

Recommended Revisions to the Ordinance Template

1) There needs to be a clear statement in the ordinance that the Board, (Executive Director) is to get prompt access to all citizen complaints, no matter how received or by whom. (Unless the ED has access to complaints, we can never be sure that we have seen them all, which is necessary for us to do our job.) It would be desirable to have a shared website or database of complaints.

CAO Comment: No objections to the lawfulness of the request being made by the PCRB. However, state legislation (7/1/2021) does not mandate that a board must review all complaints; therefore, in my opinion, this will be a policy decision for City Council within an amended ordinance, after considering the PCRB's and the Police Chief's recommendations.

Rather than using "prompt" it would be advisable to specify a specific period, as does the current City ordinance (Ref. 2-460).

2) There needs to be an explicit statement that the CPD (and other city departments) will provide all the information that the Board needs to fulfill its functions (investigation, review, and auditor/monitor.) One question is how specific this provision needs to be; some municipalities provide long lists of specific information that must be provided. Others make simpler, blanket statements. See examples in Appendix 1. A key issue is the ability to get access to current IA files and evidence (for review requests and independent investigations) and closed IA files, even "sustained" ones (to support auditor/monitor function.)

CAO Comment: my recommendation to City Council would be to keep language within an amended Ordinance simple, and have a blanket statement requiring specific departments or officials to cooperate with the board as necessary for the board to carry out the authorized powers.

Separately, if there will be items of information or data—in addition to the records already referenced in the current Ordinance—my recommendation to City Council would be to specify the lengthier details within the Operating Procedures that the new law requires Council to approve as a separate document. The Operating Procedures should also address FOIA issues, record-keeping issues and privacy protection issues related to information and records shared with the PCRB.

Finally, an Ordinance or Operating Procedure that compels a City official or employee to answer questions may implicate the official's or employee's Fifth and Fourteenth Amendment rights.

(3) As written, this section 2-452(a)(8), related to subpoena power, is focused on the production of evidence (SDT.) The 2020 legislation (Sec 9-601(D)) extends subpoena power to compelling the testimony of witnesses.

CAO Comment: The template prepared by the CAO does include language regarding witnesses, and was copied from the enabling legislation itself, see Lines 87-91 (the line-numbered template was provided to Mr. Mendez 2/26/21)

(4) Sec. 2-451. (Immunities) The current language states that the board shall "enjoy the protection of sovereign immunity to the extent allowed and provided by Virginia statutory and common law." Can we

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add a statement, as do some other municipalities, that “The City of Charlottesville will provide legal defense if the Board is subject to civil litigation related to the performance of its duties.”?

CAO Comment: although I did not change the language within the template I provided to you, my recommendation to City Council going forward would be to delete the existing immunity language (and not to expand upon it). This recommendation is for the following reasons: **(1)** That language is not called out elsewhere within the City Code for any other boards and commissions, because it’s not necessary—immunity is governed by state law, not by local ordinance; **(2)** since state law now clearly and expressly authorizes PCRBs, the provisions of Va. Code 15.2-1405 provide the immunity that will apply to the PCRB members, and the ordinance language should be taken out to avoid conflicts; **and (3)** as a board of the City government, the PCRB will be covered by the City’s general liability insurance, and defense counsel is provided through that mechanism, not by the City Council directly.

(5) Specify in § 2-453, that the City Council can remove Board members for cause only. (Grounds for removal will be specified in the Procedures document.)

CAO Comment: No objections to the lawfulness of the PCRB’s request, or to specifying within the Operating Procedures a list of specific causes. State legislation (7/1/2021) does not prescribe or restrict reasons for removal; therefore, this will be a policy decision for City Council within an amended ordinance, after considering the PCRB’s and the Police Chief’s recommendations and City Council’s own preferences.

(6) In § 2-453 (line 126) Allow the non-voting board member to have “law enforcement” experience; this might broaden the pool of volunteers (the current language specifies “policing.”)

CAO Comment: The state enabling legislation contains specific provisions regarding service on these boards by current or former law enforcement officers (see 9.1-601(E) (7/1/2021). Any language in the Ordinance must strictly conform with the state enabling legislation.

(7) Sec. 2-456. (Executive Director) This section should list the Executive Director’s specific duties and powers related to

- complaint intake,
- monitoring of ongoing IA investigations,
- initiating (with Board approval) independent investigations of serious misconduct,
- consulting with the Police Chief on issues relating to IA investigations and disciplinary matters,
- convening hearings to make findings related to complaint review requests and independent investigations,
- monitoring and conducting audits of IA investigations, police encounters, and other issues as directed by the Board or City Council, and
- (my favorite) appointing a scribe to take minutes at Board meetings. (See also the job description.)

CAO Comment: the state enabling legislation authorizes an oversight body to exercise certain powers and duties. Since the legislation doesn’t, for the most part, prescribe HOW an oversight body will perform its authorized duties and functions, in my opinion City Council has the authority to authorize an Executive Director or other staff to *assist* the PCRB. However, the

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Ordinance and Procedures should be careful to not delegate the PCRB's authority to the ED, but only to specify how the ED or other staff will be utilized as a means by which the PCRB itself will carry out those duties.

My recommendation to Council would be for the Ordinance to contain more general language broadly authorizing the Executive Director to assist the PCRB with implementation and exercise of all of its powers and authority authorized within the Ordinance, and then to list more specific functions or tasks in the Operating Procedures, along with guidelines, standards, processes, etc.

(8) Sec. 2-460 (a) Complaint Intake. As noted above, a mechanism need to be in place to assure that the Board (ED) is rapidly notified of all complaints. (If the CPD receives a complaint by whatever route, it should go into a common database and be shared immediately with the Board, or at least with the Executive Director.) A complaint should be deemed to have been received when it is filed on the CRB complaint website or when a written form is received by the ED or their designee. If complaints are received in writing, they should be entered (transcribed or scanned) into a joint CPD-CRB database immediately. All complaints received by the CPD will be forwarded to the CRB within 2 business days. (Some of this detail can be left to the Procedures document.)

CAO Comment: see my response to ¶(1), above.

This is all very specific and prescriptive, and in my opinion much more appropriate for the Council-Approved Operating Procedures, which—in turn—should set out the relative responsibilities of PCRB, CPD and IT for establishing databases, coming up with protocols as to who can access them, how information can be used (and subject to what privacy or confidentiality restrictions), maintenance and updating of the database, etc.

(9) Sec. 2-460 (Complaint Contents) The current language implies that a complaint must contain all the elements listed in this section. Add "To the extent possible..." (We can make clear in the Procedures document that witnesses' personal information will be kept confidential.)

CAO Comment: at this time, unless the General Assembly makes changes to FOIA, neither the PCRB nor the City Council can promise or represent that witnesses' personal information can be protected from public disclosure.

FOIA, within Va. Code 2.2-3706(B)(9) allows an exemption from public disclosure of records of administrative investigations relating to allegations of wrongdoing by employees of a law enforcement agency, and of other administrative investigations conducted by a LE agency. This exemption may or may not be available for records of the PCRB. Even if the exemption would apply, FOIA doesn't render any record legally confidential; it allows public officials the discretion to withhold them from public disclosure. One record-keeping issue that needs to be addressed within the Operating Procedures is what City official will have authority to decide whether the exemption will be claimed in a given situation—particularly when duplicate copies of a particular record are in the possession of the PCRB and CPD. To avoid arguments, City Council

may wish to consider saying [in the Operating Procedures] that if a discretionary exemption protecting an individual's personal information is available, it must be exercised.

(10) (b) Complaint Processing. Adjust the language to incorporate the following steps.

- When a complaint is received, the ED and Board Chair review the complaint to determine if the alleged misconduct warrants independent investigation as defined in the Board procedures^{1, 2}
- If the ED and Chair determine that the complaint warrants independent investigation, they will notify the City Manager to that effect.
- The Board Chair or Board members may all call a special meeting, as described in Procedures, if they feel a complaint warrants independent investigation.³

CAO Comment: in my opinion the two preceding bullets belong in a revised "Investigations" Section of the Ordinance (currently Sec. 2-462). The Ordinance should simply state that the Board may call for an independent investigation.

Separately, the Operating Procedures should address how that "call" is to be made. The PCRB as a group should be the decision-maker, but the Operating Procedures may

- (1) establish a standing committee of the PCRB with delegated authority to make decisions on behalf of the entire PCRB (with the assistance of the ED), or
- (2) may specify that the Chair, or any [two?] members of the Board may call for a special meeting (this is what's currently specified in your Bylaws), or
- (3) the Operating Procedures may set out a specific list of criteria that will determine whether an independent investigation will be used, and then if those criteria are present, the ED may procure an investigator without PCRB action and start the process.

- The City Manager will engage an independent investigator to conduct the investigation.⁴

CAO Comment: My recommendation to City Council will be to **modify** the language in §2-462(d) that says the "*City Manager in consultation with the Executive Director shall procure an investigator*". In my opinion, that's unnecessarily complicated.

The Operating Procedures should simply put PCRB members and staff on notice of public procurement requirements, and then establish HOW goods or services needed by the PCRB will be procured in accordance with City procurement policies. Most likely the ED will function as what is known as a "decentralized buyer" and the City's Procurement Manager and her staff will provide information and training. If an independent contractor is used, the contract would be made in the name of the "City of Charlottesville" acting on behalf of the PCRB, and would be

¹ The condition for conducting an independent investigation would include alleged misconduct defined as "serious" (see Appendix 2), as well as considerations of the degree of public concern.

² We can move the details of independent investigation to Sec. 2-463 (see (22), below)

³ There's a balancing act here: we want the ED and Chair to be able act quickly if they think a complaint is serious, but we also want to keep the Board involved in making these decisions.

⁴ In practice, it would be much better to have an investigator already under an "on-call" contract, much like our independent counsel. (All this is subject to budget constraints.)

signed by the CM after the Finance Director verifies that funding is available within the PCRB budget. But the City Manager would not him/her/themself be arranging or engaging contracted services, that would be done through the procurement procedures.

- Upon notification that the Board is conducting an independent investigation, the CPD Internal Affairs division will cease its own investigation and turn all relevant records, data, evidence, and files to the independent investigator.

CAO Question: at what point might the Police Chief be able to reinstate CPD's own Internal Investigation?

- The independent investigator shall complete their investigation and report the results to the Board within 30 days.⁵ An extension of up to 30 days may be granted with the approval of a Board majority.

CAO Comment: I would not recommend to the City Council that the current provisions of City Code 2-462(d) be deleted. The City Manager, as the City's Director of Public Safety (see City Code 2-146) should always be a direct recipient of every Investigation Report, and should receive that Report from an investigator simultaneously with the PCRB.

- If the ED and Board Chair determine that the alleged misconduct does not require independent investigation, they shall report this finding to the Board, and the IA will continue its investigation of the complaint.

CAO Comment: as noted above, I do not believe that any decision-making authority should be delegated by the PCRB to the ED. I've provided three alternatives in response to 10(b), above

- The IA shall complete its investigation (of complaints that are not "serious") and provide an investigation report to the Board within 45 days.⁶

(11) Sec. 2-460(c) Complaint Results. (Note that this section now applies only to complaints that were not selected for independent investigation by the Board.) As noted above, change the deadline for issuing a finding to 45 days unless the case is subject to litigation or subject to other unavoidable delay. Also, instead of furnishing the complainant and Board with a letter explaining the findings, the IA should provide the ED and Board with the full investigative report. Also, allow the Board to conduct a complaint review without a formal review request, as long as the complainant does not object.⁷

⁵ The scope of complaint investigations would be described in the Procedures document; at a minimum, it will fulfill all the procedural requirements of CPD General Order 49-99.

⁶ The current ordinance allows 75 days, but the internal CPD target is 45 days, so let's be consistent. The same extensions for cases that are under litigation would apply.

⁷ Because these complaints have been screened to be not "serious", there will be less need to explicitly review findings that are sustained. However, all IA reports will be subject to periodic audit.

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(12) Sec. 2-460(d) Charlottesville Police Department Complaints. This section is superseded by changes in 2-460(a) assuring that the ED reviews all complaints as they come in.

(13) Sec. 2-461(a) Scope of Board Review Authority. Add an option (3) allowing a review if there is: "A majority vote of the Board in favor of reviewing the complaint."

(14) Sec. 2-461(a)(5) New language concerning what the Board may not review: "Any portion of an internal affairs investigation which is sustained, except that the Board may examine the nature of the misconduct for which the complaint was sustained and the disciplinary category to which it was assigned."

(15) Sec 2-461 (b.) Deferral of Pending Proceedings. Perhaps we can take most of the detail out of this section. Just say that if litigation is ongoing concerning a complaint, the review process will be suspended as described in the Procedures document.

CAO Comment: I believe that the details serve appropriate purposes, but agree that the more granular details are a better fit within Operating Procedures.

(16) Sec 2-461 (c.) Access to Materials. As noted in (2) above, the access to information provisions of the ordinance needs to be broad and clear. There should be a paragraph in this section stating that the IA will immediately provide all files and evidence from an ongoing IA investigation if the Board decides to conduct its own investigation.

(17) Lines 372-3. The language about the Board having access to "raw and aggregated data on the timing, findings, and dispositions of CPD internal affairs investigations..." would be superseded by the general information access statement that the Board should have access to any and all data (including IA reports) that it needs to fulfill its functions.

(18) Sec 2-461 (d.) Review Request Hearing. Again, most of the procedural details related to hearings can go in the Procedures document. Ideally, most of the procedures for a review hearing and investigative hearing should be the same. We do need to specify that the ED can call a hearing at the request of a majority of the Board. The general principles that the complainant may present witnesses and evidence and be represented by counsel or other designee should also be included. The language about the Board not being able to subpoena witnesses or evidence needs to be revised to be consistent with the 2020 legislation.

CAO Comment: I would recommend that a special meeting or a hearing can be called at the request of any two (2) members of the PCR. Then you avoid FOIA issues. (This is what's already specified in your Bylaws for the call of a special meeting)

(19) Sec 2-461 (e) (2) Findings. If the Board finds that the findings of the IA are not "are not supported...", the recommendations they make may include reclassification of misconduct within the CPD Discipline Matrix.

CAO Comment: I would not recommend that the PCRB be able to change the Matrix itself to suit what it wants to do in a given situation. But if what you mean is that you think that the PCRB may recommend that the misconduct should be classified as “Category A” rather than “Category B” within the existing Matrix, no legal issue.

(20) Sec. 2-462.-Investigations. This section needs to be extensively revised to focus on independent investigations initiated by the Board for serious allegations, not just for the case where an AI investigation is not completed in 75 days. Most of the points relating to independent investigation from (11) can go here.

(21) There should be a separate section on Disciplinary/Corrective⁸ Action. It should include:

- Board’s power to initiate investigations of complaints of serious misconduct as defined in the Board’s Procedures document, and serious incidents as defined in Sec 2-452(b)
- Procedures for investigation of serious misconducts or incidents to be defined in Procedures document (see Note 7.)
- Power to hold hearings on serious misconduct⁹
- If, during their investigation, the Board identifies evidence suggesting misconduct not alleged in a complaint, they may initiate investigation and make findings on these actions as well.
- If, during their investigation, the Board identifies evidence suggesting violation of law, they will immediately report their findings to the Chief of Police, provide the evidence to the CPD, and cease investigation of the alleged violation.
- If the Board determines that allegations of serious misconduct are sustained, it will make a report to this effect to the Chief of Police and City Manager. The report will include the nature of the alleged misconduct, the evidence used to support the findings, and the specific Policies and/or General Orders that have been violated.
- If an allegation is sustained, the Board will recommend options for corrective action and/or discipline. The recommendations will be generally in conformance with CPD General Order 517.00.
- The Police Chief, Executive Director, and Board Chair may¹⁰ meet to discuss to Board’s recommendations. The Chief of Police will implement the recommendations of the Board or, if she decides not to accept Board recommendations, she shall notify the Executive Director, provide written reasons for not accepting the recommendations, and specify what alternative corrective/disciplinary action she proposes to implement.

⁸ “Corrective” is put here to clarify that Board powers extend to recommendations for training, restitution, or other restorative measures

⁹ The Board actions on discipline would not necessarily require a hearing. Hearings could be held at the request of the complainant, the accused officer, or to exercise subpoena power when necessary. The hearing process could be the same as for review requests(?)

¹⁰ This meeting is put here to be consistent with the legislation’s requirement for “consultation.” If the Chief and Board generally agree on appropriate disciplinary action, the meeting will be perfunctory.

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- The Chief will not impose the alternative disciplinary/corrective action for 10 days after notifying the Executive Director. During this period, the Board may, by majority vote, appeal the Chief's decision to the City Manager, providing the reasons for the appeal in writing.^{11, 12}

CAO Comment: This will be procedurally problematic. In this model, the PCRB is not assuming responsibility for the disciplinary action, but proposes to make a recommendation and then shift final decision-making responsibility to the CM if the Chief of Police disagrees. In my opinion either the Police Chief needs to make the final, binding disciplinary decision (as she currently does) or the PCRB needs to do so pursuant to a local ordinance enacted per Va. Code 9.1-601(C)(3) in cases where the PCRB is acting "concordant with an investigation" being conducted by the PCRB as authorized by the ordinance.

In the City's grievance procedure, the City Manager is the City official who reviews the disciplinary action at the request of the employee. It will be problematic for the City Manager to participate in making the disciplinary action and then also be the person who is responsible for offering the employee a fair review of that same action as the final step in the grievance process.

(22) Sec. 2-452(a)(4) and (7), It would be desirable if our powers related to "investigations" and "reports" would be defined to include periodic "audits" and "analysis of trends" related to police-public interactions.

CAO Comment: the details of HOW the audits or analysis would be undertaken, and how frequently, should be specifically set out in Operating Procedures. Also I would recommend that the Operating Procedures identify what data will consistently be collected and that, if "industry standard" categories or types of data are typically utilized by experts to measure outcomes or trends that the methodology for audits and trend analysis be set out in the Operating Procedures.

(23) The ordinance should allow the Board to function as much as possible without an Executive Director. Possible language might be, "When the position of Executive Director is vacant, the Board Chair shall fulfill the functions of the Executive Director related to the receipt of complaints and review requests, monitoring the progress of Internal Affairs investigations, initiating independent investigations and hearings, and consultation with the Chief of Police related to Internal Affairs findings and disciplinary recommendations."

CAO Comment: I agree that, consistent with Va. Code 9.1-601 (July 1, 2021) the General Assembly has expressed an intention that a review board itself has all of the powers to undertake functions authorized within a local ordinance.

¹¹ This decision will be made in an open Board meeting, so will become public. Not clear at this point what the City Manager's options are...

¹² The Chief retains authority to place officers on administrative leave during investigations. The chief's disciplinary power during an investigation needs to be defined.

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I recommend that the Ordinance language be clarified that the PCRB has all necessary authority to act as a board (by majority vote, and by virtue of any duly-approved procedures or committee designations). The Ordinance should not restrict any functions to being performed by the ED. The ED should be a person who *assists* the PCRB with carrying out its functions, when the position is filled.

(24) Add a section on Mediation or Alternative Conflict Resolution. “The Board may establish procedures for...”

CAO Question: resolving conflicts between/ among what parties? As I read the provisions of Va. Code 9.1-601, the PCRB investigates, makes findings, makes disciplinary determinations, reviews IA investigations, issues reports, etc. I don't see authority for the PCRB to function as a mediator or arbitrator of legal claims or disputes between the City or CPD and any complainant.

Appendix 1. Examples of information access language:

“The monitor shall have complete and unrestricted access to all complaints, investigative records and information obtained or developed by professional standards unit related to an administrative investigation of a complaint, whether the information exists in electronic format or hard copy, including information stored on the professional standards unit database...” (Boulder CO)

“Boise City Code provides the Office of Police Oversight with, “full, unrestricted and complete access to any and all information, files, evidence or other material which the Director shall deem necessary in the performance of the duties specified and responsibilities set forth in this chapter.” § 2-22-06(B). As a result, all City employees, volunteers, contractors, and those persons operating on behalf of the City shall fully and without delay comply with all such requests made by the Director or his or her designee.” (Boise, ID, Procedures)

Appendix 2. Suggested Definition of “Serious” Misconduct

For purposes of determining the Board’s authority to conduct independent investigations and make disciplinary recommendations, “serious breaches of departmental and professional standards” shall include:

1. unlawful or inappropriate arrest
2. excessive or inappropriate use of force (7-1, 7-2)¹³
3. unlawful or inappropriate search or seizure
4. the use of abusive racial, ethnic or sexual language or gestures (1-3, 1-5)
5. harassment or discrimination based on race, color, sexual orientation, gender, religion, national origin, marital status, age, familial status, immigration status or disability (1-6, 6-1, 6-2, 6-3, 6-5, 6-8, 6-9)
6. acting in a rude, careless, angry, retaliatory, or threatening manner not necessary for self-defense (1-3, 7-1, 7-2)
7. reckless endangerment of detainee or person in custody, including failure to provide appropriate medical aid (11-7)**¹⁴
8. violation of laws or ordinances (5-1)¹⁵
9. other serious violations of Charlottesville Police Department General Orders, including the Charlottesville Police Code of Conduct and Biased Policing Policy, that occur both on or off duty.

¹³ Numbers in parentheses refer (approximately) to the corresponding sections of the Charlottesville Police Disciplinary Matrix

¹⁴ Section 11-7 of the Disciplinary Matrix refers only to prisoners.

¹⁵ Probably beyond the authority of the Board to investigate.