



DATE: November 5, 2019

TO: Mayor and City Council

FROM: Chief of Police

SUBJECT: Response to City Council Referral: Hayward Police Department Use of Deadly Force – Independent Investigations

RECOMMENDATION

That Council considers adopting a policy where the City Manager requests an independent investigation from the California Department of Justice, Office of the Attorney General (DOJ/AG), if a death results from the use of force during an Officer Involved Shooting (OIS) incident involving Hayward Police Department (HPD) officers.

SUMMARY

On June 4, 2019, the City Council approved a referral memorandum regarding the use of deadly force by the Hayward Police Department (HPD) and directed City staff to evaluate and report back regarding independent investigative options. The referral included a recommendation that if an external investigative option were to be adopted, the HPD officer-involved shooting (OIS) death of Agustin Gonzalez, which occurred on November 15, 2018, would be included within the scope of such request.

As required by state law, HPD currently conducts internal investigations whenever an OIS results in a death. There are several components to an internal HPD investigation, including an administrative investigation into compliance with policies, procedures, and tactics, an internal criminal investigation to determine if any crimes were committed by any of the actors involved in the OIS, including possible criminal actions of the officers or anyone injured or killed as a result of the incident, and, as required by State law and consistent with Alameda County protocols, the District Attorney conducts an independent criminal investigation to determine if the actions of the officers' warrant pursuing criminal charges.

In response to the June 4 referral, staff evaluated five independent investigation models, two of which are currently being practiced, that include:

1. Independent criminal investigations conducted by the Alameda County District Attorney's Office (*current practice*)
2. Independent investigations conducted by a plaintiff's attorney(s) during the civil lawsuit process (*current practice*)

3. Independent investigations conducted by the State of California Department of Justice, Office of the Attorney General (*DOJ/AG*)
4. Independent investigations conducted by an independent auditor (*appointed by police chief/sheriff or governing board of city/county*)
5. Independent investigations conducted by a civilian review board or police commission (*appointed by governing board of city/county*)

After careful review and evaluation, staff recommends Council consider adopting a policy where the City Manager would submit a request to the DOJ/AG to conduct an investigation if a death results from the use of force during an OIS incident involving HPD officers. This DOJ/AG investigation would be in addition to the internal HPD and Alameda County District Attorney investigations currently in place.

BACKGROUND

Police officers are tasked with maintaining order and protecting the communities they serve and often face situations where there is an imminent threat of serious injury or death to community members and circumstances that may require use deadly force to protect members of the community and themselves. These low frequency, high impact incidents are felt throughout communities and often serve as catalysts for discussions regarding policing, reviews of policies or practices, and they have led to increased calls for transparency and accountability across the nation.

In California, this is evidenced by the implementation of new legislation addressing transparency, specifically in the aftermath of an OIS. SB 1421, effective January 1, 2019 and codified as part of the State Public Records Act (PRA), requires disclosure of records and information regarding reports, investigations or findings any time a police officer discharges a firearm at a person. AB 748, effective July 1, 2019 and incorporated in the PRA, requires disclosure of video and audio recordings any time a police officer discharges a firearm at a person. Regardless of the investigative processes in place following an OIS, the media and members of the community now have access to information law enforcement agencies were previously required to keep confidential under personnel rules outlined in State law. Even without PRA requests, many agencies are proactively releasing body-worn camera video and audio of critical incidents involving use of force and OIS while investigations are pending. Transparency and accountability are now understood to be critically important in maintaining trust and confidence in the relationship between law enforcement agencies and the communities they serve.

In the 1980s, HPD became the first police organization to achieve accreditation through the Commission on Accreditation for Law Enforcement Agencies (CALEA)¹ west of the Mississippi River and since 2011, CALEA Accreditation has been achieved annually. Each year, HPD's policies, procedures, and practices are evaluated by certified CALEA assessors from other parts of the country and compliance with over 400 CALEA standards must be demonstrated prior to receiving CALEA accreditation. Most recently, the HPD achieved CALEA accreditation

¹ CALEA website: <https://www.calea.org/>

with “Excellence,” which is a designation awarded to the highest tier of accredited law enforcement agencies in the nation.

Included in CALEA’s annual evaluation is HPD’s use of force policy. ‘Deadly force,’ a subset of the use of force policy, is defined as ‘force reasonably anticipated and likely to cause serious injury or death.’ Consistent with this definition, HPD officers can use deadly force under the following circumstances:

1. An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.
2. An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the subject is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Effective January 1, 2020, pursuant to AB 392, police officers will be limited to using deadly force only when it is necessary. Current law allows the use of deadly force when it is reasonable. However, HPD’s policies and procedures already reflect AB 392 standards. SB 230 will require law enforcement agencies to adopt training requirements no later than January 1, 2021 regarding the use of deadly force. The training requirements must include de-escalation techniques, crisis intervention tactics, and other alternatives to the use of deadly force when feasible. Given the CALEA certification discussed above, and HPD’s implementation of other legislative mandates for transparency and accountability, the community can be assured that every effort is being made to give Hayward police officers the tools to only use deadly force as necessary and within the constraints required by law.

In addition to the legislative changes described above and the annual CALEA accreditation process, HPD has taken an important step towards increased transparency and continued commitment to community policing. The recent appointment of community members to the police chief’s Community Advisory Panel (CAP) will serve to strengthen the relationship between HPD and the Hayward community. It will create a structured and intentional vehicle for community dialogue, with the opportunity to provide direct input to the chief of police. The CAP will allow for dialogue to take place surrounding key community issues regarding policing, including OIS and critical incidents, perceived issues of bias or inconsistent application of policies, the formation of strategies and concepts around community policing, improving community awareness, and the productive and inclusive exchange of ideas to be considered in HPD’s decision making processes.

The men and women of HPD value the sanctity of life. When a fatality results from police engagement, it is a terrible tragedy for the families of the deceased, the community, and the involved officers. HPD is committed to the continual evaluation of policies and practices in an effort to meet nationally recognized best practices in law enforcement. On average, HPD has three (3) OIS incidents per year. In the past five (5) years, there have been a total of fifteen

(15) OIS incidents, with four (4) fatalities. In 2019, there have been two (2) OIS incidents, neither of them fatal. In the discussion below, several different independent investigation models are described, including those currently in place in Alameda County.

DISCUSSION

The following discussion outlines several different independent investigation models, including those currently in place in Alameda County.

1. CONCURRENT INVESTIGATIONS BY HPD AND THE ALAMEDA COUNTY DISTRICT ATTORNEY (current practice)

If HPD uses deadly force resulting in a fatality, investigative processes are initiated in accordance with a protocol that all law enforcement agencies in Alameda County follow. Based on this protocol, three (3) separate investigations are initiated:

- A. A criminal investigation into the actions of the involved subject(s) (conducted by HPD homicide investigators or homicide investigators from the jurisdiction where the fatality occurred). This investigation evaluates conduct of the decedent(s).
- B. An administrative investigation into the actions of the involved HPD officer(s) (conducted by HPD internal affairs to determine policy compliance).
- C. An independent criminal investigation into the actions of the involved HPD officer(s) (conducted by the Alameda County District Attorney's Office (ACDA) to determine whether the conduct of the involved HPD officer(s) was criminal).

When an OIS occurs, a team from the ACDA responds immediately. The ACDA OIS team consists of experienced senior, assistant, and/or deputy district attorneys as well as experienced district attorney inspectors who are themselves sworn law enforcement officers. During their independent investigation, they conduct inspections of the scene of the OIS, they review all evidence collected, and they participate in interviews of the involved HPD officer(s). Their findings are compiled into a final report, which is delivered to the chief of police. Members of HPD are not involved in authoring the ACDA's final report, nor are they involved in decisions regarding potential criminal prosecution of the involved HPD officer(s). If the District Attorney has any concerns regarding conflicts of interest, that office can also ask another DA's office from a different county to conduct the investigation.

Pros:

- Clearly established county protocol and framework in place
- County protocol followed by all law enforcement agencies in Alameda County
- County protocol that is nationally recognized as a best practice by CALEA
- Investigations are conducted by law enforcement professionals who are well-trained and possess experience with OIS incidents
- No additional cost to the City
- Provides for accountability

Cons:

- Some public perception that these investigations are not independent or are biased (because a relationship exists between law enforcement agencies and the ACDA within the criminal justice system), accentuated by the fact the DA is elected and seeks political endorsements and campaign contributions from labor groups and special interests

2. INVESTIGATION BY PLAINTIFF'S ATTORNEY(S) DURING CIVIL LAWSUIT PROCESS (current practice)

The civil lawsuit process allows a plaintiff's attorney to conduct his/her own independent investigation into an OIS. Federal and state law allow civil litigation against police officers, supervisors, the law enforcement agency itself, and the municipal entity, when they believe police officers acted outside of the scope of their authority. Plaintiffs may seek compensatory and punitive damages as well as the recovery of attorney's fees. During the discovery phase of the civil lawsuit process, a plaintiff's attorney is provided with all evidence collected and all documents prepared during the OIS investigative process including, but not limited to, physical evidence, statements, audio/video recordings, photographs, and written reports. Additionally, a plaintiff's attorney can take depositions, or statements/testimony given under oath, from police officers and/or witnesses.

Because of the discovery phase and the deposition process, the civil lawsuit process constitutes the truest form of an independent investigation of all the independent investigation models in existence. At trial, plaintiffs offer their own narrative and theories about the OIS, and a jury or judge can make decisions that differ significantly from the internal investigative conclusions reached by law enforcement agencies. In the Bay Area, it is unusual for an OIS not to be litigated.

Pros:

- Clearly established protocol and framework in place
- Established process and protocols allow for plaintiff's access to evidence, documents related to OIS investigations
- Process and protocols allow for plaintiff's attorney to depose (interview) police officers, including those directly involved, and witnesses
- Plaintiff's attorneys can present their own experts, narrative, or context regarding an OIS incident to a jury or judge
- Civil lawsuit process is the truest form of an independent investigation
- Provides for accountability

Cons:

- Lengthy process, which takes time (sometimes years) to complete

3. INVESTIGATION BY STATE OF CALIFORNIA DOJ, OFFICE OF THE ATTORNEY GENERAL

The State of California Department of Justice (DOJ) is an organization under the direction of the Attorney General (AG), who is the top lawyer and law enforcement official in California. The DOJ/AG serves the people of California through a broad range of responsibilities, including overseeing the enforcement of civil rights laws and investigations into police practices or police misconduct allegations. Additionally, the DOJ/AG can oversee investigations into law enforcement agencies when there is evidence to suggest systemic police misconduct. In recent years, the DOJ/AG have conducted independent investigations into several high profile OIS incidents at the request of local government officials. However, it is not necessary for local law enforcement to request DOJ/AG intervention. The DOJ/AG can initiate on its own an independent investigation of an OIS incident or misconduct allegation at any time. Similarly, the family of someone injured or killed by an OIS, or the family's legal counsel, can ask the DOJ/AG to intervene and conduct an investigation.

Pros:

- Clearly established statewide protocol and framework in place
- Investigations are conducted by law enforcement professionals who are well-trained and possess experience with OIS incidents
- No direct relationship between HPD and DOJ/AG within the criminal justice system
- Could improve trust between HPD and the community regarding OIS incidents
- Provides an additional layer of accountability

Cons:

- Financial impact to the City (cost of independent investigations would vary based upon level of complexity)
- Does not supplant or supersede ACDA political or legal authority
- DOJ/AG could decline the request

4. INVESTIGATION BY AN INDEPENDENT AUDITOR

An independent auditor is a law enforcement agency employee whose typical role is to investigate the process by which a law enforcement agency accepts and investigates complaints and reports on the thoroughness and fairness of the process to the community. Some independent auditors also review uses of force, OIS incidents, pursuits, conduct police performance audits, and make recommendations to the chief of police (or sheriff) regarding policies or procedures. They sometimes oversee administrative investigations into complaints or allegations of misconduct but are most frequently used to review and assess the dispositions of administrative investigations. This independent investigation model would require the creation and funding of a new position as well as the recruitment and hiring of a qualified individual who would report directly to the chief of police. In some models, the report is made directly to the appointing governing board.

Pros:

- Clearly established models in place (Richmond, San Jose, etc.)
- Position would serve as a liaison between the HPD and the community regarding OIS incidents

- Position would serve as a liaison between the HPD and City Council regarding OIS incidents
- Could improve trust between the HPD and the community regarding OIS incidents
- Provides an additional layer of accountability

Cons:

- Significant financial impact to the City (creating and funding a new position)
- Average number of OIS incidents involving HPD would not justify this independent investigation model
- Some perceive this position would not be independent as the position would be within HPD
- Could raise City Charter conflict regarding independence and reporting authority

5. INVESTIGATION BY A CIVILIAN REVIEW BOARD OR POLICE COMMISSION

A civilian review board (CRB) or police commission (commission) is a governing body made up of members who are either elected or appointed and whose responsibilities include the oversight of a law enforcement agency's operations, policies, and procedures. Some CRBs or commissions can investigate allegations of police misconduct and recommend findings to the chief of police. Others review administrative investigations, make recommendations to the chief of police, serve as a body where community members can appeal findings of an administrative investigation, and some have the authority to impose discipline and terminate employees. There are a variety of CRB and commission models in existence. Each is different and based upon an assessment of the needs of the community and the cost-benefit of the oversight model that is adopted. CRBs and commissions are typically born out of a community's specific needs related to policing issues, such as a law enforcement agency's history of systemic police misconduct, a history of civil rights violations, or a failure to adopt nationally recognized best practices in law enforcement.

Pros:

- Clearly established models in place (Oakland, San Francisco, etc.)
- Would serve as a liaison between the HPD and the community regarding OIS incidents
- Would serve as a liaison between the HPD and the City Council regarding OIS incidents
- Could improve trust between the HPD and the community regarding OIS incidents
- Provides an additional layer of accountability

Cons:

- Significant financial impact to City (depending on the model, members of a CRB or commission might need to be compensated, trained, etc.)
- Legal challenges from labor groups and inconsistent results and recommendations from civilian oversight bodies have minimized their value
- Average number of OIS incidents involving HPD would not justify this independent investigation model
- Depending on the model, investigations and/or recommendations could be made by CRB or commission members with no investigative experience

- Underlying agendas or pre-conceived notions about HPD could influence outcomes

After careful review and evaluation of the five options listed above, staff recommends Council consider adopting Option 3, a policy where the City Manager submits a request to the DOJ/AG to conduct an independent investigation, if a death results from the use of force during an OIS incident involving HPD officers. In addition, Option 1 (review by DA's office and internal HPD investigations) will still be utilized in all OIS incidents, consistent with current practice and Option 2 (civil litigation) will likely be utilized in most OIS incidents resulting in a death.

Before implementing any policy change at Council direction, the City will meet and confer with the Hayward Police Officers Association per the requirements of the Meyers-Milias-Brown Act, which governs collective bargaining in the State of California.

FISCAL IMPACT

The adoption of this policy recommendation alone has no fiscal impact. However, there would be a cost for the DOJ/AG to conduct an independent investigation if the request were accepted.

STRATEGIC INITIATIVES

This agenda item supports the Complete Communities Strategic Initiative. This item supports the following goal and objective:

Goal 1: Improve quality of life for residents, business owners, and community members in all Hayward neighborhoods.

Objective 1: Increase neighborhood safety and cohesion.

SUSTAINABILITY FEATURES

This policy would remain in effect unless rescinded by a future City Council.

NEXT STEPS

If the City Council directs the City Manager to implement the recommendation, HPD would work with DOJ/AG to establish a framework for OIS referrals, consistent with similar referrals made by other law enforcement agencies in the state. The November 15, 2018 OIS resulting in the death of Agustin Gonzalez would be included within the scope of such framework.

Prepared by: Bryan Matthews, Police Captain

Recommended by: Toney Chaplin, Chief of Police

Approved by:

A handwritten signature in black ink, appearing to read 'K. McAdoo', written in a cursive style.

Kelly McAdoo, City Manager