (Art. XVIII, Sec. 125(19)(g).)
7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief,

Section III.B.

and send a final determination with a written explanation to the Director, the Board, and the Chief. (Art. XVIII, Sec. 125(19)(g).)

8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec. 125(19)(i).)

IV. INFORMAL COMPLAINTS

- A.** An informal complaint is a communication from a member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features, and alleges any act of misconduct pertaining to the manner in which the officer performs their duties. Such complaints shall be treated confidentially.
- B.** ODPa staff shall contact the complainant to explain the policy complaint and formal individual complaint processes.
- C.** Informal complaints will be agendaized for a closed session at the next regular Board meeting and distributed to the Board in closed session, with notice to the named officer(s).
- D.** The Board shall consider the informal complaint and recommend what additional action, if any, the Director of Police Accountability should take.

(Adopted by the PRC Jan. 8, 2020.)

V. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A.** These Interim Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPa staff shall furnish them to any person requesting a copy.
- B.** Amendments to these Interim Regulations require a majority vote of the Board and ratification by the City Council.

(PRC Reg. Sec. IX, modified.)

Police Accountability Board
Office of the Director of Police Accountability

**Interim Regulations for Handling Complaints Against Sworn Officers of the
Police Department under City Charter Article XVIII, Section 125 (Measure II)**

Preamble

These interim regulations for handling complaints against sworn members of the Berkeley Police Department are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II establishes a Police Accountability Board (Board) and a Director of Police Accountability (Director), and is intended to promote public trust by providing for prompt, impartial and fair investigations of complaints by members of the public against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.

Under Resolution No. 69,531 N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council. In order for the Director to accept and investigate complaints filed against sworn members of the Police Department beginning July 1, 2021, interim regulations are needed until such time as the Board adopts permanent regulations and the Council ratifies them.

These interim regulations reflect the procedures for handling complaints against police officers as set forth in Measure II as well as the provisions of the PRC Regulations for Handling Complaints Against Members of the Police Department (effective April 4, 2018) that are not in conflict with Measure II. They shall apply to all complaints that were pending with the PRC as of July 1, 2021, and all complaints filed with the Office of the Director of Police Accountability on and after July 1, 2021. Applicability of permanent regulations to these pending cases will be determined later.

I. GENERAL PROVISIONS**A. Definitions**

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential personnel hearing is held.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.

Section I.A.

4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.
7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: A member of the public who files a complaint with the Office of the Director of Police Accountability.
9. Days: Means calendar days unless otherwise specified.
10. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
11. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
12. Hearing Panel: Three Board members impaneled to conduct a confidential personnel hearing.
13. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODP.
14. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
15. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
16. Review Panel: Three Board members impaneled to conduct a review of a BPD investigative record.
17. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
18. Witness Officer: A sworn employee of the Berkeley Police Department who has personal knowledge of events described in a complaint, but is not a subject officer.

(PRC Reg. Sec. II.B., modified.)

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley

Section I.B.

Police Department personnel. ODPa staff will likewise have access to such confidential information. It is vitally important to the integrity of the complaint process under Measure II that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law. (PRC Reg. Preamble.)

2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. (Art. XVIII, Sec. 125(20)(b).) In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated. (PRC Reg. Sec. IV.A.)
3. Closed hearings; effect on public records. All confidential personnel hearings and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. Records of these investigations are confidential and will not be disclosed to members of the public. However, any public records included in, or attached to, investigative reports shall remain public records. (PRC Reg. Sec. 1.A.)
4. Handling confidential information. For any proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. (PRC Reg. Sec. IV.B.2.) For any proceeding in which electronic copies of confidential information are distributed to Board members, each Board member shall delete all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so. (NEW)
5. Effect of violation. A Board member who violates confidentiality before or during a confidential personnel hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of confidentiality for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)

Section II.A.

II. COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY**A. Initiating a complaint**

1. Complaint form. A complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(a)(1); PRC Reg. Secs. I.B.7, II.A.1.) Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath." Complaints shall be signed by the complainant, except for complaints initiated by the Board. (PRC Reg. Sec. II.A.1.)
2. Who may file. Aggrieved parties, as well as eyewitnesses to alleged police misconduct, may file a complaint. Complaints may also be initiated by the Board upon a vote of five Board members to authorize an investigation. (PRC Reg. Secs. I.B.2., II. A.3.)
3. Filing period. A complaint must be filed within 180 days of the alleged misconduct, except that the 180 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.(PRC Reg. Sec. II.A.2.)
4. Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be submitted by the Director to the Board for administrative closure at the next regular meeting that allows the complainant to be provided at least 5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2. (PRC Reg. Sec. II.A.4.a.)

Section II.A.

5. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPa is notified that a complainant or subject officer is represented, then the ODPa shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives. (PRC Reg. Sec. II.A.5.)

B. Mediation

1. Election

- a. ODPa staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. G.1 below.
- b. If the complainant elects mediation, ODPa staff shall notify the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before mediation session begins.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and to proceed to a confidential personnel hearing, unless the subject officer withdraws from mediation.

2. Completion

After receiving notice from the mediator that a mediation has concluded, ODPa staff shall close the case and inform the Board.

(Art. XVIII, Sec. 125(18)(a)(2); PRC Reg. Sec. II.B., modified)

C. Complaint investigation

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies (Art. XVIII, Sec. 125(18)(e)), except:
 - a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPa shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be

Section II.C.

tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPA shall contact the District Attorney's Office to determine the status and anticipated resolution of the criminal proceeding (PRC Reg. Sec. III.C.3.).

- b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.O.
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed. (Art. XVIII, Sec. 125(18)(g).)
3. Notice of Complaint and Allegations. Within 28 days of a complaint filing or the acceptance of a late-filed complaint, the ODPA shall prepare and send a Notice of Complaint and Allegations by hard copy or electronically to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complaint requests mediation, or the Director recommends administrative closure. (PRC Reg. Sec. III.B.1, modified.)
4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPA staff with the schedules of all sworn employees of the Police Department. (PRC Reg. Sec. VII.A.1.)
5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence. (PRC Reg. Sec. III.C.1.)
6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, without redaction or limitation, unless required by state or federal law. (Art. XVIII, Sec. 125(20)(a).)
 - a. The Director may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)
 - b. Whenever a PRC investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
 - I. The original Communications Center tapes relevant to the complaint.

Section II.C.

- II. All police reports, records, and documentation, including body-worn camera video.
 - III. Names, addresses, telephone numbers, and statements of all witnesses. (PRC Reg. Sec. II.E.2.)
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. (Art. XVIII, Sec. 125(20)(c); PRC Reg. Exhibit A.) ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability. (PRC Reg. Sec. III.D.2.)
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. (PRC Reg. Sec. III.D.1.) While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint (PRC Reg. Sec. III.D.3.)

D. Pre-hearing complaint disposition.

1. Administrative Closure

a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. Request for closure by complainant.
- iii. Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.

¹ Government Code Sec. 3300 et seq.

Section II.E.

- iv. Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- vi. Failure of ODPa staff to timely complete its investigation, as set forth in Section II.C.1.

- b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 7 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

- c. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

(PRC Reg. Sec. V.A.)

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.G.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them. (PRC Reg. Sec. V.B., modified)

E. Initial submission and consideration of investigative findings and recommendations.

1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a confidential personnel hearing if the Board requests it. (Art. XVIII, Sec. 125(18)(i).) This deadline may be extended as provided under Section II.O.

Section II.E.

2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.” (Art. XVIII, Sec. 125(18)(c).)
3. Categories of Findings
 - a. If the evidence shows that the alleged act did not occur, the finding shall be “Unfounded.”
 - b. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be “Not Sustained.”
 - c. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be “Exonerated.”
 - d. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be “Sustained.”(PRC Regs., Sec. VIII.B.)
4. Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline. (Art. XVIII, Sec. 125(18)(i).)
5. Board decision. Upon reviewing the Director’s investigative findings, the Board must then decide whether to hold a confidential personnel hearing.
 - a. If the Board agrees with the Director on all findings and recommendations, (i.e., no need for hearing), the Director shall send the findings and recommendations to the Chief of Police. The findings and recommendations must be sent within 195 days of the City’s discovery of alleged misconduct, except if extended as provided under Section II.M.2.
 - b. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential personnel hearing.(Art. XVIII, Sec. 125(18)(i).)

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

1. Time. If the Board decides to move forward with a confidential personnel hearing, it must be held within 60 days of the date the ODPa has completed its investigation. (Art. XVIII, Sec. 125(18)(i).)

Section II.F.

2. Scheduling hearing. ODPa staff shall determine the availability of subject officers before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on same complaint do not share a common day on duty. (PRC Reg. Sec. VII.A.1.)
3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential personnel hearing. A Hearing Panel shall consist of three Board members, except that in death cases and any cases in which six Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel. (PRC Reg. Sec. VI.A.)
4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. (PRC Reg. Sec. VI.B.1.) If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing and constitutes good cause for continuing the hearing. (PRC Reg. Sec. VI.B.2.)
5. Effect of continuance. If a hearing is rescheduled due to unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened. (PRC Reg. Sec. VI.B.3)
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel. (PRC Reg. Sec. VII. A.2)
7. Hearing Packet. The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation (Art. XVIII, Sec. 125(18)(i)), at least 14 days before the hearing date. The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command Officer, and the Police Chief. The complainant shall receive a Hearing Packet without documents containing confidential investigatory materials or findings and recommendations. Witness officers and civilian witnesses shall receive a copy of only their interview transcript. (PRC Reg. Sec. VII.B., modified.)

Section II.G.

G. Board member impartiality; recusals; challenges

1. Conduct.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential personnel hearings, they shall hear all viewpoints. (Art. XVIII, Sec. 125(8)(b).)
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint. (PRC Reg. Sec. VI.D.2.)
 - c. A Board member who violates Section G.1.b above, before or during a confidential personnel hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendaize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)
2. Recusal; disclosure of ex parte contacts. Board members recused for a conflict of interest must do so immediately when an item is taken up. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing. (Art. XVIII, Sec. 125(8)(b)(2).)
3. Challenges to Hearing Panel member
 - a. Basis for Challenge. A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:
 - i. a familial relationship or close friendship with the complainant or subject officer;
 - ii. witnessing events material to the inquiry;
 - iii. a financial interest in the outcome of the inquiry;
 - iv. a bias for or against the complainant or subject officer.

Section II.G.

b. Procedure

- i. No later than 7 days of the date of mailing of the Hearing Packet, which includes the names of the Board members constituting the Hearing Panel, the complainant or the subject officer(s) may file a written challenge for cause to any Board member. Such challenge must specify the nature of the conflict of interest.
 - ii. The Director shall contact the challenged Board member as soon as possible after receipt of the challenge.
 - iii. If the Board member agrees to recuse themselves, the Director shall ask another Board member to serve.
 - iv. If the Board member disagrees that the challenge is for good cause, they shall state their reasons in writing, and the Director shall make this determination. If the Director finds good cause for the challenge, the Director shall inform the challenged Board member and ask another to serve.
 - v. If the Director rejects a challenge to a Board member and the Board member serves, the written challenge and the Board member's written response shall be made part of the hearing record.
- c. Replacement of Board member. Any Board member who is unable to serve for any reason shall be replaced by another Board member, except in cases involving a death.

(PRC Reg. Sec. VI.C., modified.)

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i). (PRC Reg. Sec. VII.C.4., modified)
2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODP staff no later than 14 days before the

Section II.H.

scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. ODPa staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODPa staff shall notify both the complainant and the subject officer of the Hearing Panel's decision. (PRC Reg. Sec. VII.C.1.)

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date. Procedural issues can include, without limitation, expiration of the 1-year limitation period under Government Code section 3304, or whether an officer should testify. (PRC Reg. Sec. VII.C.2.)

I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director and Investigator may be present during the entirety of the hearing. The Duty Command Officer may be present for all but the Board members' deliberations. (PRC Reg. VII.D.1.) The complainant and the subject officer shall be present to answer questions from Board members, subject to state law. (Art. XVIII, Sec. 125(18)(i).) An attorney or other representative for the complainant or the subject officer may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for ensuring their representative's presence at the hearing. (PRC Reg. VII.D.2.)
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative. (PRC Reg. Sec. VII.D.3.)
3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained. (PRC Reg. Sec. VII.D.4.)
4. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous. (PRC Reg. Sec. VII.D.5.)

Section II.I.

5. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing. (PRC Reg. Sec. VI.A.)
6. Taking testimony at the hearing.
 - a. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officers and their representatives may be present during their testimony. The complainant or their representative may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) The complainant or the complainant's representative may ask questions; b) Board members may ask questions; c) the subject officer or his or her representative may ask questions; d) Board members may ask follow-up questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement. (PRC Reg. Sec. VII.D.7., modified)
 - b. The subject officers and any witness officers will be called into the hearing room to testify separately. The complainant and their representative may be present during their testimony. Subject officer representatives may be present for all testimony. Each subject officer may make a statement or choose to rely on the interview statements. Questioning will then proceed as follows: 1. Subject officers' representatives may ask questions. 2. Board members may ask questions. The officer may then be questioned by 2 Board members unless the officer waives this requirement. 3. Complainant or their representatives may ask questions. 4. Board members may ask follow up questions. After questioning is completed, each subject officer will have up to 15 minutes to provide a summary of their case and a closing statement.
 - c. All except Board members and staff will then be excused from the hearing room.
7. Subpoenas. The Board may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)
8. Maintaining order. No person at hearing shall become subject of undue harassment, personal attack, or invective. If the chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient. (PRC Reg. Sec. VII.D.10.)

Section II.J.

J. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be taken in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, they may be called and examined as if under cross-examination.;
 - b. Oral evidence shall be taken only under oath.
 - c. The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d. The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e. The Chairperson will conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPa staff will answer Board members' questions on the evidence, points of law, and procedure.
 - f. The City Attorney's opinion will be sought whenever the interpretation of a City Ordinance or the City Charter is contested and pivotal to the case, or when a case raises substantial legal issues of first impression.
 - g. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h. If either party requests that the hearing be continued to consider motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

(PRC Reg. Sec. VII.E.)

Section II.K.

K. Deliberation and Findings

1. Deliberation. After the hearing has concluded, the Hearing Panel deliberates outside the presence of everyone except ODPA staff. The Hearing Panel shall not consider any information not received in the hearing packet or during the hearing. (PRC Reg. Sec. VIII.A.)
2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(j).) All action of the Hearing Panel shall be by majority vote of those Board members present. (PRC Reg. Sec. VIII.B.)
3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing (Art. XVIII, Sec. 125(18)(j)), unless extended as provided under Section II.M.2. (Art. XVIII, Sec. 125(18)(m).)
4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision. (Art. XVIII, Sec. 125(18)(j).)
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning (PRC Reg. Sec. VIII.B.), unless the dissenter agrees with the Director's finding and recommendation. (NEW)

L. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.E.5.a. above, or from the Hearing Panel under Section II.K.3.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision to the Director and the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.

Section II.L.

3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.

(Art. XVIII, Sec. 125(18)(k).)

4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.M.2. (Art. XVIII, Sec. 125(18)(m).)

M. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec.(125)(18)(d).)
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days. (Art. XVIII, Sec.125(18)(m).)

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT.**A. Application**

1. This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code. (Art. XVIII, Sec. 125(19)(d).)
2. If a finding is "not sustained," "unfounded," or "exonerated," the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief's determination to the Director. (Art. XVIII, Sec. 125(19)(e).) The

Section III.B.

Director, if appropriate, may request to review all files, transcripts, and records related to the complaint. (Art. XVIII, Sec. 125(19)(e)(1).)

3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene a Review Panel to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.

(Art. XVIII, Sec. 125(19)(e)(1); Review Panel added.)

4. If the Director decides that the Board will conduct a review, ODPa staff shall secure a Review Panel of three Board members to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Review Panel members and ODPa staff will be present. A Duty Command Officer may be present.
 - b. The Review Panel shall evaluate the investigative record to determine whether the complainant's objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief's decision is not supported by the evidence in the record.
 - c. All action of the Review Panel must be by majority vote.

(NEW. Details not in Charter and no counterpart in PRC procedures.)

5. The Review Panel must, within 45 days of the date the Director accepts an objection:
 - a. Dismiss the complainant's objection; or
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Review Panel finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.

(Art. XVIII, Secs. 125(19)(f), 125(19)(g).)

6. Within 15 days of receiving a Review Panel's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections. (Art. XVIII, Sec. 125(19)(g).)

Section III.B.

7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief, and send a final determination with a written explanation to the Director, the Board, and the Chief. (Art. XVIII, Sec. 125(19)(g).)
8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec. 125(19)(i).

IV. INFORMAL COMPLAINTS

- A.** An informal complaint is a communication from a member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features, and alleges any act of misconduct pertaining to the manner in which the officer performs their duties. Such complaints shall be treated confidentially.
- B.** ODPA staff shall contact the complainant to explain the policy complaint and formal individual complaint processes.
- C.** Informal complaints will be agendaized for a closed session at the next regular Board meeting and distributed to the Board in closed session, with notice to the named officer(s).
- D.** The Board shall consider the informal complaint and recommend what additional action, if any, the Director of Police Accountability should take.

(Adopted by the PRC Jan. 8, 2020.)

V. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A.** These Interim Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPA staff shall furnish them to any person requesting a copy.
- B.** Amendments to these Interim Regulations require a majority vote of the Board and ratification by the City Council.

(PRC Reg. Sec. IX, modified.)

**Police Accountability Board
Office of the Director of Police Accountability**

**Interim Regulations for Handling Complaints Against Sworn Officers of the
Police Department under City Charter Article XVIII, Section 125 (Measure II)**

Preamble

These interim regulations for handling complaints against sworn members of the Berkeley Police Department are issued in accordance with an amendment to the Charter of the City of Berkeley adding Article XVIII, Section 125, approved by the voters of the City as Measure II on November 3, 2020. Measure II establishes a Police Accountability Board (Board) and a Director of Police Accountability (Director), and is intended to promote public trust by providing for prompt, impartial and fair investigations of complaints by members of the public against sworn employees of the Berkeley Police Department. The Board and Director replace the Police Review Commission (PRC), established by Ordinance No. 4,644-N.S.

Under Resolution No. 69,531 N.S., the City Council directed that the core functions of the Board and Director be implemented by July 1, 2021. Under Article XVIII, Section 125(13)(c) of the City Charter, the Board must establish rules of procedure governing the conduct of its business, which are subject to ratification by the City Council. In order for the Director to accept and investigate complaints filed against sworn members of the Police Department beginning July 1, 2021, interim regulations are needed until such time as the Board adopts permanent regulations and the Council ratifies them.

These interim regulations reflect the procedures for handling complaints against police officers as set forth in Measure II as well as the provisions of the PRC Regulations for Handling Complaints Against Members of the Police Department (effective April 4, 2018) that are not in conflict with Measure II. They shall apply to all complaints that were pending with the PRC as of July 1, 2021, and all complaints filed with the Office of the Director of Police Accountability on and after July 1, 2021. Applicability of permanent regulations to these pending cases will be determined later.

I. GENERAL PROVISIONS

A. Definitions

The following definitions shall apply in these interim regulations:

1. Administrative Closure: Closure of a complaint before a confidential personnel hearing is held.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct.
3. Allegation: An assertion of specific police misconduct.

Section I.A.

4. Board Member: A member of the Police Accountability Board appointed by the City Council.
5. Chief; Police Chief: Chief of the Berkeley Police Department.
6. City's discovery of alleged misconduct: The City's discovery by a person authorized to initiate an investigation of an alleged act, omission, or other misconduct.
7. Complaint: A declaration that alleges misconduct by a sworn employee of the Berkeley Police Department.
8. Complainant: An aggrieved party who files a complaint with the Office of the Director of Police Accountability.
9. Days: Means calendar days unless otherwise specified.
10. Director of Police Accountability (Director): The individual appointed by the City Council to investigate complaints and carry out the operations of the Police Accountability Board and the Office of the Director of Police Accountability (ODPA).
11. Duty Command Officer (DCO): A sworn employee of the Berkeley Police Department designated by the Chief of Police to appear at a hearing or review proceeding to answer questions clarifying BPD policy.
12. Hearing Panel: Three Board members impaneled to conduct a confidential personnel hearing.
13. Investigator: Employee of the Office of Director of Police Accountability whose primary role is to investigate complaints filed with the ODPA.
14. Mediation: A process of attempting to reach a mutually agreeable resolution, facilitated by a trained, neutral third party.
15. Police Accountability Board (Board): The body established by City Charter Article XVIII, Section 125.
16. Review Panel: Three Board members impaneled to conduct a review of a BPD investigative record.
17. Subject Officer: A sworn employee of the Berkeley Police Department against whom a complaint is filed.
18. Witness Officer: A sworn employee of the Berkeley Police Department who has personal knowledge of events described in a complaint, but is not a subject officer.

(PRC Reg. Sec. II.B., modified.)

B. Confidentiality

1. Importance. In their capacity as Board members, each Board member will have access to confidential data or information related to Berkeley

Section I.B.

Police Department personnel. ODPa staff will likewise have access to such confidential information. It is vitally important to the integrity of the complaint process under Measure II that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law. (PRC Reg. Preamble.)

2. Duty. Board members, ODPa staff, and their agents and representatives shall protect and maintain the confidentiality of any records and information they receive consistent with state or federal law governing such records or information. (Art. XVIII, Sec. 125(20)(b).) In particular, such persons shall not violate the rights of sworn officers to confidentiality of personnel file information under Penal Code secs. 832.7, 832.8 (3(d)), and state law. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission, and the obligation to maintain confidentiality applies, regardless of how the information is communicated. (PRC Reg. Sec. IV.A.)
3. Closed hearings; effect on public records. All confidential personnel hearings and closed session meetings relating to the investigation of complaints against sworn officers will be closed to the public. Records of these investigations are confidential and will not be disclosed to members of the public. However, any public records included in, or attached to, investigative reports shall remain public records. (PRC Reg. Sec. 1.A.)
4. Handling confidential information. For any proceeding in which hard copies of confidential information are distributed to Board members, each Board member shall return all confidential material to ODPa staff at the close of the proceedings, or as soon thereafter as practicable. (PRC Reg. Sec. IV.B.2.) For any proceeding in which electronic copies of confidential information are distributed to Board members, each Board member shall delete all confidential information as soon as the information is no longer needed, and promptly inform ODPa staff that they have done so. (NEW)
5. Effect of violation. A Board member who violates confidentiality before or during a confidential personnel hearing shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of confidentiality for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)

Section II.A.

II. COMPLAINTS FILED WITH THE OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY**A. Initiating a complaint**

1. Complaint form. A complaint alleging misconduct by one or more sworn officers of the Berkeley Police Department must be filed on a form provided by the Office of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(a)(1); PRC Reg. Secs. I.B.7, II.A.1.) Complaint packets must include information about the difference between mediation and an investigation; language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint; and conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board shall be given under oath." Complaints shall be signed by the complainant, except for complaints initiated by the Board. (PRC Reg. Sec. II.A.1.)
2. Who may file. Only an "aggrieved party" may file a complaint, except that if no complainant is available to initiate a complaint, and in any case involving a death, 5 Board members may vote to authorize an investigation or take other such action they deem appropriate. (PRC Reg. Secs. I.B.2., II. A.3.)
3. Filing period. A complaint must be filed within 90 days of the alleged misconduct, except that the 90 days shall be tolled if:
 - a) the complainant is incapacitated or otherwise prevented from filing a complaint; or
 - b) the complainant is the subject of a criminal proceeding related to the subject matter of the complaint, in which case the time for the complainant to file is tolled until the criminal matter has been adjudicated or dismissed.(PRC Reg. Sec. II.A.2.)
4. Late-filed complaints. Complaints filed between 91 and 180 days of the alleged misconduct must be reviewed by the Police Accountability Board in a closed session meeting. Six Board members must find good cause for the late filing, by clear and convincing evidence, to accept the complaint. A complaint filed after 180 days after the alleged misconduct will not be accepted. (PRC Reg. Sec. II.A.2.a)
5. Sufficiency of complaint. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory, shall be submitted by the Director to the Board for administrative closure at the next regular meeting that allows the complainant to be provided at least

Section II.A.

5 days' notice. If a majority of Board members agree, the case will be closed; if the Board rejects the Director's recommendation, the Notice of Complaint and Allegations must be issued within 10 days, unless the complainant has elected mediation. This section does not apply to complaints initiated by the Board under Section II.A.2. (PRC Reg. Sec. II.A.4.a.)

6. Right to representation. Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but a representative is not required. If the ODPA is notified that a complainant or subject officer is represented, then the ODPA shall thereafter send copies of any materials or notices provided to the complainant or subject officer(s) to their representatives. (PRC Reg. Sec. II.A.5.)

B. Mediation

1. Election

- a. ODPA staff shall provide every complainant with information about the option to select mediation, and make every effort to ensure complainants understand this option. The complainant may elect to enter into mediation up until they are notified that the Director has submitted findings and recommendations as set forth in Section II. G.1 below.
- b. If the complainant elects mediation, ODPA staff shall notify the subject officer within 7 days that the complainant has opted for mediation, and include a copy of the complaint if not previously provided. This notice shall also inform the subject officer of their right to agree to or reject mediation within 10 days.
- c. A subject officer who agrees to mediation must agree to toll the City's 240-day disciplinary deadline if the officer later withdraws from mediation before mediation session begins.
- d. Once both parties agree to mediation, the complainant no longer has the option to have their complaint investigated and to proceed to a confidential personnel hearing, unless the subject officer withdraws from mediation.

2. Completion

After receiving notice from the mediator that a mediation has concluded, ODPA staff shall close the case and inform the Board.

(Art. XVIII, Sec. 125(18)(a)(2); PRC Reg. Sec. II.B., modified)

C. Complaint investigation

1. Time for completion. Complaint investigations must begin immediately, proceed expeditiously, and be completed within 120 days of the City's

Section II.C.

discovery of the alleged misconduct, unless a Government Code sec. 3304(d) applies (Art. XVIII, Sec. 125(18)(e)), except:

- a. If the complainant or subject officer is the subject of criminal proceedings related to the complaint, the ODPa shall not commence an investigation until the criminal matter is adjudicated or dismissed. All time limits for processing the complaint shall be tolled during the pendency of the proceedings. As soon as practicable after the filing of a complaint, the ODPa shall contact the District Attorney's Office to determine the status and anticipated resolution of the criminal proceeding (PRC Reg. Sec. III.C.3.).
 - b. A longer time period for the investigation, not to exceed 195 days, may be agreed upon as provided under Section II.O.
2. Transmittal of complaint. Complaints accepted by the Director shall be sent by hard copy or electronically to the Chief of Police, BPD Internal Affairs, Board members, and each sworn officer against whom the complaint is filed. (Art. XVIII, Sec. 125(18)(g).)
 3. Notice of Complaint and Allegations. Within 28 days of a complaint filing or the acceptance of a late-filed complaint, the ODPa shall prepare and send a Notice of Complaint and Allegations by hard copy or electronically to the complainant, the Chief of Police or BPD Internal Affairs, and each identified subject officer. The Notice of Complaint and Allegations need not be sent if the complaint requests mediation, or the Director recommends administrative closure. (PRC Reg. Sec. III.B.1, modified.)
 4. Sworn officers' schedules. The Chief of Police or their designee shall provide ODPa staff with the schedules of all sworn employees of the Police Department. (PRC Reg. Sec. VII.A.1.)
 5. Nature of investigation. The investigation shall consist of conducting recorded interviews with the complainant, subject officers, witness officers, and civilian witnesses; and collecting relevant documentary evidence, including, but not limited to, photographic, audio, and video evidence. (PRC Reg. Sec. III.C.1.)
 6. Production, subpoena, and preservation of records. The Berkeley Police Department and all other City departments must produce records and information requested by the Office of the Director of Police Accountability and Board in connection with investigations, without redaction or limitation, unless required by state or federal law. (Art. XVIII, Sec. 125(20)(a).)
 - a. The Director may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)

Section II.C.

- b. Whenever a PRC investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:
 - I. The original Communications Center tapes relevant to the complaint.
 - II. All police reports, records, and documentation, including body-worn camera video.
 - III. Names, addresses, telephone numbers, and statements of all witnesses. (PRC Reg. Sec. II.E.2.)
7. Interview notices. Subject officers and witness officers must appear for interviews related to complaints. (Art. XVIII, Sec. 125(20)(c); PRC Reg. Exhibit A.) ODPa staff shall notify subject and witness officers at least 9 days before a scheduled interview date by hard copy or, when feasible, email. An officer who is unavailable for an interview shall contact the Director or the Investigator immediately to state the reason for their unavailability. (PRC Reg. Sec. III.D.2.)
8. Conduct of interviews, exercise of Constitutional rights. Interviews should be conducted such that they produce a minimum of inconvenience and embarrassment to all parties. Subject and witness officer interviews shall be conducted in compliance with the Public Safety Officers' Procedural Bill of Rights Act¹ ("POBRA"). When possible, ODPa staff shall avoid contacting BPD employees at home, and avoid contacting others at their place of employment. (PRC Reg. Sec. III.D.1.) While all officers have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the ODPa regarding conduct and observations that arise in the course of their employment, and are subject to discipline for failure to respond. The exercise of any constitutional rights shall not be considered by the Board in its disposition of a complaint (PRC Reg. Sec. III.D.3.)

D. Pre-hearing complaint disposition.

1. Administrative Closure

a. Grounds

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- i. Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- ii. Request for closure by complainant.

¹ Government Code Sec. 3300 et seq.

Section II.D.1.

- iii. Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.
- iv. Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means.
- v. Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- vi. Failure of ODPa staff to timely complete its investigation, as set forth in Section II.C.1.

b. Procedure

A complaint may be administratively closed by a majority vote of Board members during closed session at a meeting. The complainant shall be notified of the opportunity to address the Board during the meeting no later than 7 days before the meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

c. Effect of Administrative Closure

Administrative Closure does not constitute a judgment on the merits of the complaint.

(PRC Reg. Sec. V.A.)

2. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before the Director submits their findings and recommendations to the Board under Section II.G.1. If the subject officer sends a "no contest" response, the Director shall so notify the Board when findings and recommendations are sent to them. (PRC Reg. Sec. V.B., modified)

E. Initial submission and consideration of investigative findings and recommendations.

- 1. Time to submit. Within 60 days of completing an investigation, the Director must submit and present investigative findings and recommendations to the Board in a closed session and convene a

Section II.E.

confidential personnel hearing if the Board requests it. (Art. XVIII, Sec. 125(18)(i).) This deadline may be extended as provided under Section II.O.

2. Standard of proof. In determining whether a sworn officer has committed misconduct, the standard is “preponderance of the evidence.” (Art. XVIII, Sec. 125(18)(c).)
3. Categories of Findings
 - a. If the evidence shows that the alleged act did not occur, the finding shall be “Unfounded.”
 - b. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be “Not Sustained.”
 - c. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be “Exonerated.”
 - d. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be “Sustained.”(PRC Regs., Sec. VIII.B.)
4. Recommendation of discipline and level of discipline. If the Director recommends a “sustained” finding on any allegation of misconduct, a recommendation of whether discipline is warranted must also be included. For those cases where an allegation of misconduct, if sustained, would involve any of the classes of conduct described in Penal Code 832.7, as enacted pursuant to Senate Bill 1421, the Director must include a recommendation regarding the level of discipline. (Art. XVIII, Sec. 125(18)(i).)
5. Board decision. Upon reviewing the Director’s investigative findings, the Board must then decide whether to hold a confidential personnel hearing.
 - a. If the Board agrees with the Director on all findings and recommendations, (i.e., no need for hearing), the Director shall send the findings and recommendations to the Chief of Police. The findings and recommendations must be sent within 195 days of the City’s discovery of alleged misconduct, except if extended as provided under Section II.M.2.
 - b. If the Board decides that further fact-finding is needed, the Board may vote to hold a confidential personnel hearing.(Art. XVIII, Sec. 125(18)(i).)

Section II.F.

F. Scheduling a hearing, assigning Hearing Panel members, distributing hearing packet.

1. Time. If the Board decides to move forward with a confidential personnel hearing, it must be held within 60 days of the date the ODPa has completed its investigation. (Art. XVIII, Sec. 125(18)(i).)
2. Scheduling hearing. ODPa staff shall determine the availability of subject officers before setting a hearing date and time. Hearings are not to be scheduled on an officer's day off or during vacation or other leave, unless two or more subject officers on same complaint do not share a common day on duty. (PRC Reg. Sec. VII.A.1.)
3. Hearing Panel. ODPa staff shall secure a Hearing Panel to conduct the confidential personnel hearing. A Hearing Panel shall consist of three Board members, except that in death cases and any cases in which six Board members vote to sit as a whole, the entire Board, with a minimum of six Board members, will constitute the Hearing Panel. (PRC Reg. Sec. VI.A.)
4. Obligation to serve; unavailability. Board members must serve on roughly an equal number of Hearing Panels each year. (PRC Reg. Sec. VI.B.1.) If a Hearing Panel member becomes unavailable, they shall be replaced by another Board member, and notice of substitution shall issue as soon as possible. If substituted within 7 days of a hearing, the subject officer retains the right to challenge the Board member for cause. The notice of challenge of a substituted Board member must be made at least 3 business days before convening the hearing and constitutes good cause for continuing the hearing. (PRC Reg. Sec. VI.B.2.)
5. Effect of continuance. If a hearing is rescheduled due to unavailability of the complainant, a subject officer, or either party's attorney, another Hearing Panel may be assigned. However, the Hearing Panel composition shall not change after the hearing has been convened. (PRC Reg. Sec. VI.B.3)
6. Notice of hearing. The ODPa must issue a written hearing notice at least 14 days before the hearing to all parties, witnesses, representatives, Hearing Panel members, and the Police Chief. This notice must include the time, date, and location of the hearing, and the composition of the Hearing Panel. (PRC Reg. Sec. VII. A.2)
7. Hearing Packet. The ODPa shall provide the Hearing Panel with a Hearing Packet, which shall contain the Director's findings and recommendations, and all evidence and documentation obtained or produced during the investigation (Art. XVIII, Sec. 125(18)(i)), at least 14 days before the hearing date. The Hearing Packet shall also be sent to the subject officer(s), any representatives, the Duty Command

Section II.F.

Officer, and the Police Chief. The complainant shall receive a Hearing Packet without documents containing confidential investigatory materials or findings and recommendations. Witness officers and civilian witnesses shall receive a copy of only their interview transcript. (PRC Reg. Sec. VII.B., modified.)

G. Board member impartiality; recusals; challenges

1. Conduct.
 - a. Board members shall maintain basic standards of fair play and impartiality, and avoid bias and the appearance of bias. In confidential personnel hearings, they shall hear all viewpoints. (Art. XVIII, Sec. 125(8)(b).)
 - b. No member of a Hearing Panel shall publicly state an opinion regarding policies directly related to the subject matter of a pending complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint. (PRC Reg. Sec. VI.D.2.)
 - c. A Board member who violates Section G.1.b above, before or during a confidential personnel hearing, shall be automatically disqualified from further participation in the hearing. Additionally, a Board member or the Director may agendize an alleged violation of that Section for discussion and action at a regular meeting of the Board, which may take adverse action upon a two-thirds vote of those present. Such adverse action may include: notice of the violation to the Board member's nominating Councilmember or to the City Council, or a prohibition from participating in future confidential personnel hearings for the remainder of the Board member's term. (PRC Reg. VI.D.3.)
2. Recusal; disclosure of ex parte contacts. Board members recused for a conflict of interest must do so immediately when an item is taken up. Board members shall verbally disclose all ex parte contacts concerning the subject of the hearing and shall submit a written report of such contacts before the hearing begins. Ex parte contacts include any contact between a Board member and any party involved in the complaint before the public hearing. (Art. XVIII, Sec. 125(8)(b)(2).)
3. Challenges to Hearing Panel member
 - a. Basis for Challenge. A Board member who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:

Section II.G.

- i. a familial relationship or close friendship with the complainant or subject officer;
 - ii. witnessing events material to the inquiry;
 - iii. a financial interest in the outcome of the inquiry;
 - iv. a bias for or against the complainant or subject officer.
- b. Procedure
- i. No later than 7 days of the date of mailing of the Hearing Packet, which includes the names of the Board members constituting the Hearing Panel, the complainant or the subject officer(s) may file a written challenge for cause to any Board member. Such challenge must specify the nature of the conflict of interest.
 - ii. The Director shall contact the challenged Board member as soon as possible after receipt of the challenge.
 - iii. If the Board member agrees to recuse themselves, the Director shall ask another Board member to serve.
 - iv. If the Board member disagrees that the challenge is for good cause, they shall state their reasons in writing, and the Director shall make this determination. If the Director finds good cause for the challenge, the Director shall inform the challenged Board member and ask another to serve.
 - v. If the Director rejects a challenge to a Board member and the Board member serves, the written challenge and the Board member's written response shall be made part of the hearing record.
- c. Replacement of Board member. Any Board member who is unable to serve for any reason shall be replaced by another Board member, except in cases involving a death.
- (PRC Reg. Sec. VI.C., modified.)

Section II.H.

H. Continuance requests; other pre-hearing motions

1. Pre-hearing continuance requests. Requests to continue a hearing must be made to the Director as soon as the cause for continuance arises. The Director may grant the request only for good cause. Factors in determining good cause include: reason for request, timeliness, prejudice to the other party, filing date of complaint, and previous continuance requests. A request for a continuance made within 3 business days of the hearing date shall not be granted unless the requester cannot attend due to a personal emergency or can demonstrate substantial prejudice if denied. A continuance granted at a subject officer's request shall toll any disciplinary time period under the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association and the 60-day time limitation under Article XVIII, Section 125(18)(i). (PRC Reg. Sec. VII.C.4., modified)
2. Newly Discovered Evidence or Witnesses. The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the ODP staff no later than 14 days before the scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. ODP staff shall inform the Hearing Panel of the newly discovered evidence or witnesses as soon as possible.

The Hearing Panel shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and ODP staff shall notify both the complainant and the subject officer of the Hearing Panel's decision. (PRC Reg. Sec. VII.C.1.)

3. Procedural issues. The complainant and subject officer shall raise any procedural issues by submitting them in writing to the Director at least 7 days before the hearing date. Procedural issues can include, without limitation, expiration of the 1-year limitation period under Government Code section 3304, or whether an officer should testify. (PRC Reg. Sec. VII.C.2.)

I. Hearing procedures

1. Who may or must be present at hearing. Hearings are closed to the public. The Director and Investigator may be present during the entirety of the hearing. The Duty Command Officer may be present for all but the Board members' deliberations. (PRC Reg. VII.D.1.) The complainant and the subject officer shall be present to answer questions from Board members, subject to state law. (Art. XVIII, Sec. 125(18)(i).) An attorney or other representative for the complainant or the subject officer may participate in the hearing, but a representative is not required, and the complainant or subject officer is responsible for

Section II.I.

- ensuring their representative's presence at the hearing. (PRC Reg. VII.D.2.)
2. Continuances. If good cause is shown, the Hearing Panel may continue the hearing due to the unanticipated unavailability of a witness or a representative. (PRC Reg. Sec. VII.D.3.)
 3. Party's failure to appear. Absent good cause, if the complainant fails to appear within 30 minutes of the scheduled hearing time, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes of the scheduled hearing time, the hearing will proceed and the allegations may be sustained. (PRC Reg. Sec. VII.D.4.)
 4. Lack of full Hearing Panel. If two Hearing Panel members are present but a third fails to appear within 30 minutes of the scheduled hearing time, the hearing will be continued until a third Hearing Panel member is seated, unless all parties agree to proceed with two Hearing Panel members, in which case all findings must be unanimous. (PRC Reg. Sec. VII.D.5.)
 5. Chair of panel. The Hearing Panel shall select one member to serve as the Chairperson of the hearing. (PRC Reg. Sec. VI.A.)
 6. Taking testimony at the hearing.
 - a. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officers and their representatives may be present during their testimony. The complainant or their representative may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) Board members may ask questions; b) the subject officer or his or her representative may ask questions; c) Board members may ask follow-up questions. After questioning is completed, the complainant or their representative will have up to 15 minutes to provide a summary of their case and a closing statement. (PRC Reg. Sec. VII.D.7.)
 - b. The complainant and their representative, and civilian witnesses will each be excused from the hearing room after their testimony or representation is completed. (PRC Reg. Sec. VII.D.8.)
 - c. The subject officers and any witness officers will be called into the hearing room to testify separately. Subject officer representatives may be present for all testimony. Each subject officer may make a statement or choose to rely on the interview statements. Each subject officer will be questioned by their representative first, after which the officer may be questioned by 2 Board members, unless the officer waives this requirement. After questioning is completed,

Section II.I.

each subject officer will have up to 15 minutes to provide a summary of their case and a closing statement.

- d. The subject officers and witness officers will each be excused from the hearing room after their testimony is completed. (PRC Reg. Sec. VII.D.9.)
7. Subpoenas. The Board may issue subpoenas to compel the production of books, papers, and documents as needed to carry out their duties and functions. (Art. XVIII, Sec. 125(20)(c).)
8. Maintaining order. No person at hearing shall become subject of undue harassment, personal attack, or invective. If the chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The burden shall be upon the BPD employee to establish to the City Manager's satisfaction that their reason for leaving was sufficient. (PRC Reg. Sec. VII.D.10.)

J. Evidence

1. General. The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Procedure. Evidence shall be taken in accordance with the following provisions:
 - a. The complainant and subject officers shall have the right to testify and refer to any relevant evidence that has been entered into the record. If the complainant or subject officers do not testify on their own behalf, they may be called and examined as if under cross-examination.;
 - b. Oral evidence shall be taken only under oath.
 - c. The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d. The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e. The Chairperson will conduct the hearing subject to being overruled by a majority of the Hearing Panel members. Hearing Panel members shall be primarily responsible for obtaining testimony. ODPA staff will answer Board members' questions on the evidence, points of law, and procedure.
 - f. The City Attorney's opinion will be sought whenever the interpretation of a City Ordinance or the City Charter is contested

Section II.K.

and pivotal to the case, or when a case raises substantial legal issues of first impression.

- g. If the Hearing Panel needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h. If either party requests that the hearing be continued to consider motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
3. Judicial disposition. Either party may present to the Hearing Panel evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the Hearing Panel shall accept those findings as true.

(PRC Reg. Sec. VII.E.)

K. Deliberation and Findings

- 1. Deliberation. After the hearing has concluded, the Hearing Panel deliberates outside the presence of everyone except ODPa staff. The Hearing Panel shall not consider any information not received in the hearing packet or during the hearing. (PRC Reg. Sec. VIII.A.)
- 2. Vote. The Hearing Panel shall affirm, modify, or reject the findings and recommendation of the Director of Police Accountability. (Art. XVIII, Sec. 125(18)(j).) All action of the Hearing Panel shall be by majority vote of those Board members present. (PRC Reg. Sec. VIII.B.)
- 3. Transmittal of findings. The Hearing Panel's decision must be submitted in writing to the Chief of Police within 15 days of the hearing (Art. XVIII, Sec. 125(18)(j)), unless extended as provided under Section II.M.2. (Art. XVIII, Sec. 125(18)(m).)
- 4. Content of findings.
 - a. If the Hearing Panel agrees with the findings and recommendations of the Director, no explanation is required.
 - b. If the Hearing Panel modifies or rejects a finding or recommendation of the Director, the Hearing Panel shall provide an explanation of its decision. (Art. XVIII, Sec. 125(18)(j).)
 - c. Any Hearing Panel member dissenting from a finding or recommendation of the majority shall submit a separate written explanation of their reasoning (PRC Reg. Sec. VIII.B.), unless the dissenter agrees with the Director's finding and recommendation.
(NEW)

Section II.L.

L. Findings of Chief of Police; tentative decision; final determination by Chief or City Manager.

1. Chief's decision. Within 10 days of receiving the findings and recommendations from the Director under Section II.E.5.a. above, or from the Hearing Panel under Section II.K.3.b. above, the Chief of Police shall take one of the following actions
 - a. Issue a final decision if the Chief agrees with the Director or with the Hearing Panel.
 - b. Submit a tentative decision to the Director and the Police Accountability Board.
2. Director's request to review tentative decision. If the Chief submits a tentative decision, the Director may request, within 10 days of receiving the decision, that the Chief submit the decision to the City Manager. If the Director does not make the request, the Chief's decision becomes final.
3. City Manager's final decision. Within 25 days of receiving the submittal from the Chief, the City Manager or their designee shall submit a final determination, with a written explanation, to the Director, the Board, and the Chief.

(Art. XVIII, Sec. 125(18)(k).)

4. Extension of time. The deadlines in this Section II.L may be extended as provided under Section II.M.2. (Art. XVIII, Sec. 125(18)(m).)

M. Time limits; extensions.

1. Overall limit. The time limit for investigations and notification of discipline is 240 days from the date of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec.(125)(18)(d).)
2. Other time limits. The deadlines for the Director to complete an investigation, present investigative findings to the Board, submit findings and recommendations to the Chief of Police, or request that the Chief submit a tentative decision to the City Manager; as well as deadlines for the Chief to act on findings and recommendations from the Director or Hearing Panel, and for the City Manager or their designee to make a final decision, are advisory, and may be adjusted by the Director after consulting with the City Manager and Chief, to ensure that all investigations and notifications are completed within 240 days. The timeline for completing an investigation shall not be extended beyond 195 days. (Art. XVIII, Sec.125(18)(m).)

Section III.

III. CONTESTING FINDINGS OF DECISION WHEN COMPLAINT FILED WITH THE POLICE DEPARTMENT.**A. Application**

1. This Section III applies to complaints that a member of the public files with the Police Department only.

B. Procedure

1. When the Internal Affairs division of the Police Department has completed its investigation of a complaint, the Chief of Police shall issue a letter of disposition to the subject officer and the Director. The Chief shall also issue a letter of disposition to the complainant that complies with the Penal Code. (Art. XVIII, Sec. 125(19)(d).)
2. If a finding is “not sustained,” “unfounded,” or “exonerated,” the complainant has 20 days from the date notice is sent (by mail or other reasonable means that the complainant agrees to), to contest the Chief’s determination to the Director. (Art. XVIII, Sec. 125(19)(e).) The Director, if appropriate, may request to review all files, transcripts, and records related to the complaint. (Art. XVIII, Sec. 125(19)(e)(1).)
3. Within 15 days of receiving an objection from a complainant or a notice from the Chief that a complainant has objected, the Director, in their discretion, may notify the complainant that either:
 - a. The objection is accepted and the Board will convene a Review Panel to conduct a review based on the investigative record provided by the Department; or
 - b. The objection is dismissed. In such cases, the Director must notify the Board of such dismissal in writing within 30 days of notifying the complainant of the dismissal.
(Art. XVIII, Sec. 125(19)(e)(1); Review Panel added.)
4. If the Director decides that the Board will conduct a review, ODPA staff shall secure a Review Panel of three Board members to conduct a review of the investigative record at a closed session meeting.
 - a. At the meeting, only Review Panel members and ODPA staff will be present. A Duty Command Officer may be present.
 - b. The Review Panel shall evaluate the investigative record to determine whether the complainant’s objection has merit, either because the Department failed to proceed in a manner required by state and federal law, or because the Chief’s decision is not supported by the evidence in the record.
 - c. All action of the Review Panel must be by majority vote.

Section III.

(NEW. Details not in Charter and no counterpart in PRC procedures.)

5. The Review Panel must, within 45 days of the date the Director accepts an objection:
 - a. Dismiss the complainant's objection; or
 - b. Issue a report agreeing with the Chief's determination; or
 - c. Issue a report disagreeing with the Chief's determination if the Review Panel finds that: 1) the Department failed to proceed in a manner required by state and federal law; or 2) the Chief's decision is not supported by the evidence in the record. The Director shall submit this report to the Chief and the City Manager.

(Art. XVIII, Secs. 125(19)(f), 125(19)(g).)
6. Within 15 days of receiving a Review Panel's recommendation disagreeing with the Chief, the Chief may prepare a report for the City Manager addressing any concerns or objections. (Art. XVIII, Sec. 125(19)(g).)
7. Within 25 days of receiving the Chief's report, the City Manager or their designee shall consider the reports of both the Board and the Chief, and send a final determination with a written explanation to the Director, the Board, and the Chief. (Art. XVIII, Sec. 125(19)(g).)
8. The deadlines in this Section III are advisory, and may be adjusted by mutual agreement between the City Manager, the Director, and the Chief, to ensure that all investigations are completed such that the time limit for investigations and notification of discipline occurs within 240 days, and investigation of all complaints filed with the Police Department are completed within 120 days of the City's discovery of alleged misconduct, unless a Government Code section 3304(d) exception applies. (Art. XVIII, Sec. 125(19)(i).)

IV. INFORMAL COMPLAINTS

- A.** An informal complaint is a communication from a member of the public, not on a complaint form, that identifies an officer or officers by name, badge number, or other identifying features, and alleges any act of misconduct pertaining to the manner in which the officer performs their duties. Such complaints shall be treated confidentially.
- B.** ODPA staff shall contact the complainant to explain the policy complaint and formal individual complaint processes.
- C.** Informal complaints will be agendaized for a closed session at the next regular Board meeting and distributed to the Board in closed session, with notice to the named officer(s).

Section IV.

- D. The Board shall consider the informal complaint and recommend what additional action, if any, the Director of Police Accountability should take.

(Adopted by the PRC Jan. 8, 2020.)

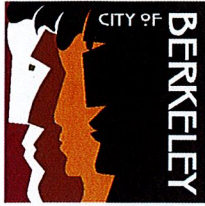
V. AVAILABILITY AND AMENDMENT OF REGULATIONS

- A. These Interim Regulations shall be posted on the website of the Office of the Director of Police Accountability, and ODPA staff shall furnish them to any person requesting a copy.

- B. Amendments to these Interim Regulations require a majority vote of the Board and ratification by the City Council.

(PRC Reg. Sec. IX, modified.)

ATTACHMENT 5



OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

July 20, 2021

To: Police Accountability Board Regulations Subcommittee,
Lt. Dan Montgomery (BPD), Sgt. Scott Castle (BPA)

From: Katherine J. Lee, ^{KA} Interim Director of Police Accountability

Re: Draft Interim Regulations for Handling Complaints Filed with the PAB/ODPA
Against Sworn Members of the Police Department

Attached for your review are draft Interim Regulations governing the handling of complaints filed with the Police Accountability Board / Office of Director of Police Accountability. These draft regulations are intended to allow the ODPA and PAB to perform investigations, hold hearings, and conduct reviews, pending adoption of permanent regulations.

These draft regulations reflect a merger of the provisions of City Charter Article XVIII, Section 125 (aka Measure II) and the Police Review Commission (PRC) Regulations for Handling Complaints Against Members of the Police Department (latest edition, dated April 4, 2018) that do not conflict with Measure II. I've included a copy of Charter Article XVIII, and an annotated copy of the PRC Regulations, with cross-references to where sections were placed in the draft Interim Regulations and showing which sections were omitted.

Specific notes:

1. **The most important aspect of your review is to carefully study Draft Sections E, I, K, L, and M**, which implement Charter Art. XVIII, Sections 125(18) (i), (j), (k), and (m), and 125(19) (e) through (i). These reflect the new procedures of the Charter amendment. Charter Section 125(18), especially subsection (i), is somewhat difficult to plow through, so I created a flowchart to help visualize the process. (Flowchart on Section 19 to come.)
2. Confidentiality provisions, scattered in several places in the PRC Regs, are gathered in one section. (Draft Sec. I.B.)
3. The following decisions, formerly in the hands of the Commission or the Board of Inquiry, have been put in the hands of the Director for efficiency's sake. This is also consistent with a bit more authority being placed in the hands of the Director under Measure II:

Draft Interim Regulations
July 20, 2021
P. 2 of 2

- a. Challenge to Board member (Draft Sec. II.I.3.) – Note also that the PRC Regulations provided for the PRC Officer to poll the other two Commissioners, which violates the Brown Act. (PRC Reg. VI.C.2.d.)
- b. Request for continuance (Draft Sec. II.J.)

General notes:

1. Police Accountability Board, Board member, Office of the Director of Police Accountability, and Director, have replaced Police Review Commission, Commissioner, PRC staff and PRC Officer, respectively.
2. I have removed all provisions relating to policy complaints. These are best left to a separate document, or perhaps incorporation into the Board's Standing Rules.
3. "Business days" have been converted to calendar days in almost all instances. I thought going back and forth between business and calendar days in the PRC Regulations was unnecessary and confusing.

This is a lot of information to go through, and I welcome any questions or concerns you may have. Subcommittee members can discuss with me without fear of violating the Brown Act; I just cannot transmit your thoughts to other subcommittee members until we're in a meeting.

Attachments:

- Draft Interim Regulations, dated July 20, 2021
- Annotated PRC Regulations, dated April 4, 2018
- City Charter Article XVIII, Section 125
- Flowchart, Section 125(18)

CITY OF BERKELEY

REGULATIONS

For Handling Complaints Against Members of the Police Department

Effective April 4, 2018

POLICE REVIEW COMMISSION

POLICE REVIEW COMMISSION OFFICES: 1947 Center Street, First Floor, Berkeley, CA 94704
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TABLE OF CONTENTS

PREAMBLE 1

I. GENERAL 1

 A. Application of Regulations - Confidentiality of Complaint Proceedings..... 1

 B. Definitions..... 2

II. INITIATING THE PROCESS 3

 A. Filing a Complaint..... 3

 B. Mediation..... 4

III. COMPLAINT INVESTIGATION 5

 A. Priority of Investigations..... 5

 B. Notice and Availability of Complaint..... 5

 C. Investigation Process..... 5

 D. Interviews 6

 E. BPD Reports..... 7

 F. Report of Investigation..... 7

IV. CONFIDENTIALITY OF PERSONNEL MATTERS..... 7

 A. Responsibilities of PRC Commissioners 7

 B. Conduct..... 7

V. PRE-HEARING COMPLAINT DISPOSITION..... 8

 A. Administrative Closure..... 8

 B. No Contest Response..... 9

 C. Waiver of Hearing..... 9

VI. BOARDS OF INQUIRY 9

 A. Composition..... 9

 B. Designation..... 9

 C. Challenge of BOI Commissioner..... 10

 D. Responsibilities of BOI Commissioners 10

 E. Function..... 11

 F. Subpoena Power 11

VII. HEARINGS 11

 A. Scheduling and Notice..... 11

 B. Board of Inquiry Hearing Packet..... 12

 C. Pre-Hearing Motions..... 12

 D. Procedure..... 14

 E. Evidence..... 15

VIII. DELIBERATION AND FINDINGS 15

 A. Deliberation 15

 B. Majority Vote..... 15

 C. Standard of Proof 16

 D. Categories of Findings..... 16

 E. Findings Report and Notification..... 16

 F. Petition for Rehearing 16

IX. AMENDMENT AND AVAILABILITY OF REGULATIONS 17

EXHIBIT A Memorandum from City Manager Re: Subject Officer Testimony 18

Section references
in left margin are
to DRAFT
Interim
Regulations dated
7-20-2021

BERKELEY POLICE REVIEW COMMISSION

**REGULATIONS FOR HANDLING COMPLAINTS AGAINST
MEMBERS OF THE POLICE DEPARTMENT**

(Adopted May 13, 1975. Amended August 8, 1984; April 30, 1990; May 26, 1993;
November 7, 2007; July 14, 2010; July 9, 2014; March 28, 2016; April 4, 2018)

PREAMBLE

Revised

The following procedures for handling complaints against members of the Berkeley Police Department (BPD) have been drawn up in accordance with the enabling Ordinance establishing the Police Review Commission for the City of Berkeley. That Ordinance, No. 4644-N.S., passed by the voters April 17, 1973, was intended to provide prompt, impartial, and fair investigation of complaints brought by individuals against the BPD and these regulations are adopted by the Commission to carry out that purpose.

That Ordinance, by setting up this Commission made up of community residents, is intended to establish a process for reviewing Police Department policies, practices and procedures and for handling individual complaints against members of the BPD that is available to any individual, free of charge and without the need for attorneys or other professional advisors. The Ordinance gives the Commission the power to adopt rules and regulations and develop procedures for its own activities and investigations.

Accordingly, the Commission reserves the right to establish and interpret its procedures in the spirit of the Ordinance and in the best interests of the City of Berkeley, as long as they are consistent with the powers granted to it by the enabling Ordinance, current California case law, the Public Safety Officers Procedural Bill of Rights Act (Gov't Code sections 3300-3319), and Penal Code sections 832.5 and 832.7, governing the confidentiality of peace officer personnel records.

In their capacity as PRC Commissioners, each Commissioner will have access to confidential data or information related to Berkeley Police Department personnel. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission. Regardless of how the confidential information is communicated, it shall not be disclosed to any unauthorized person or organization, and it is the responsibility of each PRC Commissioner to protect confidential information from unauthorized disclosure. It is vitally important to the integrity of the Berkeley Police Review Commission process that all parties involved understand and adhere to the confidentiality of the process, and do all in their power to protect the privacy rights of Berkeley Police Department employees as required by law.

I. GENERAL

A. Application of Regulations - Confidentiality of Complaint Proceedings

I.B.

The following regulations govern the receipt and processing of complaints submitted to the Police Review Commission (PRC or Commission). All Board of Inquiry (BOI) and Commission proceedings relating to the investigation of an individual complaint against an officer shall be closed to the public. Records of these investigations shall be treated as confidential and will not be disclosed to members of the public. Any

Section I.A.

public records included in, or attached to, any investigative reports shall remain public records, and copies shall be made available to the complainant and subject officer.

I.A.

(substantive provisions removed from definitions.)

B. Definitions.

The following definitions shall apply in these regulations:

1. Administrative Closure: Complaint closure before a BOI hearing. [Administrative closure requires a majority vote of the Commissioners, in closed session, at a regularly scheduled meeting, and does not constitute a judgment on the merits of the complaint.] See II.D.1.
2. Aggrieved Party: Any person directly affected by the alleged police misconduct. Only an aggrieved party may file a complaint, except that a complaint by an aggrieved minor must be filed by the minor's parent or guardian.] See II.A.2.
3. Allegation: A specific assertion of police misconduct by a complainant or the Commission.
- ~~4~~. Board of Inquiry (BOI): Three Commissioners impaneled to hear and render findings on complaints; ~~a~~ BOI Commissioner is required to sign a confidentiality and nondisclosure agreement.] replaced by Hearing Panel
- ~~5~~. BOI Hearing Packet: Evidence and information for the hearing, issued no later than 10 business days before the scheduled hearing.
- ~~6~~. Commissioner: A resident of Berkeley appointed by a City Council member or the Mayor to serve on the PRC.
7. Complaint: A declaration that alleges misconduct by a Berkeley Police Department (BPD) employee [(including employees of the Public Safety Communications Center) while engaged in official duties.] deleted
8. Complainant: Any aggrieved party who files a complaint with the PRC.
9. Duty Command Officer (DCO): A sworn BPD officer designated by the BPD's Chief of Police to appear at a Board of Inquiry and answer procedural questions clarifying BPD policy.
- ~~10~~. Findings Report: Summary of the BOI's findings, provided to the City Manager and the Chief of Police.
11. Mediation: A process of reaching a mutually agreeable resolution to a complaint, which is facilitated by ~~a~~ local mediation agency.] revised
- ~~12~~. Policy Complaint: A declaration alleging that a BPD policy, practice or procedure is improper or should be reviewed or revised.
13. PRC Investigator: A person employed by the City Manager and assigned to the PRC to investigate complaints.
- ~~14~~. PRC Officer: A person employed by the City Manager and assigned to the PRC as the office administrator and secretary to the Commission.
- ~~15~~. Report of Investigation: Report issued within 80 calendar days of the filing date of the complaint.

Section I.B.

- 16. Subject Officer: A sworn BPD officer, [or other BPD employee] against whom a complaint is filed.
- 17. Summary Dismissal: Dismissal of any or all of the allegations in a complaint prior to the start of a BOI hearing; requires a unanimous vote of the BOI Commissioners, and constitutes a judgment on the merits.
- 18. Toll: Stop the running of the clock/investigation timeline.
- 19. Witness Officer: A sworn BPD officer, [or other BPD employee,] who has personal knowledge of events described in a complaint, but is not the subject officer.

II. INITIATING THE PROCESS

A. Filing a Complaint

II.A.1.

1. Complaint Form

Complaints and policy complaints must be filed on a form provided by the PRC and, except as provided in section 3, signed by the complainant. Non-policy complaint forms will include information about the difference between mediation and an investigation; and language advising a complainant who is the subject of, or has commenced, litigation relating to the incident that gave rise to the complaint to consult an attorney before filing a complaint. Non-policy complaint forms will conclude with the following: "I hereby certify that, to the best of my knowledge, the statements made herein are true. I also understand that my oral testimony before the Board of Inquiry shall be given under oath."

II.A.3.,
II.A.4.

2. Filing Period

- a. To be considered timely, a complaint must be filed within 90 calendar days of the alleged misconduct, except that the 90-day period shall be tolled when a complainant is incapacitated or otherwise prevented from filing a complaint. Any complaint filed after 90 calendar days of the alleged misconduct shall be dismissed, unless accepted as a late-file. A complaint filed between 91 and 180 calendar days of the alleged misconduct must include a late-file form, and can be accepted as a late-file if at least 6 Commissioners find, by clear and convincing evidence, good cause for the complainant's failure to file in a timely fashion. The PRC staff will submit a late-file to the Commission for a vote in closed session at the next regularly scheduled meeting. Any complaint filed after 180 calendar days of the alleged misconduct will not be accepted.
- b. If a person is the subject of a criminal proceeding related to the subject matter of the complaint, the time for that person to file a complaint shall be tolled until the criminal matter has been adjudicated or dismissed.

II.A.2.

3. Unavailability of Complainant

If there is no complainant able to initiate a complaint, and in any case where a sworn officer or other BPD employee is involved in a death, 5 Commissioners may vote to authorize an investigation or take such other action they deem appropriate.

Section II.A.

II.A.5.

4. Sufficiency of Complaint

- a. Complaints must allege facts that, if true, would establish that misconduct occurred. Complaints that do not allege prima facie misconduct, or are frivolous or retaliatory shall be referred by the PRC staff to the Commission for administrative closure at the next regularly scheduled meeting, provided there is sufficient time to give the complainant notice (see Sec. V.A.2.), and before the Notice of Allegations is issued. If a majority of the Commissioners agree, the case will be closed; if not, the Notice of Allegations will be issued within 10 calendar days after the date of the vote rejecting the PRC Officer's recommendation for closure, unless the complainant has elected mediation. This Section II.4.a. does not apply to complaints initiated by the Commission under Section II.A.3.
- b. [Policy complaints will be brought to the Commission for discussion or action within 30 calendar days of filing or at the next regularly scheduled meeting of the PRC if the 30 days has expired. If a majority of the Commissioners feel that a policy review is warranted, they may take appropriate action, including, but not limited to, initiating a formal investigation or establishing a subcommittee; a subcommittee, if established, will seek BPD involvement in its review of a BPD policy. Upon completion of its review, the subcommittee will present its conclusions and recommendations to the full Board.]

Policy complaints
not included in
Interim Regs.

II.A.6.

5. Right to Representation

Complainants and subject officers have the right to consult with, and be represented by, an attorney or other representative, but an attorney is not required. If PRC staff is notified that a complainant or subject officer is represented by an attorney, PRC staff shall thereafter send copies of any materials and notification provided to the complainant or the subject officer(s) to their representative.

B. Mediation

II.B.1.,
modified

1. Election

- a. PRC staff shall provide the complainant with information about the option to select mediation. The complainant may elect to enter into mediation up until notice of the Board of Inquiry hearing has been issued. PRC staff shall make every effort to ensure complainants understand the mediation option.
- b. If the complainant elects mediation, the PRC staff shall provide the subject officer with a copy of the complaint, if not previously provided, and notify him or her of the complainant's election, within 5 business days.
- c. If the subject officer agrees to mediation, she or he shall notify PRC staff within 10 calendar days of being informed of the complainant's election. A subject officer who agrees to mediation must agree to toll the City's 120-day disciplinary deadline should the officer later withdraw from mediation before the start of the mediation session.
- ~~x~~. If notice of a Board of Inquiry hearing has been issued, the hearing shall be cancelled upon both parties agreeing to mediation.

Section II.B.

e. Once both parties agree to mediation, the complainant no longer has the option to proceed to a Board of Inquiry hearing unless the subject officer withdraws from mediation.

2. Notice of completion

After receiving notice from the mediator that a mediation has concluded, PRC staff shall close the case and inform the Commission.

III. COMPLAINT INVESTIGATION

A. Priority of Investigations

Recognizing that the Memorandum of Understanding between the City of Berkeley and the Berkeley Police Association places a 120-day limit on the imposition of officer discipline, it shall be the priority of staff in those cases where a BOI is convened, that the BOI findings be issued within 105 days of the filing of the complaint.

II.C.3.

B. Notice and Availability of Complaint

1. Notice of Allegations

Within 20 business days of the date a timely-filed complaint is received at the PRC office, unless it is submitted to the Commission for administrative closure or the complainant elects mediation, PRC staff shall prepare a Notice of Allegations. The Notice of Allegations shall be sent in hard copy or electronically, to the complainant, the Chief of Police and/or BPD Internal Affairs, and, by delivery to the BPD, each identified subject officer. [If the Notice of Allegations is not issued in the time required, PRC staff shall submit the case to the Commission for administrative closure at the next regularly scheduled meeting; the complaint shall be closed, unless the Commission determines that good cause exists for the delay.] ~~deleted~~

[II.C.2,
II.C.3.]

X. Availability of Complaint

The complaint shall be available at the PRC office, [and a copy shall be provided to the subject officer with the Notice of Allegations] PRC staff shall maintain a central register of all complaints filed.

II.C.5.

C. Investigation Process

1. Nature of Investigation

The investigation of a complaint shall consist of conducting recorded interviews with the complainant, the subject officer(s), and any witnesses to the incident that gave rise to the complaint;¹ collecting relevant documentary evidence, including, but not limited to: police reports and records, photographs, and visual or audio records; and issuing a Notice of Allegations and Report of Investigation.

¹ Recordings of interviews shall be kept for 100 days or until the Board of Inquiry's Findings Report has been provided to the City Manager, whichever is later.

Section III.C.

2. Time for Investigation

- ~~X~~ PRC staff shall make every effort to complete the Report of Investigation within 80 days of filing.
- ~~X~~ If the Report of Investigation is not completed within 80 days, PRC staff shall make an oral report to the full Commission in a closed session at its next regularly scheduled meeting.

Unsure if one-year limit is applicable

- ? c. The investigation must be completed within one year, unless a Government Code Sec. 3304(d) exception applies.
- ? d. If the investigation is not completed within one year, the PRC Officer or Investigator shall submit the case to the Commission for administrative closure at the next regularly scheduled meeting; the case shall be closed, unless the Commission determines that a Government Code Sec. 3304(d) exception applies.
- ? e. If a Government Code Sec. 3304(d) exception to the one-year limitation period applies, the BOI Hearing Packet shall state the applicable exception.

II.C.1.a.

3. Pending Criminal Action

If the complainant or the subject officer is the subject of criminal proceedings related to the matter of the complaint, the PRC shall not undertake an investigation until the criminal matter has been adjudicated or dismissed. All time limitations applicable to the processing of PRC complaints shall be tolled during the pendency of any such criminal proceedings. Within one week of the filing of the complaint, or as soon thereafter as possible, the PRC Officer shall determine the status and anticipated resolution of the criminal proceedings by communicating, in writing, directly with the District Attorney's Office.

D. Interviews

II.C.8.

1. Conduct

Interviews should be conducted in a manner that will produce a minimum of inconvenience and embarrassment to all parties. BPD officer interviews must be conducted in compliance with the Peace Officers Procedural Bill of Rights, Government Code Section 3303. When possible, BPD employees should not be contacted at home, and others should not be contacted at their places of employment.

II.C.7.

2. Notice

PRC staff shall notify subject and witness officers at least 9 calendar days before a scheduled interview date by providing a hard copy and, when feasible, an electronic mail notification. An officer who is unavailable for an interview shall contact the PRC Officer or the Investigator immediately to state the reason for his/her unavailability.

II.C.8.

3. Exercise of Constitutional Rights

Subject officer testimony shall be required, in accordance with the City Manager's policy (see Exhibit A). While all BPD employees have a right to invoke the Fifth Amendment, they also have a duty to answer questions before the PRC regarding conduct and observations that arise in the course of their employment

Section III.D.

and may be subject to discipline for failure to respond. The exercise of any or all constitutional rights shall not be considered by the Commission in its disposition of a complaint.

E. BPD Reports

See II.C.6.

✕ The PRC should receive un-redacted police reports from BPD once the PRC Officer has established and implemented security and chain of custody procedures that satisfy the City Manager and the Chief of Police. Police reports will be redacted when distributed to BOI Commissioners, but un-redacted reports will be available at the PRC Office for BOI Commissioners to review.

II.C.6.b.

2. Whenever a PRC investigation is tolled, the Chief of Police shall take appropriate steps to assure preservation of the following items of evidence:

- a) The original Communications Center tapes relevant to the complaint.
- b) All police reports, records, and documentation.
- c) Names, addresses, telephone numbers, and statements of all witnesses.

✕ Report of Investigation

- 1. PRC staff shall assemble all relevant information in a confidential Report of Investigation. The Report shall list the allegations, provide a summary of the complaint, provide the applicable BPD, state or local rules and regulations, and include a copy of the interview transcripts.
- 2. Upon completion, the Report of Investigation shall be provided to subject officers, and any known representatives, with a copy to the Chief of Police and the Duty Command Officer.

IV. CONFIDENTIALITY OF PERSONNEL MATTERS

I.B.1.

A. Responsibilities of PRC Commissioners

In their capacity as PRC Commissioners, each Commissioner will have access to confidential data or information related to Berkeley Police Department personnel. Confidential information may be provided through witness testimony or through electronic or hard-copy transmission. Regardless of how the confidential information is communicated, no Commissioner shall disclose it to any unauthorized person or organization.

B. Conduct

I.B.2,
I.B.4.

- 1. It is the responsibility of each PRC Commissioner to protect confidential information from unauthorized disclosure.
- 2. At any proceeding in which confidential information was distributed to the Commissioners, each Commissioner shall return all confidential material to the PRC staff at the close of the proceeding or as soon thereafter as practicable.

Section V.

V. PRE-HEARING COMPLAINT DISPOSITION**A. Administrative Closure****II.D.1.a.****1. Grounds**

The grounds upon which a complaint may be administratively closed include but are not limited to the following:

- a) Complaint does not allege prima facie misconduct or is frivolous or retaliatory.
- b) Request for closure by complainant.
- c) Unavailability of complainant where staff has attempted at least 3 telephone, electronic mail and/or regular mail contacts. Attempts to reach the complainant by telephone and/or mail shall be documented in the recommendation for Administrative Closure.
- d) Mootness of the complaint including but not limited to situations where the subject officer's employment has been terminated or where the complaint has been resolved by other means (e.g. mediation)
- e) Failure of the complainant to cooperate, including but not limited to: refusal to submit to an interview, to make available essential evidence, to attend a Board of Inquiry hearing, and similar action or inaction by a complainant that compromises the integrity of the investigation or has a significant prejudicial effect.
- f) Failure to timely issue the Notice of Allegations, as set forth in Section III.B.1.
- g) Failure to timely issue the Report of Investigation, as set forth in Section III.C.2.b.
- h) Failure to timely complete its investigation, as set forth in Section III.C.2.d.
- i) A policy complaint that has been considered by the Commission.

II.D.1.a.**2. Procedure**

A complaint may be administratively closed by a majority vote of Commissioners during closed session at a regularly scheduled meeting. The complainant shall be notified of the opportunity to address the commission during closed session at this meeting and such notice shall be sent no later than 5 calendar days prior to said meeting. Cases closed pursuant to this section shall be deemed "administratively closed" and the complainant, the subject officer, and the Chief of Police shall be notified by mail.

A policy complaint may be administratively closed by a majority vote of Commissioners during open session at a regularly scheduled meeting.

II.D.1.c.**3. Effect of Administrative Closure**

Administrative Closure does not constitute a judgment on the merits of the complaint.

Section V.

II.D.2. B. No Contest Response

A subject officer who accepts the allegations of the complaint as substantially true may enter a written response of "no contest" at any time before a hearing. Upon receipt of a "no contest" response, the PRC Officer or Investigator shall refer the file and the response to the City Manager and the Chief of Police for appropriate action.

⊗ Waiver of Hearing

Either the complainant or the subject officer may request that findings be rendered without a hearing. If both the complainant and the subject officer sign a written waiver of their right to a hearing, a Board of Inquiry may issue findings based on interview statements and documentary evidence.

Replaced by Hearing Panels

[VI. BOARDS OF INQUIRY]

**II.F.3,
II.I.5.**

A. Composition

A Board of Inquiry (BOI) shall consist of 3 Commissioners, who shall designate one of them to be Chairperson. In cases involving the death of a person, and in such other cases as the Commission shall determine by a vote of 6 Commissioners, the Commission shall sit as a Board of the whole, with a minimum of 6 Commissioners.

B. Designation

II.F.4.

1. Obligation to Serve

Commissioners will volunteer for dates upon which hearings have been scheduled, without knowledge of the factual dispute to be heard. PRC staff will keep a record of the number of cases heard by each Commissioner, who will be expected to hear an approximately equal number of cases over each three-month period. A BOI Commissioner is required to sign a confidentiality and nondisclosure agreement.

II.F.4.

2. Unavailability of BOI Member

If any member of a Board of Inquiry becomes unavailable, s/he shall be replaced by another Commissioner. Notice of this substitution shall be made as soon as possible to the subject officer. If a Commissioner is substituted within 7 calendar days of a Board of Inquiry, the subject officer will retain the right to challenge said Commissioner for cause under Section VI.B.4.C. below. The notice of challenge of a substituted Commissioner must be made at least 3 business days prior to the convening of a Board of Inquiry and shall be deemed as just cause for a continuance of the hearing.

II.F.5.

3. Effect of Continuance

If a hearing is rescheduled due to the unanticipated unavailability of the complainant(s), the subject officer(s) or the complainant's or subject officer's attorney, the case may be reassigned to another Board of Inquiry. The Board composition shall not change once a hearing has been convened, however.

Section VI.

II.G.3.

C. Challenge of BOI Commissioner

1. Basis for Challenge

A Commissioner who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias include, but are not limited to:

- a) a familial relationship or close friendship with the complainant or subject officer;
- b) witnessing events material to the inquiry;
- c) a financial interest in the outcome of the inquiry;
- d) a bias for or against the complainant or subject officer.

2. Procedure

- a. Within 7 calendar days from the date of mailing of the Board of Inquiry hearing packet, which includes the names of the Commissioners constituting that Board, the complainant or the subject officer(s) may file a written challenge for cause to any Commissioner. Such challenge must specify the nature of the conflict of interest.
- b. The PRC Officer or his/her designee shall contact the challenged Commissioner as soon as possible after receipt of the challenge.
- c. If the Commissioner agrees, PRC Officer or his/her designee shall ask another Commissioner to serve.
- d. If the Commissioner does not agree that the challenge is for good cause, PRC Officer or his/her designee shall [poll the other members of the Board and, if both agree that the challenge is for good cause,] shall inform the challenged Commissioner and ask another to serve.
- e. If a challenge to a Commissioner is rejected, and the Commissioner serves, the written challenge and the Commissioner's written response shall be part of the record of the complaint.

[revised - poll is
Brown Act
violation]

3. Replacement of Commissioners

Any Commissioner who is unable to serve for any reason shall be replaced by another Commissioner, except in cases involving a death.

D. Responsibilities of BOI Commissioners

1. Confidentiality

- a. Each Commissioner shall maintain the confidentiality of personnel matters as required under Section IV of these Regulations and by state law.
- b. Consistent with Section IV.B.2., each Commissioner shall return the confidential portions of the Hearing Packet and any other confidential documents to PRC staff at the close of the BOI.

I.B.2,
I.B.4

Section VI.D.

II.G.1.b.

2. Conduct

In accordance with the PRC enabling ordinance, which requires that complaint investigations be conducted in a fair and impartial manner, no member of a BOI shall: publicly state an opinion regarding policies that are directly related to the subject matter of a pending BOI complaint; publicly comment on any of the facts or analysis of a pending complaint; or pledge or promise to vote in any particular manner in a pending complaint.

I.B.5.,
II.G.1.c.

3. Violation

- a. A violation of Sections VI.D.1. or VI.D.2. above, before or during a BOI shall automatically disqualify a Commissioner from a BOI.
- b. In addition, a Commissioner or PRC staff may agendize an alleged violation of Sections VI.D.1. or VI.D.2. for discussion and action at a regularly scheduled meeting. Any action adverse to a Commissioner requires a two-thirds vote of the Commissioners present. Such action may include: notice of the violation to the Commissioner's appointing City Councilmember; a communication to the City Council; or a prohibition from sitting on future BOIs for the remainder of the Commissioner's term.

~~E.~~ Function

The BOI members shall review the confidential Hearing Packet and the evidence gathered in connection therewith, hear testimony in closed session, prepare findings, and advise the Chief of Police and the City Manager of its findings.

II.I.8.

F. Subpoena Power

The Commission's subpoena power shall be used to the extent necessary to insure fairness to all parties.

VII. HEARINGS

A. Scheduling and Notice

II.F.2.

1. BPD Schedules

The Chief of Police, or his designee, shall provide PRC staff with a subject officer's schedule prior to the scheduling of a hearing. Hearings shall not be held on an officer's regular days off, scheduled vacation or any authorized leave of absence, except if subject officers in the same complaint do not share a common day on duty. In such cases, a hearing may be scheduled on an officer's regular day off, but not during a scheduled vacation or any authorized leave of absence. PRC staff shall determine the complainant's and the subject officer's availability before scheduling a hearing.

II.F.7.

2. Notice

No later than 10 business days before the hearing date, the PRC Officer or the Investigator shall provide written notice of the date, time and location of the hearing, and the composition of the Board of Inquiry, to the complainant, the subject officer(s), any representatives, civilian witnesses, witness officers, the BOI members and the Chief of Police.

Section VII.

B. Board of Inquiry Hearing Packet

See II.F.7.

No later than 10 business days before the hearing date, PRC staff shall provide a Hearing Packet to the BOI members, the complainant, the subject officer(s), any representative(s), any witnesses, the DCO and the Chief of Police.

1. The BOI Hearing Packet distributed to the BOI members shall contain:
 - a) The Report of Investigation referenced in Section III.F.
 - b) .Any supplemental evidence or analysis staff deems necessary.
 - c) A copy of the complaint, if not contained in the report of investigation.
 - d) Police reports and any other relevant documentary evidence, including evidence submitted by the complainant.
 - e) The PRC staff's recommendations, if any, concerning summary disposition or procedural matters.
2. The BOI Hearing Packet distributed to the subject officer(s), the officer's representative, the DCO, and the Chief of Police shall contain:
 - a) Any supplemental evidence or analysis staff deems necessary.
 - b) A copy of the complaint, if not included in the Report of Investigation.
 - c) Any evidence submitted by the complainant.
3. The BOI packet distributed to the complainant shall contain:
 - a) A copy of the complaint.
 - b) Police reports and any other non-confidential, relevant documentary evidence, including evidence submitted by the complainant.
 - c) A copy of the complainant's interview transcript.
4. Each witness shall receive a copy of his/her interview transcript.

C. Pre-Hearing Motions

II.H.2.

1. Newly Discovered Evidence and/or Witnesses

The complainant and subject officer shall provide any newly discovered evidence or witnesses' names to the PRC Officer or Investigator no later than 10 business days before the scheduled hearing date, with an explanation as to why the evidence or witnesses could not have been discovered earlier and its significance. The PRC Officer or Investigator shall inform the BOI of the newly discovered evidence or witnesses as soon as possible.

The BOI shall decide whether or not to allow the evidence or witnesses no later than 4 business days before the scheduled hearing date, and the PRC Officer or Investigator shall notify both the complainant and the subject officer of the Board's decision.

II.H.3.

2. Procedural Issues

The complainant and subject officer shall raise any procedural issues, by submitting them to the PRC Officer in writing, no later than 5 business days before the scheduled hearing date. Procedural issues can include, but are not

Section VII.C.

limited to, the expiration of the 1-year limitation period and/or whether an officer should testify.

X Summary Dismissal

- a. After issuance of the BOI Hearing Packet, and upon the motion of the subject officer or its own motion, the BOI may summarily dismiss any or all of the allegations that it finds clearly without merit based on the evidence contained in the BOI Hearing Packet. A vote to summarily dismiss an allegation must be unanimous.
- b. A subject officer's motion for summary dismissal must be in writing and submitted no later than 7 calendar days before the date of the BOI Hearing. The BOI shall consider the motion either at a special BOI meeting or at the scheduled BOI hearing. Parties to the complaint shall be notified of the request for summary dismissal.
- c. The BOI may summarily dismiss, upon its own motion at a scheduled BOI hearing, any or all of the allegations.
- d. When the summary dismissal is being considered the BOI shall not hear arguments or ask questions of the parties to the complaint. Following public comment, the BOI shall excuse everyone, except PRC staff, from the meeting and deliberate. The BOI shall consider only the information included in the BOI Hearing Packet when making its decision on summary dismissal. The decision of the BOI will be announced orally and issued in writing.

4. Continuances

- a. A continuance may be granted by a [majority of the BOI.] In considering whether to grant such a continuance, the BOI members shall consider the reason for the request; the timeliness of the request; the prejudice to the other party; the date of the filing of the complaint; previous continuance requests; and other relevant information.
- b. A continuance request shall be presented to the BOI as soon as the cause for continuance arises. Whenever possible, requests for continuance shall be considered at a specially convened meeting of the BOI. Such a meeting shall be convened in accord with existing procedures and regulations.
- c. A continuance shall not be granted in the absence of good cause.
- d. A request for continuance made within 3 business days of the hearing date shall not be granted unless the requesting party is unable to attend due to a personal emergency, or can demonstrate substantial prejudice if a continuance is denied.
- e. A continuance granted at the request of the subject officer shall toll any BPD disciplinary time period.

II.H.1., giving authority to grant continuance to DPA

Section VII.

D. Procedure

- II.I.1. 1. All BOI hearings shall be closed to the public. PRC staff may be present during the entirety of the closed hearing, and the DCO shall be present for all but the Commissioners' deliberations.
- II.I.1. 2. An attorney or other person acting on behalf of any complainant or subject officer may participate in the hearing. However, a representative is not required and the complainant and subject officer is each responsible for insuring his/her counsel's presence at the hearing.
- II.I.2. 3. If good cause is shown, the BOI may continue the hearing due to the unanticipated unavailability of a witness or a representative.
- II.I.3. 4. Absent good cause, if the complainant fails to appear within 30 minutes after the scheduled time for the hearing, the complaint will be dismissed. Absent good cause, if the subject officer fails to appear within 30 minutes after the scheduled time for the hearing, the hearing will proceed and the allegations may be sustained.
- II.I.4. 5. If a third Commissioner fails to appear within 30 minutes after the scheduled time for the hearing, the hearing will be continued until a third Commissioner is seated unless all the parties present agree to proceed with 2 Commissioners. If the hearing proceeds with 2 Commissioners, all findings must be unanimous.
- See II.I.6. ~~6.~~ The PRC Officer or Investigator will present the complaint, introduce witnesses, if any, and answer appropriate questions addressed to them.
- II.I.7. 7. The complainant and any civilian witnesses will be called into the hearing room to testify separately; the subject officer and the officer's representative may be present during the complainant's and the civilian witnesses' testimony. The complainant may make a statement or rely on the interview statements. Questioning will then proceed as follows: a) Commissioners may ask questions; b) the subject officer or his or her representative may ask questions; c) Commissioners may ask follow-up questions. After questioning is completed, the complainant will have up to 15 minutes to provide a summary of his/her case and/or closing statement.
- II.I.7. 8. The complainant and any civilian witnesses will each be excused from the hearing room after his/her testimony is completed.
- II.I.7. 9. The subject officers and any witness officers will be called into the hearing room to testify separately. Any subject officers' representative(s) will be allowed to remain in the hearing room through the duration of all testimony. Each subject officer may make a statement or choose to rely on the interview statements. The subject officer(s) will be questioned by his/her representative first, after which the officer may be questioned by 2 Board members, unless s/he waives this requirement. After questioning is completed, each subject officer will have up to 15 minutes to provide a summary of his/her case and/or closing statement. The subject officers and any witness officers will each be excused from the hearing room after his/her testimony is completed.
- II.I.9. 10. No person who is present at a BOI hearing shall become the subject of undue harassment, personal attack, or invective. If the Chairperson fails to maintain reasonable order, BPD employees may leave the hearing without prejudice. The

Section VII.D.

burden shall be upon the BPD employee to establish to the City Manager's satisfaction that his/her reason for leaving was sufficient.

II.J.

E. Evidence

The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

1. Evidence shall be taken in accordance with the following provisions:
 - a) The complainant and subject officer(s) shall have the right to testify and refer to any relevant documentary evidence and exhibits. If the complainant or subject officer does not testify on his/her own behalf, he/she may be called and examined as if under cross-examination.
 - b) Oral evidence shall be taken only under oath.
 - c) The Chairperson shall exclude irrelevant and unduly repetitious evidence.
 - d) The Chairperson shall exclude unruly or disruptive persons from the hearing.
 - e) The Chairperson will conduct the hearing subject to being overruled by a majority of the BOI members. BOI members shall be primarily responsible for obtaining testimony. The PRC Officer or his/her designee will answer Commissioner's questions on the evidence, points of law, and procedure.
 - f) The City Attorney's opinion will be sought whenever the interpretation of City of Berkeley Ordinance is contested and pivotal in the case, or when a case raises substantial legal issues of first impression.
 - g) If the BOI needs additional evidence or an opinion from the City Attorney to reach its findings, it may continue the hearing to a future date.
 - h) If upon the petition of either party, the hearing is continued for consideration of motions or points of law, any applicable BPD disciplinary time limit shall be tolled for the period of such continuance.
2. Either party may present to the BOI evidence of the disposition of a related matter by any branch of the judiciary (including but not limited to superior court, traffic court, and small claims court), and the BOI shall accept those findings as true.

VIII. DELIBERATION AND FINDINGS

II.K.1.

A. Deliberation

After the hearing has been concluded, the Board will deliberate outside of the presence of the complainant, the subject officer(s), and any witnesses or representatives. The Board shall not consider any information not received in the Hearing Packet or during the hearing.

II.K.2.

B. Majority Vote

All action by the Board under Section VIII of these regulations shall be by majority vote of those Commissioners present. Each dissenting member shall set forth the

Section VIII.B.

reasons for dissenting in writing, and such dissent shall be circulated in the same manner as the decision of the majority.

II.E.2.

C. Standard of Proof

No complaint shall be sustained unless it is proven by clear and convincing evidence presented at the hearing or otherwise contained in the record. "Clear and convincing" is more than a preponderance of the evidence, but less than beyond a reasonable doubt.

II.E.3.

D. Categories of Findings

1. If the evidence shows that the alleged act did not occur, the finding shall be "Unfounded."
2. If the evidence fails to support the allegations, but the allegations cannot be shown as false, the finding shall be "Not Sustained."
3. If the evidence shows that the alleged act did occur, but was lawful, justified, and proper, the finding shall be "Exonerated."
4. If the evidence shows that the alleged act did occur and the action was not justified, the finding shall be "Sustained."

E. Findings Report and Notification

1. Within 7 calendar days of the hearing, the PRC office shall inform the complainant and subject officer, in writing, whether the allegation was sustained, not sustained, unfounded or exonerated, and about the right to petition for rehearing.
2. Within 15 calendar days of the hearing, the PRC office shall submit a Findings Report, together with the Hearing Packet, to the City Manager and the Chief of Police, except that for late-filed complaints, the Findings Report shall be filed within 30 calendar days of the hearing.

F. Petition for Rehearing

1. Within 15 calendar days of the mailing of the Board's findings, any party to the complaint may petition in writing for a rehearing. A rehearing may be granted only if the applicant establishes that: there is newly discovered, material evidence that, with reasonable diligence, could not have been discovered and produced at the hearing; or, that there was substantial procedural error likely to have affected the outcome.
2. After receipt of a petition for rehearing by either party, the Commission shall vote in closed session whether to grant or deny it at its next regularly scheduled meeting for which there is adequate time to meet Brown Act requirements. Both the complainant and the subject officer shall receive notice that the Commission will vote on the petition for rehearing. If, by a majority vote of the Commissioners, a rehearing is granted, it shall be held within 60 calendar days of the receipt of the petition. If the officer makes the request, the officer must agree to toll the 120-day disciplinary period and the requirement that the Commission's investigation be completed within one year, provided the request is granted; tolling reverts back to the date the request is submitted and continues until the

Section VIII.F.

hearing is concluded and the findings are issued. However, there shall be no tolling if the 120 days has already passed.

3. If a petition for rehearing is granted, the Board of Inquiry shall be composed of the same Commissioners who presided over the original hearing unless circumstances make such composition impossible.

Sec. V.

IX. AMENDMENT AND AVAILABILITY OF REGULATIONS

- Amendments to the Regulations for Handling Complaints Against Members of the Police Department (Regulations) require a majority vote of the Commission.
- Amendments shall be distributed to Commissioners, the Berkeley Police Association, the City Manager, the City Attorney, and the Chief of Police.
- The PRC office shall maintain a complete set of the current Regulations.

SUBJECT OFFICER TESTIMONY

MEMORANDUM

July 20, 1990

To: Ronald D. Nelson, Chief of Police
Police Review Commission
Berkeley Police Association

From: Michael F. Brown, City Manager

Subject: SUBJECT OFFICER TESTIMONY

The purpose of this memorandum is to set forth my policy regarding testimony by accused officers at Police Review Commission (PRC) Boards of Inquiry.

Subject officer testimony has been required since July 1, 1983 based on agreements reached in negotiations between the PRC, the Berkeley Police Association (BPA), and the City Manager's Office (CMO) in the fall of 1982.

The requirement is as follows:

Each Subject Officer, each BPD Member Witness, the Duty Command Officer (DCO), the Complainant, and the Police Review Commission's Investigator shall be present at PRC Boards of Inquiry and shall testify unless otherwise directed by the City Manager.

If the DCO observes actions which in his/her opinion constitute a violation of PRC rules and Regulations, the DCO shall request of the Chairperson that the violation be corrected. If the violation is not corrected, the DCO may direct the Subject Officer to leave the hearing. Such a decision should only be reached under very extreme circumstances after all other means of resolving the situation have failed.

The requirement of the Subject Officer to testify shall not apply in cases where the complaint was filed during the 90-day filing extension period.

The requirements to testify before the PRC shall not apply to non-sworn employees of the Parking Division.

