Police Auditor Ordinance Review Committee
January 5, 2009
5:00 p.m. - 7:00 p.m.

Committee Members: See Back of Agenda
Please read:  Agenda_Jan5_Background.pdf
Please bring:  Background Materials, Schedules through March

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5:00 p.m. - 5:30 p.m. Introduction
Welcome Sarah Medary, Assistant City Manager
Kitty Piercy, Mayor
Introduction of Facilitator and Committee Members

5:30 p.m. - 6:15 p.m. Scope and Charge
Motion Describing Committee Charge
Review Background Materials

6:15 p.m. - 6:45 p.m. Schedule and Timeline
Review Proposed Schedule
Discuss Public Input Process
Next Meeting Agenda Focus

6:45 p.m. - 7:00 p.m. Wrap-up
Questions?

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Expected Outcomes of Meeting:

- Discussed Ground Rules
- Adopted Schedule
- Agreed Upon Public Input Methods
- Review of Background Materials
- Set Agenda For Next Meeting
## Police Auditor Ordinance Review Committee

<table>
<thead>
<tr>
<th>Name</th>
<th>Representing</th>
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<tbody>
<tr>
<td>1 Mayor Kitty Piercy</td>
<td>Mayor and Council</td>
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<td>2 Chris Pryor</td>
<td>City Council</td>
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<td>3 Alan Zelenka</td>
<td>City Council</td>
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<td>4 Dawn Reynolds</td>
<td>Police Auditor</td>
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<td>5 Chief Pete Kerns</td>
<td>City of Eugene</td>
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<td>6 Willy Edewaard</td>
<td>Eugene Police Employee’s Association</td>
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<td>7 Erik Humphrey</td>
<td>Eugene Police Employee’s Association</td>
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<td>8 Norton Cabell</td>
<td>Citizen Review Board</td>
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<td>9 Rick Brissenden</td>
<td>Citizen Review Board</td>
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<td>10 John Ahlen</td>
<td>Police Commission</td>
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<td>11 Joe Alsup</td>
<td>Police Commission</td>
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<td>12 Ron Chase</td>
<td>Citizens United for Better Policing</td>
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<td>13 Angie Sifuentez</td>
<td>Citizens United for Better Policing</td>
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<td>14 Claire Syrett</td>
<td>Citizen At Large Appt.</td>
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<tr>
<td>15 Tim Laue</td>
<td>Citizen At Large Appt.</td>
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Staff:
Sarah Medary, Assistant City Manager
Jerry Lidz, City Attorney
Ellen Teninty, Facilitator
Background Materials

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## Police Auditor Ordinance Review Committee
### Proposed Schedule and Outcomes

<table>
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<tr>
<th>Meeting #</th>
<th>Meeting Date</th>
<th>Deliverables/Outcomes</th>
<th>Televised</th>
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<tbody>
<tr>
<td><strong>1</strong></td>
<td>January 5, 2009, 5-7 p.m., McNutt Room</td>
<td>Ground Rules Discussed Schedule, Timeline &amp; Next Agenda Set Review Background Materials Public Input Methods Set</td>
<td>Yes</td>
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<tr>
<td><strong>2</strong></td>
<td>TBD or January 15, 5-7:30, McNutt Room</td>
<td>Identify items from first 12 to move forward, or adjust in minor ways. Identify items from first 12 for further review.</td>
<td>TBD, when date set</td>
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<tr>
<td><strong>3</strong></td>
<td>TBD or January 22, 5-7:30, McNutt Room</td>
<td>Identify items from Final Six to move forward, or adjust in minor ways. Identify items from Final Six for further review. Narrow list for review at next meeting.</td>
<td>TBD, when date set</td>
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<td><strong>4</strong></td>
<td>TBD January 29, 5-7:30, McNutt Room</td>
<td>Finalize items from first two lists. Discuss other items to consider.</td>
<td>TBD, when date set</td>
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<tr>
<td><strong>5</strong></td>
<td>TBD February 5, 5-7:30, McNutt Room</td>
<td>Finalize first set of recommendations for public input.</td>
<td>TBD, when date set</td>
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**Input**

* Public Input possibilities before final recommendation - web portal, email link, forum, report back to constituencies, etc.

**Input/PH**

February 17, 2009, Council Chambers Input on Draft Recommendations Yes

**6**

TBD or February 19, 5-7:30, McNutt Room Finalize recommendations for March 11. TBD, when date set

**7**

TBD or February 26, 5-7:30, McNutt Room AIS Information Finalized TBD, when date set

**Action**

*March 5, 2009 - AIS Due to City Manager’s Office

**Action**

March 11, 2009, 12-1:30 p.m., McNutt Room - Council Work Session Recommendations Presented to Council Yes
Expected Outcomes

By March 11, 2009, the Police Auditor Ordinance Review Committee (PAORC) will report back to the City Council with recommendations on amendments to the police auditor ordinance. They will first review issues raised in Councilor Bettman’s November 10 and November 17, 2008 motions (see attached) and if time permits, the committee will consider other issues that committee members believe should be reviewed. Public input will be obtained as part of the committee’s work.

Background and Charge
November 17 Motion created the committee:

“...to review the issues raised by Councilor Bettman's November 10th motion, as well as other issues that the committee members believe should be reviewed, and to report back to the City Council by March 11 with recommendations on amendments to the police auditor ordinance. The committee shall be composed of two members of the Civilian Review Board (to be designated by the CRB), two members of the Police Commission (to be designated by the Police Commission), two individuals designated by Citizens United for Better Policing, two members of the Eugene Police Employees Association (designated by EPEA), the Police Auditor, the Police Chief, the Mayor, two councilors appointed by the Mayor, and two community members at-large appointed by the Mayor.

Committee Members

Mayor Kitty Piercy
Chris Pryor, City Council
Alan Zelenka, City Council
Dawn Reynolds, Police Auditor
Chief Pete Kerns, Police Chief
Willy Edewaard, EPEA
Erik Humphrey, EPEA
Norton Cabell, CRB
Rick Brissenden, CRB
John Ahlen, Police Commission
Joe Alsup, Police Commission
Ron Chase, CUBP
Angie Sifuentez, CUBP
Claire Syrett, Citizen at Large
Tim Laue, Citizen At Large
**General Guidance**

- The PAORC will operate in accordance with Oregon Public Meetings Law.
- The committee will appoint a Chair and Vice Chair from the non-elected officials of the committee.
- The City will provide a staff lead, a meeting Facilitator and Minutes Recorder.
- The committee is to be independent in its work, but not independent and apart from the City. Therefore, any and all inquiries or requests for information from the media will be coordinated by Jan Bohman, the City of Eugene’s Public Affairs Officer.
- The PAORC is responsible for determining how best to accomplish the expected outcomes, including what information to collect, how to collect and analyze the information and the reporting format.
- The committee will establish their own work schedule to accomplish the expected outcomes as stated above.
- Any additional resources or expertise that the committee may need will be coordinated through Sarah Medary, Assistant City Manager.
- Logistical support; for example space reservations, meeting notices, etc., will be coordinated through the City Manager’s Office.
- The PAORC will present recommendations to the City Council. Based on their analysis and deliberation of these recommendations, the City Council will make the final decisions on amendments to the ordinance.
- The committee will develop a decision-making model for their work. However, the committee may want to consider a model in which a minimum 2/3 vote of those present is needed to move a recommendation forward. In addition, all motions considered by the committee would be included in an appendix so that Councilors have the full benefit of the committee’s discussion.
Motions Referenced and Prioritized For Consideration:
November 10 Motion
Move/second: Bettman/Zelenka
I move to direct the City Manager to bring back Ordinance No. 20374 to a public hearing on December 8, 2008, amended as follows:

1. The Police Auditor shall have exclusive authority to classify and route complaints, as well as to reclassify complaints if upon further investigation and additional information, no available at the time of intake, the Auditor finds reclassification if warranted.

2. Investigation of complaints shall commence upon classification of the complaint by the Police Auditor or as soon as possible thereafter, and no investigation shall occur before the Police Auditor has received, classified, and routed the complaint.

3. Upon the opening of a case file, and any time thereafter including closed cases, the Police Auditor shall have complete, unrestricted, and direct access to all records, evidence, documents, and all material the Police Auditor deems relevant to the complaint.

4. Administrative investigations shall proceed concurrently with any related criminal investigation; administrative investigations shall not be suspended, delayed, or postponed, while criminal proceedings involving complainants and witnesses are resolved.

5. The Police Auditor shall have complete, unrestricted, and direct, access to the necessary Eugene Police Department offices; the same as Internal Affairs staff. In addition the Police Auditor shall have complete, unrestricted, and direct access to Internal Affairs PRO database the same as the program coordinator and the Internal Affairs PRO supervisor.

6. The Police Auditor shall maintain strict name confidentiality wherever warranted or legally required. Upon classification of the complaint, the Police Chief may request the Police Auditor provide name confidentiality on a specific case, and the Police Auditor shall comply, but the identifications of any involved parties shall not be withheld from the Police Auditor.

7. There shall be an opportunity for appeal of the Police Chief’s adjudication to the City Manager for final determination (on the existing record). Appeal shall be available in cases of misconduct upon the request of the Police Auditor, the Civilian Review Board, or the complainant in cases where there is disagreement between the Police Auditor and the Police Chief and/or the Civilian Review Board and to the Police Chief.

8. Risk claims shall be forwarded to Internal Affairs and the Police Auditor for classification and processing as a complaint.

9. The Police Auditor shall review random selections of Service Complaints.

10. The definition for “police employee” shall include the Police Chief by adding “including the Chief who answers to the City Manager.”

11. The Police Auditor’s budget shall be sufficient to accomplish all of the duties and responsibilities of the office including the sufficient and readily available funds to contract for external investigations.

12. Update Section 2.456(2)(c)(d) for consistency with the Charter.
November 17 Motion

Move/second: Bettman/Taylor
I move to substitute to direct that the City Manager and the Police Auditor work with the Civilian Review Board to review and recommend next steps for the program for External Oversight of Complaints Involving Police Employees including, but not limited to:

· authority for the Police Auditor to determine final adjudication;
· authority for the Police Auditor to recommend discipline;
· subpoena power for the Civilian Review Board and Police Auditor;
· the Police Auditor’s role in training of police employees;
· the Civilian Review Board’s role in evaluating and overseeing the Police Auditor; and
· authority for the Police Auditor to participate in hiring processes for EPD, including the Chief of Police.
Section 15-A. **External Review of Police.**

(1) The city council shall hire, supervise and specify the salary of an independent police auditor to oversee investigations of complaints involving police employees. Notwithstanding section 16 of this charter, the city council shall authorize the auditor to: (a) receive, classify and route complaints about sworn police officers and civilian police employees; (b) contract with persons or entities to perform outside investigations of such complaints; (c) monitor the city’s internal investigations, including but not limited to access to all evidence developed as part of the investigation and participation in investigative interviews related to such complaints, and require the city to undertake additional investigation; (d) make recommendations to the city manager or designee following the investigation; (e) prepare reports on complaint trends and police practices in general; and (f) act as a liaison to and provide staff support for the civilian review board.

(2) The city council shall appoint a civilian review board of not more than seven members to review investigations of complaints involving sworn police officers. Notwithstanding section 16 of this charter, the city council shall authorize the civilian review board to: (a) review the completed investigation and adjudication of complaints filed against sworn police officers; (b) require that the city re-open an investigation; (c) provide comments on an investigation, including recommendations to the independent police auditor, city manager or designee about the investigation; (d) review trends and statistics of complaints against sworn police officers and civilian employees, and provide reports and recommendations to the city council; and (e) oversee and evaluate the work of the independent police auditor.
2.450 **Office of Police Auditor – Established.**

(1) The office of the police auditor, hereafter auditor’s office, is hereby established to provide an independent location to lodge complaints involving police employees, monitor internal investigations to ensure objective, thorough and high quality investigations, and develop recommendations to improve police services.

(2) The auditor’s office shall be headed by a full-time professional police auditor who is hired by and accountable to the city council. The city council shall hire, supervise, and specify the salary of the independent police auditor, who shall serve at the pleasure of the city council. All city council decisions regarding the auditor will be made by a simple majority vote of the city council.

(3) The independent police auditor shall have exclusive authority to hire, supervise, and to make all other employment decisions regarding the auditor’s support staff. No change relating to the authority to hire and supervise the auditor’s staff shall be made without formal action of the city council.

(4) Any findings, recommendations and actions taken shall reflect the police auditor’s independent judgment. No person shall use his/her political or administrative position to attempt to unduly influence or undermine the independence of the police auditor, or his/her staff or agent, in the performance of his/her duties and responsibilities.

(5) The city manager shall include in his/her recommended budget an allocation sufficient for the operations of the auditor’s office. The physical location of the auditor’s office shall be separate from the police department, but in close proximity so as to facilitate a close working relationship with others involved in the complaint investigation process, and easily accessible to the public.

(6) It is intended that sections 2.450 through 2.456 and 2.240 through 2.246 will provide a system of independent oversight of the police complaint process and implement section 15-A of the Eugene Charter of 2002 as adopted by the city electorate on November 8, 2005.

*(Section 2.450 added by Ordinance No. 20374, enacted December 13, 2006, effective January 12, 2007.)*

2.452 **Office of Police Auditor – Definitions.** Words and phrases used in sections 2.240 through 2.246 and 2.450 through 2.456 have the following meanings:

**Chief of police.** The person designated by the city manager as the chief of police.

**Community impact case.** A complaint involving sworn police officer(s) that alleges excessive force, bias, disparate treatment or violation of constitutional rights, which the police auditor determines should be reviewed by the civilian review board in accordance with section 2.244(3) and 2.244(4) of this code.

**Complaint.** An expression of dissatisfaction, allegation of misconduct, or question about a police employee’s conduct, police services provided or not provided, or police department policies or practices in general.

**Conclusion of any criminal investigation or conclusion of any such criminal investigation.** A criminal investigation is deemed concluded when the appropriate criminal prosecutor decides either to press charged or to not press charges.
Critical incident. An occurrence involving a significant police action including, but not limited to, a civil disturbance or riot, an officer-involved shooting, or other action by a sworn police officer resulting in serious physical injury or death.

Facilitated conversation. A discussion guided by a third party, trained facilitator, between the complainant and a department representative, most often the named employee’s supervisor or internal affairs staff.

Immediate family member. A person’s spouse or domestic partner, a parent, step-parent, grandparent, child, stepchild, grandchild, sibling, half-sibling or step-sibling of the person or of the person’s spouse or domestic partner.

Internal affairs. The police employees designated by the chief of police to investigate allegations of misconduct against police employees.

Mediation. A voluntary, confidential complaint resolution option that is an alternative to the investigation, adjudication and disciplinary process. It is a structured process guided by a neutral, third-party, professionally-trained mediator enabling direct communication between the complainant and employee.

Police employee. A city employee who reports directly or through others to the chief of police.

Preliminary investigation. As used in section 2.456(1)(c), an initial inquiry by the police auditor or the auditor’s designee into the facts and circumstances of a complaint for purposes of deciding how to classify and route the complaint.

Substantial evidence. Evidence that, considering the record as a whole, a reasonable person would rely upon to conclude that something is true. For purposes of section 2.244(4), an adjudication is supported by substantial evidence when the civilian review board reasonably could reach the same finding after considering all the evidence in the record, whether or not the board actually agrees with the adjudication.

Sworn police officer. A police employee who is also certified and employed as a peace officer under the laws of this state.

(Section 2.452 added by Ordinance No. 20374, enacted December 13, 2006, effective January 12, 2007.)

2.454 Office of Police Auditor – Powers and Duties.

(1) The police auditor is the administrative head of the auditor’s office and shall:
   (a) Oversee the operations of the auditor’s office, establish program priorities and objectives, and manage the implementation and evaluation of work programs;
   (b) Develop and maintain operating procedures for the auditor’s office, including protocols for handling complaints and monitoring investigations;
   (c) Establish standards of professional conduct and provide necessary training for staff in the auditor’s office.
(d) Act as liaison and provide staff support to the civilian review board. In collaboration with the civilian review board, the police auditor shall:
1. Establish and maintain policies, procedures and operating principles for the civilian review board’s functions; and
2. Conduct education and outreach activities to inform the community about the process for filing complaints and commendations about police employees, and develop and disseminate information and forms regarding the police complaint handling and review system.

(e) Receive and process complaints concerning police employees and monitor the complaint investigation and review process as set forth in sections 2.456(1) and (2).

(f) Perform a quality assurance function with the goal of identifying systemic changes that will improve police services to the community. These activities include:
1. Analyzing complaint trends and recommending changes to police policy, practices and training;
2. Reviewing risk and tort claims and developing recommendations to reduce risk and liability;
3. Reviewing and reporting trends in completed police employee disciplinary decisions.

(g) Provide status reports to the civilian review board and city council and provide recommendations relevant to police policies and practices to the police commission.

(h) Develop and present to the civilian review board and city council annual public reports describing the activities of the auditor’s office, its findings and recommendations, the police department’s response to its recommendations, and any other information pertinent to assessing the performance of the auditor’s office.

(i) Provide the city council with any other reports deemed necessary or requested by the city council. All public reports shall strive to protect the privacy of all individuals and shall not contain the names of parties to a complaint (employees, complainants and/or witnesses) not previously disclosed.

(j) Determine whether applicants for the civilian review board meet the requisite qualifications in section 2.242(1)(a)1. and 2.242(1)(d).

(2) The police auditor shall receive timely notification of critical incidents to enable him/her, or a qualified designee, to report to the scene of critical incidents. The police auditor and chief of police shall develop necessary protocols for summoning the police auditor to the incident for purposes of first-hand observation.

(3) The police auditor shall participate in use of force review boards.

(4) All case adjudication and employee discipline decisions shall be made by the chief of police. The police auditor may develop adjudication recommendations, but is not authorized to recommend the level of discipline for police employees.
(Section 2.454 added by Ordinance No. 20374, enacted December 13, 2006, effective January 12, 2007.)

2.456 Office of Police Auditor – Complaint Processing.

(1) Complaint intake.

(a) Any person may lodge a complaint or commendation with the auditor’s office about the conduct of, or services provided by, a city police employee;

(b) The auditor’s office is the intake center for all community complaints about police employees. City employees may choose to lodge complaints against another employee through either internal affairs or the auditor’s office. The auditor’s office shall document all contacts and complaints received from any source. The auditor’s office may refer a complainant to another department in the city or another agency that would be more appropriate to address the complaint.

(c) The auditor’s office conducts the preliminary investigation of all complaints lodged with the auditor’s office or internal affairs to appropriately classify and route the complaint and any accompanying information accordingly. If a complaint is received that alleges criminal conduct on the part of the employee, the police auditor shall forward the complaint and any associated information to the chief of police.

(d) The auditor’s office may determine whether a complaint is appropriate for mediation or facilitated conversation, and upon the voluntary agreement of the involved parties and approval of the chief of police, shall coordinate the resolution of such cases.

1. Mediation is an alternative to the investigation, adjudication and disciplinary process; if the parties agree to mediation, the investigation, adjudication and disciplinary process will end.

2. A facilitated conversation may, but does not necessarily, result in termination of the investigation, adjudication and disciplinary process.

(e) The auditor’s office classifies complaints that will be treated as community impact cases and provides support to the civilian review board in its review of those cases and other cases accepted by the civilian review board.

(f) The auditor’s office shall provide timely updates on the status of a complaint and notification to the complainant of its final disposition.

(g) The auditor’s office may dismiss a complaint if upon review, it meets criteria that the auditor has established for such action, including reporting delays and/or insufficient information from which to take further action.

(h) The auditor may review and process a complaint not filed directly with the auditor’s office if the auditor determines that concerns have been expressed about conduct of a police employee(s).
(i) Except for good cause, complaints of minor misconduct involving courtesy, communications, and minor rules violations that might be handled as service complaints shall be filed within 60 days of the incident.

(j) Except for good cause, complaints of serious misconduct including, for example, excessive force that causes substantial physical injury, egregious acts of disparate treatment, or major rules violations shall be filed within 6 months of the incident.

(2) Complaint Investigations.

(a) The police auditor shall actively monitor internal investigations to ensure a thorough, objective, and timely investigation, and is authorized to:
   1. Participate in complainant, employee and witness interviews;
   2. Require the city to undertake additional investigation.

(b) The police auditor may require, and is authorized to contract for, an external investigation when the police auditor determines that an external investigation is appropriate.

(c) The police auditor will not be directly involved in any criminal investigations, but shall be kept apprised of the status of such investigations involving police employees. The police auditor shall have access to the case file relevant to the administrative portion of such investigations. Following the conclusion of any criminal investigation or within 60 days after the date of the incident, the auditor has the authority to initiate an internal investigation unless the police auditor receives written notice from the District Attorney, United States Attorney, or City Prosecutor that the internal investigation would jeopardize the criminal investigation and prosecution.

(d) All case files shall be provided to the police auditor upon conclusion of the investigation for review and a determination that the investigation was thorough and complete. Once the investigation is deemed complete, the involved employee’s immediate supervisor will confer with the police auditor and develop a case adjudication recommendation that will be forwarded through the chain of command to the chief of police for final adjudication. If the police auditor disagrees with the supervisor’s recommendation, his/her disagreements and comments will be documented and forwarded to the chief of police as well. The immediate supervisor and police auditor will use their best efforts to complete this process in a timely manner and without unreasonably delaying the final adjudication of the case. If the investigation reveals evidence of criminal conduct not previously known, the auditor may refer the matter to the appropriate criminal prosecutor for his/her consideration.

(e) The auditor’s office will make every reasonable effort to notify the complainant that an investigation has been conducted, summarize the case findings, and provide an opportunity for the complainant to comment or ask questions about the process.
(f) The auditor's office shall return all case file materials to internal affairs for retention, but shall have subsequent access to closed cases.

(g) The police auditor shall maintain an on-going status report on the work of the auditor's office and case investigations and shall share it with the civilian review board.

(3) Access to Records and Materials.

(a) The police auditor shall have complete and unrestricted access to all complaint and investigative records and materials, and any other information necessary for the performance of his/her specified duties. As provided in section 2.456(2)(d), the police auditor shall not have access to a criminal investigation file until the conclusion of any such criminal investigation.

(b) The police auditor shall supervise the development and implementation of a case management system to track all complaints received in coordination with the internal affairs unit, report case statistics and trends, and provide performance indicators to evaluate the effectiveness of the auditor's office.

(c) The chief of police and police auditor shall develop cooperative interdepartmental procedures and any necessary infrastructure to coordinate the flow of information and communication between the auditor's office and the police department.

(Section 2.456 added by Ordinance No. 20374, enacted December 13, 2006, effective January 12, 2007.)
CIVILIAN OVERSIGHT PROTOCOLS

Auditor’s Office Protocol

Protocols for Notification of Auditor’s Office

1. The police auditor shall receive timely notification of critical incidents to enable him/her, or a qualified designee to report to the scene of critical incidents. Ordinance No. 20374, Section 3, 2.454 (2)
2. A critical incident is an occurrence involving a significant police action including but not limited to a civil disturbance or riot, an officer-involved shooting, or other action by a sworn police officer resulting in serious physical injury or death.
3. The auditor will report his/her telephone number(s) and alternative telephone numbers to the police chief to facilitate prompt communication.
4. The auditor may respond to the scene of a critical incident in order to enable first-hand knowledge of high profile events should a complaint ensue; to participate in deadly force review boards; and to develop risk/liability reduction plans for the City of Eugene. The auditor will have no greater access to the scene of a critical incident than access afforded to the non-involved department members, or as permitted by the investigating agency.
5. The auditor will not interview the involved or witness officers at the scene regarding the incident.

Complaint Intake

1. The police auditor will perform all intake of complaints against Eugene Police Department employees by members of the public. City of Eugene employees may lodge a complaint, with the auditor’s office or with the internal affairs unit of the police department if the complaint arises out of their employment with the City.
2. Complaints may be filed by telephone, in writing by mail, by e-mail or in person. Intake forms will be made available to facilitate complaint processing by are not necessary.
3. Complaints may be accepted from third parties with a reasonably direct knowledge of the incident. Anonymous complaints alleging misconduct will be accepted provided there is specific information from which to investigate the complaint.
4. Complainants may request that their personal information, including their identity, be kept confidential and the auditor will honor this request as allowable by law and as practicable to investigate the incident.
5. The auditor may initiate a complaint based upon credible evidence of possible misconduct.
6. The auditor’s office will conduct a preliminary investigation in order to classify the complaint and further understand the nature of the potential violation(s). The preliminary investigation will include information such as a

9/22/2007
Initials: Auditor
EPEA
description of the event, date, time location, name of the employee(s), badge number(s), description of the vehicle(s), name and address of any witness(s) or any other evidence relevant to the investigation. Internal affairs personnel may assist in gathering information for the auditor’s preliminary investigation.

7. Records/warrant checks will not be conducted on a routine basis as part of the complaint intake. If, during the preliminary investigation, an outstanding warrant for the arrest of the complainant is discovered, the police auditor will encourage the complainant to resolve the warrant. In situations where the complainant named in the warrant is of a serious nature, the police auditor will advise the police department. Serious nature includes crimes of violence or crimes which involve serious risk of danger to the public such as domestic violence complaints.

8. The auditor may dismiss or decline the complaint for the following reasons:
   a. Timeliness;
   b. If the complaint involves personnel who are not within the jurisdiction of the auditor’s office;
   c. If another remedy is in use or is more appropriate;
   d. The complaint has been previously reviewed.

9. The auditor will document the reason for any dismissals and explain the decision to the complainant in writing, if possible, within five business days of initial intake. A copy of this correspondence will be forwarded to internal affairs. Internal affairs will forward this information on to the affected employee(s) and EPEA if the involved employee is an EPEA represented employee.

Classification of Complaints

1. After a preliminary investigation, the auditor will classify complaints to facilitate a timely and satisfactory resolution. Complaints will be classified into the following general categories:
   a. Allegation of criminal conduct (on or off duty)
   b. Allegation of misconduct
   c. Service complaint (concerns about employee performance or demeanor, customer service and or level of police service provided)
   d. Policy complaint (where the person is dissatisfied with current policies or established procedures)
   e. Inquiries
   f. Complaints may be further categorized as a community impact case

2. Service complaints, allegations and inquiries will be further classified by type for statistical tracking and trends analysis purposes. All complaints will be recorded in a database designed to track complaints by category type and by complainant. The database will be used by both internal affairs and the police auditor to ensure a full accounting of all complaints received and so that trends can be detected.

9/22/2007
Initials:  

Auditor: EPEA:
3. Service complaints that are not resolved at intake by the police auditor’s office will be directed to internal affairs for assignment to a supervisor. The supervisor will conduct an investigation into the complaint. The supervisor will assign the adjudication, take the appropriate action concerning the employee, if any, and return reports to internal affairs.

4. Allegations of criminal behavior will be forwarded to the chief unless, in the police auditor’s view, informing the chief will compromise a criminal investigation. In those circumstances, the police auditor may forward the allegation(s) directly to the appropriate government prosecutor.

5. Allegations of misconduct will be forwarded to the chief of police for formal investigation by internal affairs or other department staff if appropriate.

6. The police auditor may choose to contract for an outside investigation to ensure a thorough and objective review of the complaint or if the chief disagrees with the auditor’s classification of a complaint as one requiring an internal affairs investigation.

7. Service complaints will be forwarded to internal affairs who will work with the involved employee’s supervisor to address any possible employee performance issues and to determine the most appropriate complaint resolution option. The police auditor will be notified of the resolution of the complaint within ten (10) days of the resolution. If the supervisor uncovers possible misconduct during review of the incident, the matter may be reclassified.

8. The police auditor will coordinate with internal affairs to gather appropriate information necessary to resolve inquiries.

9. The police chief may reclassify a complaint; such decisions will be recorded as part of the auditor’s complaint handling process.

10. The police auditor will determine if complaints are appropriate for alternative resolution (refer to mediation protocols).

11. The police auditor determines if complaints will be treated as a community impact case and reviewed by the Civilian Review Board prior to closure. A community impact case may include complaints alleging excessive force, bias, disparate treatment, or a violation of constitutional rights.

12. The police auditor’s office will notify the complainant, the affected employee and EPEA (if the affected employee is an EPEA-represented employee) about receipt and classification decision within seven (7) business days after the complaint was received.

Auditor Review of Completed Administrative Investigations

1. Allegations of misconduct will normally be investigated by internal affairs. Upon conclusion of the internal investigation, all relevant case files will be provided to the police auditor for review and a determination that the investigation was thorough and complete. The police auditor will make this determination within ten (10) business days of receipt of the completed investigation.

9/22/2007
Initials:

Auditor

EPEA
2. The police auditor may require the city to undertake additional investigation if the investigation is deemed incomplete.

3. If the police auditor becomes aware of criminal allegation(s) not previously known, the police auditor will refer the matter to the police chief unless, the in the police auditor’s view, informing the police chief will compromise a criminal investigation. In those circumstances, the police auditor may forward the allegation(s) directly to the appropriate government prosecutor.

4. After the police auditor has reviewed the investigation and it is deemed complete, the employee’s immediate supervisor will develop a case adjudication recommendation after confering with the auditor. The supervisor’s recommendation then will be forwarded through the chain of command to the chief of police for final adjudication. The police auditor may develop independent adjudication recommendations, but is not allowed to recommend the level of discipline for police employees.

5. Adjudications may include the following:
   a. Sustained: The complainant’s allegation(s) was determined to be a violation of Eugene Police Department policies, rules and/or procedures and, the employee(s) involved committed the violation(s) as alleged.
   b. Insufficient Evidence: The chain of command was unable to determine whether or not a violation of Eugene Police Department policies, rules, and/or procedures occurred.
   c. Unfounded: The claim is unsubstantiated. It was determined that the employee(s) involved did not engage in the behavior as alleged by the complainant.
   d. Within Policy: It was determined that the behavior of the employee(s) involved did occur but was consistent with Eugene Police Policies, rules, practices and/or procedures.
   e. Mediated: During the process of an investigation it was determined that the case would likely be more successfully resolved through mediation; all parties agreed to mediate the complaint and the mediation process was completed.
   f. Administratively Closed: The investigation is closed prior to reaching a conclusion. For instance, the complainant does not provide the information needed or refuses to cooperate with the investigation. The investigation may be re-activated upon the discovery of new, substantive information or evidence.

6. If the police auditor disagrees with the supervisor’s recommendation, his/her disagreements and comments will be documented and forwarded to the chief of police.

Dismissal or Declining Investigation of Complaints

1. Except for good cause, complaints of minor misconduct involving courtesy, communications, and minor rules violations that might be handled as a service
complaint shall be dismissed by the police auditor, if not filed within 60 days of the incident.

2. Except for good cause, complaints of serious misconduct including, for example, excessive force that causes substantial physical injury, egregious act of disparate treatment, or major rules violations shall be dismissed by the auditor if not filed within six (6) months of the incident.

3. A complaint will be dismissed if the complaint is about an employee who does not work for the City of Eugene Police Department. The complaint will also be referred to the appropriate agency if that agency can be identified.

4. A complaint may be dismissed if the complainant could reasonably be expected to use or is using another remedy or channel for resolution of the complaint (for example, a judicial determination of guilt).

5. The police auditor may dismiss complaints that are subject to a judicial, administrative, or other review which will explicitly or implicitly require a finding or ruling on the conduct that is the subject of the complaint.

6. Absent new, substantial evidence or information, a complaint shall be dismissed if the complaint was previously adjudicated. This circumstance may arise if a second person files a complaint about an incident that was previously resolved. It might also arise if the same complainant files a second complaint about a matter that was previously adjudicated.

7. A complaint may be dismissed if the involved employee cannot be identified.

8. A complaint may be dismissed if the involved employee has resigned or has been terminated.

9. A complaint may be dismissed if upon review of the facts presented or information learned during intake, the allegations are found to be illogical, malicious or improbable.

Civilian Review Board Protocol

Community Impact Cases

1. A community impact case is an investigation or complaint involving sworn police personnel that alleges excessive force, bias, disparate treatment or violation of constitutional rights, which the police auditor determines should be reviewed by the Civilian Review Board as a community impact case.

2. If the police auditor selects a case for review as a community impact case, the Civilian Review Board will review a summary of the complaint and investigation and may decide if they will accept this matter as a community impact case. If the Civilian Review Board votes by a majority to review the matter as a community impact case, the chief of police will be notified by the police auditor.

3. The police auditor will monitor and review investigations of community impact cases as s/he would other misconduct investigations.

4. Upon completion of the investigation and preliminary adjudication decision by the police chief, the police auditor will provide the completed investigation to the Civilian Review Board for their confidential review.
5. Members of the Civilian Review Board will not discuss the investigation with anyone other than members of the board or the office of the auditor before the completion of the Civilian Review Board review. Board members may discuss the case with other members of the Civilian Review Board and the Police Auditor. If a board member requires further information to complete their review, they may direct the police auditor to conduct research to report to the Civilian Review Board.

6. If a community impact case is also the subject of an on-going criminal investigation or prosecution, the case will be discussed in executive session when legally permissible.

7. Within 14 days of receiving the case, the Civilian Review Board shall meet in order to discuss and present its determinations on the case. Within 30 days of the receiving the case, the Civilian Review Board will do one or more of the following:
   a. Concur with the case adjudication;
   b. Develop recommendations regarding the handling of the complaint and the investigation process, and/or identify other relevant policy or procedural issues for further consideration;
   c. Require the city to reopen the investigation if it finds either:
      i. The investigation was incomplete or inadequate, and the civilian review board has reasonable basis to believe that additional investigation is likely to reveal facts that could affect the case adjudication; or
      ii. The adjudication reached by the city is not supported by substantial evidence.
   d. Unless the Civilian Review Board has voted to reopen the investigation, the police auditor shall develop a written synopsis of the board’s proceedings and conclusions concerning the investigation and will provide that information to the chief of police so that appropriate steps to close the case can be taken.
   e. When the Civilian Review Board has voted to reopen a community impact case, the police auditor shall inform the Civilian Review Board of the subsequent investigation conducted and the final adjudication decision.

8. The Civilian Review Board will notify the complainant(s) and involved employee of its decision on whether to accept a case for review, and shall inform the complainant, the affected employee(s) and EPEA if an affected employee is an EPEA-represented employee, of its conclusions on the case.

Civilian Review Board Review of Closed Cases

1. Community members, upon receiving the disposition of a complaint previously lodged with the auditor’s office, may request that the Civilian Review Board review the complaint investigation and adjudication decision for a determination whether it was handled fairly and with due diligence. The auditor may also recommend the Civilian Review Board review a closed case.
that was not previously identified as a community impact case. This review shall not impact the outcome of the case but the board may make recommendations concerning the investigation.

2. The purpose of the Civilian Review Board review of closed cases includes the following:
   a. Identify deficiencies regarding the complaint system (intake and classification).
   b. Develop recommendations for process improvements.
   c. Make judgments about the quality of the investigation.
   d. Make judgments about the rationale for the case disposition.
   e. Increase transparency by the public discussion of a complaint.

3. The Civilian Review Board shall develop criteria to decide whether to accept a case for review. However, the Civilian Review Board may not accept a completed case that was previously reviewed as a community impact case.

4. All materials contained in the investigative file concerning the completed investigations of cases the Civilian Review Board selected to review will be made available to members for their confidential review.

5. The police auditor will prepare a case summary for use during the public meeting of the Civilian Review Board. This summary will strive to protect confidentiality of the complainant(s) and the police employee(s).

6. The Civilian Review Board may review a random sample of complaint intake and classification decisions by the auditor in order to ensure complaints are handled with due diligence.

7. The Civilian Review Board may review an investigation when the complainant requests that the board do so. The request by the complainant may be made in writing, by appearance at a scheduled board meeting, by e-mail, telephone or FAX.

8. The Civilian Review Board will report annually to the City Council concerning the following:
   a. A summary of the Civilian Review Board’s Activities, findings and recommendations during the preceding year;
   b. Assessment of the performance of the police auditor consistent with section 2.233(7) of the ordinance.
   c. Evaluating the work of the auditor’s office, including whether it is functioning as intended.

Public Comment

1. The Civilian Review Board will hold public comment period at its meetings at least quarterly.

2. The purpose of public comment will be to gather information about community concerns and about specific police actions. This information may be forwarded to the police auditor for processing and/or intake or to the Eugene Police Commission in order to review policy matters.

9/22/2007
Initials: Auditor eB
EPEA y

Police Auditor Ordinance Review Committee
January 5, 2009
3. Public comment about incident specific police actions may not occur at the same meeting as the Civilian Review Board is reviewing the investigation of the incident.

4. Public comment is limited to three minutes. Generally, the speakers will be called upon in order in which to “request to speak” forms are received by staff at the meetings. No persons will be allowed to complete a request to speak form more than 15 minutes prior to the start of the meeting.

Cristina Beamud, City Police Auditor

Willy Edewaard, EPEA President

9/22/07
Initials: Auditor

9/22-07
Date

10/2/07
Date

EPEA
CITY OF EUGENE
INTER-DEPARTMENTAL MEMORANDUM
CITY ATTORNEY – CIVIL DEPARTMENT

To: Dawn Reynolds, Interim Police Auditor
    Bob Lehner, Chief of Police
Date: October 15, 2008

Subject: Auditor Responsibilities and Powers

A number of issues have arisen over the past several months related to the implementation of the ordinance establishing the office of the police auditor. We have discussed most of these issues with each of you in some depth, shared drafts of this opinion with you, and revised the opinion to incorporate some of your comments.

Many of the questions and issues implicate several different parts of the ordinance. Instead of addressing the questions one-by-one, this memo is organized similar to the ordinance, starting with intake, then preliminary investigation, followed by complaint investigations, and ending with records.

As a general proposition, City officials and staff must comply with mandatory terms in an ordinance. Parts of the auditor ordinance are mandatory, while other parts are discretionary. To the extent that a provision of the ordinance is mandatory, the auditor, the police chief and EPD officers must comply with it. The one exception to this general proposition is that there may be occasions where the City ordinance is preempted by federal or state law, or strict compliance with a provision of the ordinance would violate a contractual obligation of the City.

Intake

The ordinance creates two categories of complaints for purposes of intake: “community” complaints and complaints from other city employees. The ordinance does not define the term “community complaint,” but we believe that it means any complaint that is filed by someone other than a city employee.

The intake for all community complaints is with the auditor’s office. Section 2.456(1)(b) states, “The auditor’s office is the intake center for all community complaints about police employees.” All other complaints, i.e., complaints filed by city employees, may be filed with either the auditor’s office or with internal affairs in the Eugene Police Department. Regardless of where the complaint is filed, the auditor’s office must document all contacts and complaints that are received from any source. Consequently, information about any complaints from city employees that were filed with EPD must be forwarded to the auditor’s office. (Information about those complaints also needs to go to the auditor’s office for the reasons discussed in the next section.)
Preliminary Investigation

Following the intake of a complaint, whether from a member of the community or from a city employee, the complaint needs to be classified and routed. The ordinance assigns that function to the police auditor. The auditor first must conduct a “preliminary investigation,” which is defined as “an initial inquiry by the police auditor or the auditor’s designee into the facts and circumstances of a complaint for purposes of deciding how to classify and route the complaint.” EC 2.452.

It is possible that there could be circumstances where the intake and preliminary investigation might not be able to work as dictated by the ordinance. That situation could arise when EPD receives information from a confidential source or restricted database that, by law, cannot be shared with the auditor’s office. As noted above, unless there is a federal or state statute, or a contract governing a database (such as LEDS), that prohibits the sharing of certain information beyond sworn police officers (or even a subset of those), the ordinance does not allow information to be withheld from the auditor. The critical question, therefore, will be whether some type of preemption actually exists.¹

It is not possible to identify and give an opinion in the abstract on those potential preemptions. Consequently, we recommend instead the following as a protocol: Whenever EPD believes it is necessary to withhold information from the auditor’s office, EPD should notify the auditor and city attorney’s office immediately. The notice should explain that some information is being withheld at least temporarily pending review by the city attorney’s office. At the same time, EPD should contact our office to review the situation to see whether we agree that the ordinance is preempted in some way so that information cannot be shared with the auditor’s office. Following our review, we can advise you both whether we believe that the information can be withheld. (Certainly, there are other possible ways to handle this situation, and we would be happy to work with you to devise a different procedure.)

Investigations of Complaints

The ordinance handles administrative complaints differently than complaints alleging criminal conduct. As used in this memo, “administrative complaints” means any complaint or allegation of a non-criminal nature.

For administrative investigations, the ordinance contemplates a contemporaneous role for the auditor. The ordinance provides that the auditor “shall actively monitor” administrative investigations. As part of that function, the ordinance also authorizes the auditor to “participate” in interviews of complainants, employees and witnesses. By definition, “participate” means something more than just observing interviews but less than controlling or directing them. On one hand, several sections of the ordinance describe the auditor’s role regarding investigations as a monitoring role. The auditor does not conduct the investigations; rather, the auditor “monitor[s] internal investigations to ensure objective, thorough and high quality investigations.”

¹ Examples of federal and state provision that might have preemptive effect are noted below in the discussion about records of investigations.
EC 2.450(1). See also EC 2.454(1)(e), 2.456(2). On the other hand, “participate” clearly contemplates more than a purely passive role. Consistent with that, the Police Commission Report on Police Complaint System and Civilian Oversight, in the section captioned “Auditor’s Role in Monitoring Investigations,” stated “the auditor may sit-in on and participate” in investigative interviews. That clearly implies that “participate” means more than just sitting in on the interviews.

The precise degree of the auditor’s participation in investigative interviews is not spelled out in the ordinance or the Police Commission’s recommendations. This is one of the numerous aspects of implementing the ordinance where the police chief’s and auditor’s expertise in conducting investigations should guide the process. To us, it seems reasonable for the internal affairs investigator conducting the interview to afford the auditor an opportunity to suggest topics, lines of questioning and even specific questions for the interviewer to pursue. Although the department investigator retains control of the interview, it makes more sense for the interviewer to consider the auditor’s suggestions before or during the interview, rather than after the Department deems the investigation complete. At that point, the only means for the auditor to cure an omission in the interview is to order additional investigation. Thus, in addition to the express authority to the auditor to “participate” in interviews, the ordinance indirectly grants the auditor the power to influence the interview: if the investigator does not heed the auditor’s admonition that the questioning is not thorough or objective, the auditor can invoke the power to require the city to undertake additional investigation. In addition, when the investigation is complete, the auditor reviews the file and may recommend to the Civilian Review Board that it review the case. The Board may, among other things, comment on the fairness and thoroughness of the investigation.

The powers described in the preceding paragraph suggest that the auditor’s participation in interviews should be sufficient to assure the auditor that the investigation is thorough and objective. When the auditor determines that it is appropriate, the auditor also has the authority to require, and to contract for, an external investigation. That could include cases in which the auditor determined that an interview was so deficient that it compromised the basic fairness of the investigation.

The auditor’s authority with regard to criminal investigations is far narrower. The ordinance provides that the auditor “will not be directly involved in any criminal investigations . . .” Consequently, the auditor has no authority to participate in interviews of the complainant, the employee or witnesses related to the criminal complaint.

Although the auditor has no authority to participate in criminal investigations, the ordinance does grant to the auditor the following roles and powers related to criminal complaints:

- First, the auditor “shall be kept apprised of the status of [criminal] investigations involving police employees.”
- Second, the auditor has the authority to initiate an internal investigation (or contract for an external investigation) following the conclusion of the
criminal investigation or within 60 days after the date of the incident, whichever is earlier. The only exception to that authority is if the auditor receives written notice from the prosecutor (US Attorney, District Attorney, or City Prosecutor) that an internal investigation would jeopardize the criminal investigation and prosecution (of a police employee). If such a notice is received from the relevant prosecutor, then the auditor would need to wait to initiate the internal investigation until after the criminal investigation is completed, or if the written notice from the prosecutor asserted that the internal investigation would jeopardize the prosecution, then until the prosecution is completed.

- Finally, the auditor must be provided access "to the case file relevant to the administrative portion" of the criminal investigation.

Timing of Investigation

The auditor’s functions, as described in the ordinance, include monitoring administrative investigations to ensure that they are “timely.” Neither the auditor ordinance nor any other provision in the Eugene Code specifies any time period within which an investigation must be concluded. Nor is there anything in the Code that empowers the auditor to directly compel the chief to complete an administrative investigation within a specific time frame.

The Police Operations Manual (“POM”), in General Order 1102, contemplates that an administrative investigation may proceed even though there is a contemporaneous criminal investigation and/or prosecution arising from the same events, unless the officer involved is also a focus of the criminal investigation or prosecution. Section 1102 B 2 directs the assigned investigator to conduct a complete investigation, including interviewing witnesses and involved employees. It then notes parenthetically: "(If there is a separate criminal investigation into the same incident, obtain authorization from the appropriate prosecuting attorney or investigations supervisor before conducting any administrative interview of an employee who is the focus of the investigation. This does not preclude gathering other information or interviewing a person who is not a focus of the investigation.)" The implication is that, if the employee is not the focus of a criminal investigation, the POM does not preclude the administrative investigation from moving forward. The General Order, section 1102 B 4, also directs the assigned investigator to complete his or her portion of the investigation within a set time period, if possible. In addition, Article 36, section 36.9, of the EPEA agreement provides that “Investigations will be concluded within sixty (60) days of intake unless EPEA is notified and provided with the rationale for an investigation continuing for longer than sixty (60) days.” Both the General Order and the EPEA

\[2\] The text of the ordinance is not informative about the meaning of the phrase “initiate an internal investigation.” Based on its context, we conclude it means that, when a complaint alleges criminal conduct by a police employee, initiation of the administrative investigation may be delayed for not more than 60 days while the criminal investigation proceeds, but after that the administrative investigation is to be initiated and proceed in the same way it would if there were no criminal investigation (unless, as described in the text following this note, the relevant prosecutor notifies the auditor that the administrative investigation would jeopardize the investigation or prosecution.)
Agreement recognize that prompt investigation and adjudication are the norm, but they leave some latitude for a deliberate choice to delay the investigation.

There are several practical reasons not to put a disciplinary investigation on hold any longer than necessary to ensure that a criminal investigation and prosecution are not jeopardized. Witnesses may leave the area or forget what they observed. If the officer is placed on administrative leave, the City may end up paying the officer’s salary for a long time without benefit of the officer’s service; on the other hand, if the complaint involves an allegation of poor police practice and the officer is not placed on leave, the City risks liability if the officer repeats the practice that generated the complaint.

Neither the General Order nor the Agreement with EPEA creates a rigid time line or prohibits putting an administrative investigation on hold while a criminal prosecution goes forward. The police chief must use professional judgment about when and how to conduct an administrative investigation. There will be some cases in which a prosecutor may be concerned that an administrative investigation could undermine or interfere with a criminal investigation or prosecution. It also makes sense that, as a matter of thoroughness, there will be some cases where, after conducting much of the investigation, the internal investigator determines that it won’t be complete until the investigator can observe, or review the record of, the criminal trial arising out of the same incident, or that the trial will provide the most efficient and reliable means of ascertaining facts.

In short, there are few hard and fast rules governing the timing of a disciplinary investigation. Based on General Order 1102 and section 36.9 of the EPEA Agreement, it appears that an administrative investigation normally should proceed regardless of whether there is a criminal prosecution against other persons involved in the incident. Nothing compels the chief to follow that practice in a particular case, however, but deviations from that practice should be supported by a need to avoid jeopardizing a criminal case. If the auditor believes that the chief’s decision to postpone an administrative investigation is either contrary to the public interest or will impair the quality of the investigation, the auditor can contract with an outside investigator.

**Records of Investigations**

The ordinance also treats administrative and criminal investigations differently when it comes to the auditor’s access to the investigative records.

For administrative investigations, the auditor is entitled to “complete and unrestricted access to all complaint and investigative records and materials . . . .” The ordinance itself does not contain any limitation on this access. However, as noted earlier, there may be occasions when that authorization is preempted by state or federal law. This would most likely occur when the department obtains information from a restricted database (such as LEDS) to which access is strictly limited. It might also occur where the information comes from a confidential informant and the federal government, the state government or the district attorney asserts that certain information – such as the informant’s identity – cannot be shared with the auditor’s office.
For example, several state and federal requirements may prevent EPD from disclosing information it receives under an agreement to maintain the confidentiality of the information.

- At the federal level, the FBI releases classified information to the Chief of Police only after he has signed a “Classified Information Nondisclosure Agreement,” which provides in part that “I will never divulge classified information to anyone unless [the recipient is properly authorized by the federal government to receive it].” (Emphasis added.) This agreement reflects confidentiality requirements in federal law.

- At the state level, the Oregon State Police administrative rules regulate access to and disclosure of information in the Oregon Criminal Offender Information System and the Law Enforcement Data System (LEDS). For purposes of EPD’s use of the information, the key provision is in OAR 257-10-0025(3): “Oregon criminal offender information may be shared between authorized Criminal Justice and Designated Agencies. All other secondary dissemination of criminal offender information by authorized agencies or personnel is prohibited unless expressly permitted by Oregon Revised Statute.” (emphasis added).

- Access to LEDS is also heavily regulated. For investigative files, OAR 257-015-0060 provides: “Information from investigative files maintained by LEDS, NCIC [FBI National Crime Information Center], or other agencies is for criminal justice use only and is not to be disseminated to any other person for other than an official criminal justice purpose.”

We believe that situations where information cannot lawfully be shared with the auditor’s office will be very rare. Except in those rare cases of preemption, the auditor’s office will be entitled to complete and unrestricted access to all information related to an administrative investigation. Therefore, as noted earlier in this opinion, we recommend that anytime the Department believes that it has information that cannot lawfully be shared with the auditor’s office, the Department notify both the auditor’s office and our office that such information exists, and request from our office an opinion as to whether the information must be disclosed to the auditor’s office.

Records related to criminal investigations are treated differently under the ordinance. The ordinance provides that the auditor’s office “shall not have access to a criminal investigation file until the conclusion of any such criminal investigation.” Note that unlike the earlier section addressing when the auditor’s office can initiate an internal investigation of an incident giving rise to a criminal investigation, here, the auditor’s office is entitled to the file upon conclusion of the criminal investigation. This would be true even if the relevant prosecutor provided written notice that he/she believed an internal investigation would jeopardize a criminal prosecution.
Conclusion

As we noted at the beginning, much of this advice is necessarily general. Situations will arise that are not covered by this opinion. When that happens, please contact us so that we can assist in trying to determine how the ordinance requires you to handle those situations. Only with the specific facts in hand can we provide more specific advice. Additionally, situations will arise that are not governed by any specific provision of the ordinance. The ordinance contemplates that the auditor and the chief will need to work out protocols for addressing those gaps. While we can identify the boundaries of the auditor’s and chief’s discretion in those areas, we cannot fill – as a matter of law – a policy gap left by the ordinance.

HARRANG LONG GARY RUDNICK P.C. –
CITY ATTORNEYS

[Signature]
Glenn Klein
Jerome Lidz

GK:abm

cc: Jon Ruiz
    Sarah Medary
    Pete Kerns
CITY OF EUGENE
INTER-DEPARTMENTAL MEMORANDUM
CITY ATTORNEY – CIVIL DEPARTMENT

To: Police Auditor Ordinance Review Committee Date: December 30, 2008

Subject: Proposed Amendments to the Police Auditor Ordinance

This committee has been asked to review eighteen proposed amendments to the ordinance governing civilian oversight of the police. This memo identifies legal issues that may affect the committee’s evaluation of the proposed amendments. You have received copies of the existing ordinance, the Civilian Review Protocols and the newly amended External Review Charter provisions, and this memo assumes some familiarity with those materials.

Before turning to the specific amendments that the city council has asked this committee to consider, we note that at least some of the proposed amendments require collective bargaining with the Eugene Police Employees Association (EPEA) before they can be implemented. We address this topic in more detail at the end of this memo.

Below, we review the amendments to the Auditor ordinance proposed by Councilor Bettman on November 10th and 17th. Each amendment is reprinted as drafted by Councilor Bettman and is followed by an explanation of the issues and impacts of the amendment.

The comments following each of the proposed amendments are not meant to deter the committee from recommending adoption of the amendments. Instead, they are intended to highlight issues that could arise if the proposed amendments are adopted as currently written. Our office is available to work with the committee to implement the concepts of the proposed amendments and minimize legal risk associated with the changes. However, if a proposed amendment conflicts with an existing Charter provision, it may be impossible to implement the proposed amendment without amending the Charter.

November 10th Suggested Amendments

1. **The Police Auditor shall have exclusive authority to classify and route complaints, as well as to reclassify complaints if upon further investigation and additional information, not available at the time of intake, the Auditor finds reclassification is warranted.**

The Civilian Oversight Protocols (the Protocols), which were previously bargained and agreed on by the Auditor and EPEA, currently allow the Police Chief to reclassify complaints if the Chief disagrees with the Auditor’s classification. This proposed amendment would remove the Chief’s authority to reclassify complaints and give the Auditor the exclusive authority to classify and reclassify complaints. To implement this proposal, the City first would need to bargain with the EPEA.
2. **Investigation of complaints shall commence upon classification of the complaint by the Police Auditor or as soon as possible thereafter, and no investigation shall occur before the Police Auditor has received, classified, and routed the complaint.**

We see no legal issues associated with the first half of this proposal.

The second half of this amendment raises several questions and issues, mostly concerning its intended scope. The primary question is: Would the ban on pre-classification investigations apply only to Internal Affairs investigations, or also to other investigations, such as an investigation of a related criminal offense? If the proposed amendment applies to all investigations, it will have significant implications for law enforcement. For example, when an officer makes an arrest at the scene of a crime that has just been committed, that officer or other officers need to interview witnesses and collect evidence immediately, even if the arrested person complains about the manner in which the arrest was effectuated. If the amendment prohibits such investigations until the Auditor has classified and routed the complaint, it would substantially impede the effectiveness of the investigation. However, if the amendment applies only to Internal Affairs, it may or may not impede Internal Affairs’ ability to investigate a complaint, depending on how broadly or narrowly “investigation” is defined.

The Auditor needs a certain amount of information in order to classify a complaint. Both the Code and the Protocols currently allow the Auditor (and Internal Affairs if the Auditor asks) to conduct “preliminary investigations” before the Auditor classifies a complaint. Similarly, the Police Operations Manual (POM) provides that if Internal Affairs receives an anonymous or third-party complaint, all available information will be noted and referred to the Auditor. If Internal Affairs’ collection of basic information constitutes “investigation” before the Auditor has classified the complaint, this proposed amendment would conflict with the POM.

If the amendment is intended to prevent a full-blown IA investigation before the Auditor has seen the complaint, we recommend revising it to reflect that intent more clearly, but it does not raise any legal issues.

Again, depending on its intended scope, adoption of this amendment could result in lost investigative opportunities. If the Auditor is gone for several days and is unavailable to classify a complaint, witnesses or physical evidence may disappear.

If the committee determines that it would be consistent with the intent of the proposed amendment, at least some of the ambiguity could be resolved by clarifying that the prohibition on pre-classification investigations applies only to full-scale Internal Affairs investigations.

Because this amendment may significantly impact criminal investigations and prosecutions, the committee may wish to hear from the District Attorney about this proposal.
3. *Upon the opening of a case file, and any time thereafter including closed cases, the Police Auditor shall have complete, unrestricted and direct access to all records, evidence, documents, and all material the Police Auditor deems relevant to the complaint.*

The POM already provides that the Auditor has access to Internal Affairs files upon request. If this amendment is intended merely to codify that practice, it poses no legal or practical issues that we are aware of.

The phrase "[a]ll material the Auditor deems relevant to the complaint” could be interpreted to grant uncontrolled discretion to the Auditor to access files throughout the City, some of which may be confidential for reasons unrelated to the complaint. For example, federal law substantially restricts access to personal and medical information in a personnel file. This proposed amendment would arguably also give the Auditor access to physical evidence collected as part of a criminal investigation, which could present chain of custody issues in subsequent litigation.

4. *Administrative investigations shall proceed concurrently with any related criminal investigation, administrative investigations shall not be suspended, delayed, or postponed, while criminal proceedings involving complainants and witnesses are resolved.*

The primary issue here is that, depending on the nature of the complaint and the relationship between the alleged misconduct and the criminal offense, concurrent investigations have the potential to complicate or even substantially interfere with a criminal prosecution.

Currently, the POM provides that in the case of separate administrative and criminal investigations arising from the same incident, the officer conducting the administrative investigation must obtain authorization from the appropriate prosecuting attorney or investigations supervisor before conducting an administrative interview of an employee who is the focus of the investigation. This does not preclude the officer conducting the administrative investigation from gathering other investigative information or from interviewing a person who is not a focus of the investigation.

The proposed amendment does not differentiate between criminal investigations of civilians and criminal investigations of police employees. Any concurrent investigation raises certain concerns because the district attorney’s office is required to disclose to the criminal defendant’s attorney any relevant written statements of any person the district attorney’s office intends to call as a witness – including statements contained in Internal Affairs files. Where a police employee is the focus of a criminal investigation, concurrent administrative and criminal investigations raise significant self-incrimination, immunity and evidentiary issues.

Where someone other than a police employee is the focus of a criminal investigation, the criminal defendant may invoke his or her 5th Amendment rights and refuse to answer any questions for Internal Affairs or the Auditor before the conclusion of the pending criminal matter. As a consequence, this proposed amendment may force the Auditor and Internal Affairs
to develop a case adjudication recommendation without the benefit of the defendant’s testimony. This would be especially problematic if the defendant is the person who filed the complaint against the police employee.

The District Attorney may also have insights to share about this amendment.

5. **The Police Auditor shall have complete, unrestricted, and direct, access to the necessary EPD offices; the same as IA staff. In addition the Police Auditor shall have complete, unrestricted, and direct access to IA PRO database the same as the program coordinator and the IA PRO supervisor.**

The Auditor already has access to Internal Affairs offices during normal business hours. It is not clear if this amendment is intended to grant access to other EPD offices, whether “unrestricted” means outside normal business hours, or which are the “necessary” EPD offices. Because the Auditor does not conduct investigations directly and already has access to Internal Affairs files, it may be that the intent of this proposed amendment is simply to codify current practice.

The District Attorney, City Prosecutor and/or EPD may have comments on whether IA staff need to be present when the Auditor reviews original documents or evidence.

If this amendment grants the Auditor access to union members’ offices, it may need to be bargained before it could take effect.

State law and agreements with other agencies may prohibit the Auditor’s access to certain EPD facilities.

Granting the Auditor the same access as the IA PRO supervisor may create technical data management concerns, which EPD staff will need to explain.

As a drafting matter, we suggest replacing the term “IA PRO” with the term “internal affairs database,” because “IA PRO” is simply the software product EPD currently uses, and EPD may use a different software program in the future.

6. **The Police Auditor shall maintain strict name confidentiality wherever warranted or legally required. Upon classification of the complaint, the Police Chief may request the Police Auditor provide name confidentiality on a specific case, and the Police Auditor shall comply, but the identifications of any involved parties shall not be withheld from the Police Auditor.**

We see no substantial legal issues associated with this amendment.

In cases where there is a significant concern for personal safety, disclosure of personal information to the Auditor places a high burden on the Auditor to maintain the strictest confidentiality. In addition, requiring that the Auditor maintain strict name confidentiality whenever “warranted,” may create liability for the City beyond what the law would otherwise impose. For example, if the Auditor reveals a name, even though it was legally permissible to do so, the person whose name was revealed could bring a legal action against the Auditor, claiming
that confidentiality was “warranted” in that person’s case, even though it was not legally required, and therefore the Auditor violated the Code by disclosing that person’s name.

If the committee decides to recommend this proposed amendment, we suggest that the committee clarify that the confidentiality requirement applies not only to names but also to personally identifiable information.

7. There shall be an opportunity for appeal of the Police Chief's adjudication to the city manager for final determination (on the existing record.) Appeal shall be available in cases of misconduct upon the request of the Police Auditor, the Civilian Review Board, or the complainant in cases where there is disagreement between the Police Auditor and the Police Chief and/or the Civilian Review Board and the Police Chief.

This section effectively prohibits the City Manager from delegating authority for discipline of police employees to the Chief of Police and therefore it may violate Section 16 of the Charter. The Charter gives the Manager exclusive authority to assign duties to all administrative employees, and this provision would prevent the Manager from assigning certain duties to the Chief.

Depending on the Civilian Review Board’s meeting schedule, adding an appeal to its process may make it impossible to meet the time lines set out in the collective bargaining agreement.

If the Committee decides to pursue this amendment, we recommend including a time line for appeal, so discipline is not delayed indefinitely.

8. Risk claims shall be forwarded to Internal Affairs and the Police Auditor for classification and processing as a complaint.

Risk Services already forwards claims involving police employees to Internal Affairs.

If the committee recommends adoption of proposed amendment number 2, which provides that investigation of a complaint cannot commence until the Auditor has received, classified and routed the complaint, it would be helpful for the committee to clarify the extent, if any, to which the combination of amendments 2 and 8 is intended to restrict Risk Services’ ability to investigate and settle claims involving police employees. Would proposed amendment number 2 apply to Risk Services’ handling of a liability claim and prevent Risk Services from investigating a claim until it is classified by the Auditor?

Not all risk claims involving the police are “complaints” within the meaning of the police oversight ordinance. We suggest that the amendment allow the Auditor to determine whether the Risk claim constitutes a “complaint” that needs to be investigated by IA.

9. The Police Auditor shall review random selections of Service Complaints.

We see no legal issues regarding this proposed amendment.
10. The definition for "Police employee" shall include the Police Chief by adding "including the chief who answers to the city manager."

As written, this amendment would turn the police oversight system into a vehicle to challenge virtually any decision that the Police Chief makes. For instance, the Chief makes decisions on service call priorities, employment matters, and the release of public records every day. Are these the types of decisions that the civilian oversight system was intended to monitor or address? The amendment also would allow the Auditor to review the Chief’s decision to adjudicate a prior complaint differently than the Auditor recommended.

It is also unclear who would investigate complaints made against the Chief, because police protocol does not allow Internal Affairs officers to investigate their superior officers. Finally, it is unclear who would make adjudication and disciplinary decisions in the case of a complaint against the Chief. The Code currently gives the Chief the exclusive authority to make adjudication and discipline decisions, but it does not make sense for the Chief to make those decisions about himself or herself.

11. The Police Auditor's budget shall be sufficient to accomplish all of the duties and responsibilities of the office including the sufficient and readily available funds to contract for external investigations.

This amendment would bind future councils. As a legal matter, one city council cannot command future councils (or the budget committee) to prioritize programs in a future budget in a certain way. As a practical matter, if over time each council mandates future funding for the programs it deems most important, soon future councils’ ability to set their own priorities is extremely limited. However, the Council may direct the City Manager to include adequate funding for the Auditor’s office in his or her proposed budget, and Code section 2.450(5) already requires the manager to do that.

12. Update section 2.456(2)(c)-(d) for consistency with the Charter.

The recent Charter Amendment does not require any update to section 2.456(2)(c)-(d). The amendment changed the phrases “the city council is authorized to” and “the city council may authorize” to the phrase “the city council shall.” In other words, the amendment removed the city council’s power to eliminate the Auditor’s position or powers. Now, because of the recent Charter Amendment, only the electors can eliminate the Auditor’s position, by voting again to amend the charter.

Neither the ballot title for the Charter Amendment, nor any of the arguments in the voters’ pamphlet mentioned the possibility that the Charter Amendment would require the Council to amend the Code. Instead, the materials in the voters’ pamphlet focused on the need to protect and ensure the continued existence of the external police review system.
November 17th, Suggested Amendments

1. Authority for the Police Auditor to determine final adjudication.

This proposal would require an amendment to the city charter, because it exceeds the scope of the authority that the Charter currently grants to the Auditor. The Charter requires the Council to empower the Auditor to make recommendations to the city manager or the manager’s designee following an investigation, but it does not allow the Council to grant the Auditor the authority to make final adjudication decisions. The City Manager is the administrative head of the City and is responsible for supervising all city employees except the municipal judge, the police auditor and himself. Transferring adjudicative authority to the Auditor would conflict with the Manager’s exclusive authority under the Charter as administrative head of the City.

2. Authority for the Police Auditor to recommend discipline

The Charter currently requires the City Council to authorize the Auditor to make recommendations to the City Manager or the city manager’s designee following an investigation, but does not specifically state what those recommendations may encompass. If the Council specifies that those recommendations may include discipline recommendations, this proposed amendment is consistent with the Charter.

The Auditor’s discipline recommendations could create some liability problems for the City if the Auditor’s recommendation is significantly different than the discipline the Chief ultimately imposes, but the liability issues probably are not significantly different than those that can arise in the context of the adjudication recommendations that the Auditor is already authorized to make.

3. Subpoena power for the Civilian Review Board and/or the Police Auditor

This proposed amendment would create a substantial change in the roles of both the Auditor and the Civilian Review Board, because it would shift their primary duties from review of completed investigations to investigation of open complaints. The proposed amendment may also require a Charter amendment, because the Charter does not expressly grant the Auditor or the Civilian Review Board subpoena power, and their current duties do not require subpoena power.

During the development of the external review system, the Police Commission considered and rejected subpoena power for the Civilian Review Board. The Commission ultimately concluded that because the Civilian Review Board has access to the full investigative file, including taped interviews with the involved officers, the power to compel testimony was not necessary to give the Civilian Review Board access to the information necessary to review an investigation.

4. The Police Auditor’s role in training

Whether or not this proposed amendment would require a Charter amendment depends on how it is implemented. As noted above, the City Manager has the exclusive authority to assign the duties of all city employees except the Auditor, the Municipal Judge and himself or herself. If
the Council or the Auditor required employees to attend certain trainings, it would conflict with the City Manager’s exclusive authority. However, the Auditor could certainly offer trainings, and the City Manager or the Chief as the manager’s designee could require employees to attend those trainings.

5. The Civilian Review Board’s role in evaluating and overseeing the Police Auditor

Code sections 2.244(7) and 2.246(7)(b) and (c) already direct the Civilian Review Board to oversee and evaluate the work of the Auditor. This committee may decide whether any additional direction is necessary or advisable.

6. Authority for the Police Auditor to participate in hiring processes for EPD, especially the Chief of Police

The Charter gives the City Manager exclusive authority to appoint and remove all administrative employees of the city, including the Police Chief. The City Manager can certainly invite and consider the Auditor’s input when selecting a Police Chief, but the Charter does not permit the Council to require that the auditor be allowed to participate in the hiring process. First, such a requirement would conflict with the Manager’s exclusive authority to hire and fire employees. Second, the Charter prohibits any councilor or the mayor from “in any manner, directly or indirectly, by suggestion or otherwise, attempt[ing] to influence the manager in the making of any appointment or any removal of city personnel . . . or discuss[ing], directly or indirectly, with the manager . . . any appointment by the manager.” The Auditor is a council employee and as such, reports directly to the Council and not to the City Manager. If the Council requires that the Auditor take part in hiring decisions, a court might determine that the Council was indirectly attempting to influence the Manager’s hiring decision through the Auditor’s comments and suggestions. On the other hand, if the Manager invites the Auditor to participate in the hiring process, there would be no Charter violation because the Manager is still in control of the hiring process.

Some of the Proposed Amendments Will Require Collective Bargaining Before They Could Take Effect

The City will be obligated to collectively bargain at least some of the proposed amendments to the Auditor ordinance with the Eugene Police Employees Association (EPEA or the police union). The Public Employees Collective Bargaining Act (PECBA) controls collective bargaining between the City and EPEA. PECBA divides City decisions that affect the working conditions of public employees into two general categories – mandatory subjects of bargaining and permissive subjects of bargaining. If the City proposes to take an action that impacts a mandatory subject of bargaining, the City must first bargain the change with the affected employees before it can be implemented. Mandatory subjects of bargaining include: monetary benefits, hours, vacations, sick leave, and grievance procedures.

In contrast, if the City proposes to take an action that affects a permissive subject of bargaining, the City may choose to bargain with employees over the proposed change before implementing it, but it is not required to do so. Permissive subjects of bargaining include issues such as:
staffing levels, safety issues (except those that directly and substantially affect on-the-job safety of public employees), scheduling of services provided to the public, qualifications necessary for a position, criteria for performance evaluations, assignment of duties, and reasonable dress and grooming requirements. Some permissive subjects of bargaining are listed in state statute, others have simply been declared permissive by the Oregon courts or the Employment Relations Board.

It is often difficult to tell whether a subject is mandatory or permissive. Under PECBA, the test is whether the City’s proposed action has a greater impact on management’s prerogative or on employee wages, hours or other terms and conditions of employment. If the action has a greater impact on employee wages, hours, or terms and conditions of employment than on management’s prerogative, the City is obligated to bargain the action. If the opposite is true, the City is not obligated to bargain the action. If the parties cannot agree on whether the subject is mandatory or permissive, the Employment Relations Board will make the final decision.

As you can see from the previous discussion, whether or not a proposed action is bargainable is a complicated question. The more clearly defined a proposed change to the Auditor ordinance is, the easier it will be to determine whether the City is required to bargain either the proposed change or its impacts. For many of the proposed amendments, we will not know whether or not they need to be bargained until the committee has developed more specificity regarding the proposed changes. Proposed amendments or impacts created by proposed amendments that the City is obligated to bargain cannot take effect until after bargaining is complete.

I will be available to answer any questions raised by this memo at the next committee meeting.

HARRANG LONG GARY RUDNICK P.C. –
CITY ATTORNEYS

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cc: Jon Ruiz
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