



# BERKELEY POLICE DEPARTMENT TEXTING OFFENCES

An Independent Investigation by the  
Police Accountability Board

**Prepared by:**

Police Accountability Board  
City of Berkeley, CA

Approved by the PAB on  
July 10, 2024



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## PREFACE

On November 10, 2022, Officer Corey Shedoudy, a former member of the Berkeley Police Department's (BPD) Downtown Task Force and Bike Unit (DTF)<sup>1</sup>, claimed the DTF maintained arrest quotas and employed questionable legal tactics including "stop and frisk, probation searches without reasonable suspicion of a crime, and a broad interpretation of stay-away orders from UC Berkeley."<sup>2</sup>

The allegations and the explicitness of those texts jolted the Berkeley community and its political leaders. Subsequently, the City hired an outside law firm to investigate the authenticity of the texts and their implications. The texts were ultimately authenticated.

The community shock produced by these egregious sentiments and conduct by sworn BPD officers was compounded by the realization that this behavior was only publicly known because a terminated member of the Department exposed it more than two years after the fact. The Police Accountability Board (PAB) and the Office of the Director of Police Accountability (ODPA) recognize and respect the hurt and suffering these expressions of apparent racism and disdain for the unhoused elicited in the community, particularly among those who are directly affected by such discriminatory attitudes and behaviors.

We are deeply troubled by these events. The PAB is designed to be a bridge between the community, the BPD, and the City leadership. Most importantly, however, it was established to ensure accountability, trust, and transparency. According to Section 125(1) of the Berkeley City Charter, the purpose of the PAB "is to promote public trust through independent, objective, civilian oversight of the Berkeley Police Department..."<sup>3</sup>

The goal of this report is to fulfill that obligation to the Berkeley community. The PAB lacks the authority to independently initiate investigations into alleged misconduct by individual DTF members or to recommend discipline without a complaint being filed with the ODPA within 180 days of the incident.<sup>4</sup> Instead, this report is mostly forward-looking in the hopes that policy and practices reforms, coupled with rigorous oversight, can restore trust and help prevent future misconduct.

Restoring trust and helping prevent misconduct through robust oversight is not only the morally right thing to do; it is the fiscally responsible thing as well. According to

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<sup>1</sup> The Downtown Task Force began operations in October 2019. In July 2020, it transitioned into a Bike Unit. The term "Downtown Task Force" or "DTF" will be used in this report to designate the unit from its beginning in October 2019.

<sup>2</sup> Email send by Former Officer Shedoudy to the Berkeley City Council:

<https://static1.squarespace.com/static/5edeeebc3032af28b09b6644/t/63725d28d35f087529c42dda/1668439336808/Shedoudy+email+11-10-22.png>

<sup>3</sup> Berkeley City Charter Section 125(1): [https://berkeley.municipal.codes/Charter/125\(1\)](https://berkeley.municipal.codes/Charter/125(1))

<sup>4</sup> Interim Regulations for Handling Complaints Against Sworn Officers of the Police Department, Section II.3.: [https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Regis\\_.Approved.2021-10-05.pdf](https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Regis_.Approved.2021-10-05.pdf)

documents provided by the City Attorney's office, over the last decade the City of Berkeley has had to respond to 471 legal claims related to BPD activities, costing the City \$1,978,953, with more than \$1,300,000 of this incurred in the last five years. The two most costly categories of liability were "excessive force" (\$558,151) and "false arrest" (\$338,551).

Reforms will involve not only changes in BPD policy and practice, but City Council action, robust accountability demanded from the BPD leadership, and ongoing efforts by the PAB to ensure full-bodied enforcement of all policies. Changes in law-on-the-books in the form of policy reforms will amount to nothing in the absence of changes in law-in-action, as policing ultimately takes place on the ground. Deterring the kind of behavior that was alleged by former Officer Shedoudy, and that uniformly offended the Berkeley community and eroded public trust, is a daunting challenge. It is achievable only if all hands are on deck.

## **EXECUTIVE SUMMARY**

In accordance with City Charter Section 125(17)(a)<sup>5</sup>, the City of Berkeley Police Accountability Board's Subcommittee on Policy and Practices relating to the Downtown Task Force and Bike Unit Allegations conducted an examination of policies, practices, and procedures within the Berkeley Police Department concerning matters related to that unit.

A Special Meeting of the PAB was called on November 15, 2022, at which the Board voted to form a subcommittee to do a policy review of all policies and practices relating to Mr. Shedoudy's allegations<sup>6</sup>. The subcommittee was comprised of former Board Member Cheryl Owens, PAB Chair John (Chip) Moore, and Board Member Kitty Calavita, and was initially chaired by Board Member Owens. When Board Member Owens resigned from the Board, the subcommittee was Chaired by Board Member Calavita.<sup>7</sup> The impetus for the review was the set of allegations brought forth by former Berkeley Police Department (BPD) Officer Corey Shedoudy and made public on November 10, 2022. Mr. Shedoudy alleged that text messages expressing racist attitudes, bias against the unhoused, and pressure to meet arrest quotas, had been sent among members of the DTF, with the Sergeant of the DTF playing a central role.

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<sup>5</sup>Berkeley City Charter Section 125(17)(a): [https://berkeley.municipal.codes/Charter/125\(17\)\(a\)](https://berkeley.municipal.codes/Charter/125(17)(a))

<sup>6</sup> Meeting Minutes for the PAB's Regular meeting on November 15, 2022: <https://berkeleyca.gov/sites/default/files/legislative-body-meeting-minutes/cc.2022-11-15%20SpecMtg.approved.minutes%20%281%29.pdf>

<sup>7</sup> On July 7, 2023, the ODPa received a policy complaint from a member of the public (DPA Case #2023-PR-0004) regarding the allegations of the DTF's arrest quotas and bias against people of color and the unhoused. At their regular meeting on September 27, 2023, the PAB voted to refer that policy complaint to this subcommittee since its work was well underway and responds (to the extent possible) to the issues raised in the complaint.

The PAB faced multiple challenges in accessing the materials necessary for its review, notwithstanding Section 125(3)(a) of the City Charter, which gives the PAB the "powers and duties...to access records of City Departments"<sup>8</sup>, including "without redaction or limitation" records relating to policies and practices, disciplinary records, and internal investigative records<sup>9</sup>. The PAB Subcommittee spent many months of critical investigative time seeking—in some cases successfully, in other cases unsuccessfully—to overcome barriers to access that had ostensibly been removed by these sections of the Charter Amendment.

This review identifies key areas where the BPD fell short of best practices, existing policy and/or legal requirements. Specifically, the Board found:

- There were expectations to reach certain arrest numbers;
- BPD officers assigned to the DTF exchanged racially charged and discriminatory text messages;
- These BPD officers routinely used personal cellphones to discuss work-related matters;
- Overtime for DTF officers was essentially unlimited;
- Some BPD policies were vague or non-existent in subject areas that could prevent violations of law or compromise fair and impartial policing;
- There was insufficient knowledge of specific BPD policies and State law among some DTF members;

The Board's preliminary recommendations regarding BPD policies and practices include:

- Establishing a new freestanding policy prohibiting formal or informal arrest quotas;
- Ensuring that stay-away orders are enforced fairly and consistent with State law;
- Increasing training on BPD policies and State law; and
- Making changes to BPD policies regarding Fair and Impartial Policing (#401)<sup>10</sup>; Standards of Conduct (#321)<sup>11</sup>; the Early Warning System (#1041)<sup>12</sup>; Employee

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<sup>8</sup> Berkeley City Charter Section 125(3)(a): [https://berkeley.municipal.codes/Charter/125\(3\)\(a\)\(5\)](https://berkeley.municipal.codes/Charter/125(3)(a)(5))

<sup>9</sup> Berkeley City Charter Section 125(20)(a): [https://berkeley.municipal.codes/Charter/125\(20\)\(a\)](https://berkeley.municipal.codes/Charter/125(20)(a))

<sup>10</sup> BPD Policy 401 "Fair and Impartial Policing": [https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Reggs\\_.Approved.2021-10-05.pdf#page=321](https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Reggs_.Approved.2021-10-05.pdf#page=321)

<sup>11</sup> BPD Policy 321 "Standard of Conduct": [https://berkeleyca.gov/sites/default/files/documents/RELEASE\\_20240301\\_T161429\\_Berkeley%20PD%20Policy%20Manual.pdf#page=189](https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=189)

<sup>12</sup> BPD Policy 1041 "Early Warning System": [https://berkeleyca.gov/sites/default/files/documents/RELEASE\\_20240301\\_T161429\\_Berkeley%20PD%20Policy%20Manual.pdf#page=903](https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=903)

Speech, Expression and Social Networking (#1029)<sup>13</sup>; Personal Communication Devices (#701)<sup>14</sup>; and Overtime Compensation Requests (#1019).<sup>15</sup>

The PAB further recommends that City Council:

- Pass an ordinance, consistent with Charter Amendment Section 125 (3)(a)(7)<sup>16</sup>, to allow the PAB to self-initiate investigations of potential misconduct and to access internal records in furtherance of those investigations. While policy reviews are important, it is at least as important to provide oversight of their implementation and practices on the ground.
- Adopt a robust resolution to ensure a full and meaningful accountability of sworn officers who engage in misconduct, whether on-duty or off-duty, consistent with the City's 2024 State and Federal Legislative Agenda to "support efforts to increase peace officer accountability...".<sup>17</sup>
- Direct the City Manager to work with the BPD, PAB and ODPa to create a public repository to fulfill the vision of California Penal Code Section 832.7(b)(1)<sup>18</sup>, including but not limited to 832.7(b)(1)(D) which states that an exception to peace officer confidentiality is required for "any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status."
- Encourage state legislators to extend the prohibition on arrest quotas, both formal and informal, in the Penal Code, which is currently limited to the California Vehicle Code (Section 41600-41603)<sup>19</sup>, to include all California law enforcement activity.

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<sup>13</sup> BPD Policy 1029 "Employee Speech, Expression and Social Networking":

[https://berkeleyca.gov/sites/default/files/documents/RELEASE\\_20240301\\_T161429\\_Berkeley%20PD%20Policy%20Manual.pdf#page=860](https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=860)

<sup>14</sup> BPD Policy 701 "Personal Communication Devices":

[https://berkeleyca.gov/sites/default/files/documents/RELEASE\\_20240301\\_T161429\\_Berkeley%20PD%20Policy%20Manual.pdf#page=584](https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=584)

<sup>15</sup> BPD Policy 1019 "Overtime Compensation Request":

[https://berkeleyca.gov/sites/default/files/documents/RELEASE\\_20240301\\_T161429\\_Berkeley%20PD%20Policy%20Manual.pdf#page=827](https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=827)

<sup>16</sup> Berkeley City Charter 125(3)(a)(7): [https://berkeley.municipal.codes/Charter/125\(3\)\(a\)\(7\)](https://berkeley.municipal.codes/Charter/125(3)(a)(7))

<sup>17</sup> City of Berkeley's 2024 State and Federal Legislative Platform. February 13, 2024

<sup>18</sup> California Penal Code Section 832.7:

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN)

<sup>19</sup> California Vehicle Code Section 41600 – 41603:

[https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=)

Our intent is not only to identify specific shortcomings in BPD policies and practices but to provide concrete steps toward rectifying them. This will require collective efforts by the PAB, the BPD and its leadership, the City Manager, and City Council. Through this report, the PAB reaffirms its commitment to the principles of collaboration, justice, fairness, trust, and community safety.

## **BACKGROUND**

On November 10, 2022, former BPD Officer Corey Shedoudy who had been a member of the DTF but was terminated for misconduct, wrote to the Berkeley City Council alleging that text messages expressing racist attitudes, bias against the unhoused, and pressure to meet arrest quotas, had been sent among members of the DTF, with Sergeant Darren Kacalek playing a central role. The allegations included screenshots of the alleged texts.

On November 14, 2022, Secure Justice Executive Director Brian Hofer urged the California Attorney General to investigate the BPD arrest quota allegation.<sup>20</sup> Shedoudy's claims continued to attract extensive media and public attention. The Los Angeles Times, San Francisco Chronicle, Berkeleyside, East Bay Times, and other media outlets all devoted space to the allegations.<sup>21</sup>

On November 17, 2022, the Center for Policing Equity, which had been hired by the City in 2015 to study potential racial disparities in BPD stops (a report presented to the City in 2018), issued a blunt 3-page statement in response to Shedoudy's allegations. It began, "The Center for Policing Equity is appalled by the views, actions, and frank disregard for public safety revealed in a series of leaked group chats among officers

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<sup>20</sup> Article: "Secure Justice Calls for Attorney General Investigation into BPD Arrest Quota Policy": <https://secure-justice.org/blog/secure-justice-calls-for-attorney-general-investigation-into-bpd-arrest-quota-policy>

<sup>21</sup> Article: Berkeley Police Department in turmoil over leaked texts about arrest quotas - Los Angeles Times (latimes.com): <https://www.latimes.com/california/story/2022-11-17/berkeley-police-department-in-turmoil-over-leaked-texts-about-arrest-quotas> ; Article: Head of Berkeley police union on leave following text message scandal, claims of arrest quotas (sfchronicle.com): <https://www.sfchronicle.com/eastbay/article/Report-Head-of-Berkeley-police-union-on-leave-17590377.php> ; Article: Leaked texts from Berkeley police union leader show 'disturbing' comments (berkeleyside.org): <https://www.berkeleyside.org/2022/11/14/berkeley-police-text-messages-darren-kacalek-bpa> ; Article: Berkeley Police Department, Interim Chief will be investigated after ex-police officer leaked texts alleging racist, illegal behavior (eastbaytimes.com): <https://www.eastbaytimes.com/2022/11/16/berkeley-police-department-interim-chief-will-be-investigated-after-ex-police-officer-leaked-texts-alleging-racist-illegal-behavior/>; Article: Berkeley police officers' 'anti-homeless' text messages probed | KRON4 <https://www.kron4.com/news/bay-area/berkeley-police-officers-anti-homeless-text-messages-probed/>; Article: Leaked Text Messages Prompt Push to Delay New Police Chief in Berkeley – NBC Bay Area: <https://www.nbcbayarea.com/news/local/east-bay/berkeley-police-text-messages-jennifer-louis/3078376/>; Article: Fired Berkeley cop leaks texts alleging bias, quotas (berkeleyscanner.com): <https://www.berkeleyscanner.com/2022/11/15/policing/fired-berkeley-cop-leaked-texts-corey-shedoudy/>

serving with the Berkeley, California Police Department (BPD).<sup>22</sup> The statement went on to characterize the texts as including “vile dehumanization” of the unhoused and “openly racist” views. It concluded, “The burden is now on the City of Berkeley and BPD to act with appropriate urgency in addressing these revelations, the institutional culture informing them, and their dire implications for Berkeley’s residents.”<sup>23</sup>

The City Council was poised to vote on appointing Interim BPD Chief Jen Louis as permanent Chief on November 15, 2022, but the vote was postponed in the context of the allegations, including a claim that then Captain Louis knew of, and ignored, the alleged misconduct. The Mayor and Council Members noted that the appointment should be put on hold pending an investigation into the allegations, and the City Manager withdrew the item.<sup>24</sup>

In December 2022, the law firm of Swanson & McNamara was hired by the City of Berkeley<sup>25</sup> to investigate. That investigation took the place of an investigation by the Internal Affairs Bureau of the BPD to dispel the perception of a conflict of interest in the context of the possibly wide-ranging nature of the inquiry.

The allegations that Swanson & McNamara was tasked with investigating included the following claims made by Mr. Shedoudy:

1. Allegations of an "unethical and illegal practice of arrest quotas of downtown unhoused ordered by [name] to DTF/Bike Force," which purportedly commenced when Chief Louis held the position of BPD Police Captain and persisted after her appointment as Interim Chief.
2. Assertions that the DTF/Bike Force was instructed to make 100 arrests per month.
3. Claims of meeting the alleged quota through questionable legal tactics, including stop and frisk, probation searches without reasonable suspicion, and “a very loose interpretation of stay-away orders from UC Berkeley”.
4. Criticisms of Captain Louis's perceived inaction.

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<sup>22</sup> Statement on Leaked Text Messages out of Berkeley Police Department:

<https://policingequity.org/newsroom/official-statements/statement-on-leaked-text-messages-out-of-berkeley-police-department>

<sup>23</sup> Center for Policing Equity, 2022. <https://policingequity.org/newsroom/official-statements/statement-on-leaked-text-messages-out-of-berkeley-police-department>.

<sup>24</sup> On May 9, 2023, prior to conclusion of the investigations into the DTF texting allegations, City Manager Dee Williams-Ridley once again forwarded to City Council her selection of Interim Chief Louis as permanent Chief, and Council voted to appoint her.

<sup>25</sup> See Appendix 1: City of Berkeley Contract for services with Swanson & McNamara LLP, Vendor Contract #32300109

<https://records.cityofberkeley.info/PublicAccess/api/Document/AU3fuygXQXXZ%C3%81TG8am4tuCPyplZzCFLJZsbxFqBxmJ3aQZTBcxS%C3%89E7ECp9r6A30gZuhAlmseUFcNLLtKRrEId7g%3D/>

5. Allegations of "illegal arrest quotas, racism, evidence suppression, lying, and quid pro quos" supported by various forms of evidence, such as text messages, emails, sworn testimony transcripts, public arrest records, and photographs.

To investigate these claims, the Swanson team submitted Mr. Shedoudy's phone to a third-party vendor for data extraction, including text communications among DTF and/or Bike Unit members from October 1, 2019, to approximately March 1, 2023. The authenticity of each message was confirmed, except for one located on page 3 of Shedoudy's allegations letter, which could not be found on the phone.

The Swanson team also reviewed data on arrests made by DTF and Bike Unit officers from October 1, 2019 through November 22, 2020. This timeframe corresponded with Shedoudy's tenure in the DTF and Bike Unit, and involved review of 481 randomly selected arrest reports, accounting for over 50% of the total.

Additionally, internal Department message board posts concerning DTF activities were gathered and reviewed by Swanson's team, covering the period from November 6, 2019, to March 24, 2020. The investigation also included interviews with former Officer Shedoudy and members of the DTF, as well as with Chief Louis.

The Swanson & McNamara investigative report was completed in June 2023. Those findings have not been made public. A summary of the findings, however, revealed that the text messages expressing racist attitudes, animosity towards the unhoused, and pressure to achieve a certain number of arrests, were authenticated by forensic analysis of former Officer Shedoudy's phone.

While the Swanson & McNamara report was deemed confidential consistent with California Penal Code Section 832.7, the Berkeley Scanner<sup>26</sup> quoted City spokesperson Matthai Chakko that "the investigation found that the department does not have a practice of racial bias," that "the department does not have any arrest quotas," and that the department follows all state laws and the constitution. Berkeleyside also published an article summarizing the City spokesperson's report: "According to city spokesperson Matthai Chakko," the article read, "Swanson and McNamara's investigation found that: the department does not have a practice of racial bias; the department does not have any arrest quotas; the department follows state law and constitutional law...; and the department has existing policies that prohibit discrimination and harassment of protected classes."<sup>27</sup>

This summary of the Swanson findings drew conclusions about the department as a whole and its official policies that went beyond any findings of the investigator whose

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<sup>26</sup> Article: Berkeley police bike team cleared of claims made by fired cop (berkeleyscanner.com): <https://www.berkeleyscanner.com/2023/07/20/policing/berkeley-police-bike-team-cleared-systemic-problems/>

<sup>27</sup> Article: Berkeley police texts probe found no quotas or racial bias, city says (berkeleyside.org): <https://www.berkeleyside.org/2023/07/20/berkeley-police-text-scandal-investigation>

task and method were to focus on specific practices of the Downtown Task Force and Bike Unit in a limited period of time. The findings of the Swanson team eroded public trust because they were not made public—other than the authenticity of the text messages—and because these overly general statements by the City spokesperson were made in piecemeal fashion to the press.

A Berkeleyside article about this City messaging quoted Mayor Jesse Arreguin’s public statement: “Regardless of the underlying findings and outcomes, the investigator verified the accuracy of the text messages. What is clear from a plain reading of the texts is that the behavior was unprofessional and does not meet the standards to which we should hold our City employees.... This episode further demonstrates the need to implement reforms.”<sup>28</sup>

Concurrent with, but independent of, the Swanson & McNamara investigation, the PAB launched a policy and practices review. According to the City Attorney’s interpretation of the Charter Amendment relating to PAB powers and duties, we were required to limit our investigation to an inquiry into relevant policies and practices and to recommend reforms as appropriate. The Swanson team’s authentication of the text messages and the allegations themselves have, among other issues, directed the PAB’s attention to the need for an additional policy prohibiting arrest quotas--implicit or explicit--and the strengthening of many existing policies and practices. These recommendations are guided by a commitment to public safety and fair and impartial policing, and the need for a set of policies and Department culture that reflect those values.

While our investigation was necessarily limited to policy and practice recommendations, the PAB recognizes that policy is effective only to the extent that it is understood and enforced. A recent study published in *Nature Human Behavior* found that when officers in police organizations are not held accountable for policy violations and misconduct, the lack of serious accountability results in the propagation of misconduct in officers around them.<sup>29</sup> The study reported that even when shuffling the officer to a different unit, their peers are more likely to engage in misconduct themselves. The takeaway from that study is not only that policy reforms must be stringently enforced to be effective, but that unenforced policies breed infectious misconduct.

The PAB thus offers these policy reforms and at the same time commits itself to oversight of their enforcement. The PAB further makes recommendations for action by

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<sup>28</sup> Article: Berkeley officials slam 'drips of information' in BPD text investigation (berkeleyside.org): <https://www.berkeleyside.org/2023/07/21/berkeley-bike-squad-investigation-criticized>

<sup>29</sup> “Causal Peer Effects in Police Misconduct,” Quispe-Torreblanca, Edika and Neil Stewart. *Nature Human Behavior* 3(8): 797-807; “Police Misconduct May Spread like a Contagion, New Study Finds,” Catherine Maticic, *Science*, May 27, 2019. <https://www.science.org/content/article/police-misconduct-may-spread-contagion-new-study-suggests>.

City Council in furtherance of accountability, transparency, and the PAB's ability to monitor implementation which is where policies are materially "enacted".

## **DATA SOURCES**

This review is based on both quantitative and qualitative data and records. The primary data sources were:

- the authenticated text messages submitted by former Officer Shedoudy;
- the Swanson Report, including the audiotaped interviews with BPD members;
- stop and arrest data of the DTF, by race and across time;
- a comparison of DTF stop and arrest data to that of the BPD as a whole;
- the rate of DTF arrests for violations of court orders, such as "stay-away orders";
- the disposition patterns of the DTF and for the BPD as a whole;
- BPD policies relating to arrest quotas, stay-away orders, fair and impartial policing, standards of conduct, off-duty conduct, employee speech, personal communication devices, overtime compensation, and the Early Warning System.

These data<sup>30</sup> provide an important window into the practices and culture of the DTF and guide our recommendations for reforms. While the BPD Transparency Hub allows the public—which in this case includes the PAB—to access raw data on stops and arrests, it is labor-intensive to analyze systematically these data in a way that is useful to full oversight. The ODPA staff and PAB Subcommittee Members spent many hours scrutinizing these data, and processing and organizing them into a form that was usable for our purposes.

## **LIMITATIONS OF THE DATA**

While the PAB utilized a substantial amount of data in its review, some of these data were already in the public domain. The PAB and the ODPA made concerted efforts to access other records that we believed fell within the purview of the policy and practices review provisions outlined in the City Charter. We were not initially allowed access to the Swanson Report, nor to the taped interviews with DTF officers. The ODPA spent many hours and valuable time attempting to access them. The ODPA also sought access to all records in possession of BPD's Internal Affairs Bureau regarding any disciplinary matters relating to former officer Shedoudy, Sergeant Kacelek and other members of the BPD Downtown Task Force and Bike Unit, and any complaints by members of the public filed with the BPD involving the Downtown Task Force. Despite concerted and repeated efforts, and despite the confidentiality oath taken by ODPA staff and PAB Members, these

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<sup>30</sup> After much discussion with the BPD, in September 2023 the PAB obtained access to body-worn camera footage for the period under review. The videos contain thousands of hours of footage and given the time and staffing constraints the PAB was unable to analyze all this footage in time for this report. For future inquiries and investigations, the ODPA recommends acquisition of a program such as TRULEO which does computerized analyses of vast video footage.

records were initially withheld from the ODPa and the PAB. Many months later, the ODPa and Subcommittee Members Moore and Calavita were allowed to read the Swanson Report but without the ability to take notes or make copies.

Ultimately, the PAB decided to use its subpoena power and issued a subpoena for the outstanding records. The PAB delegated the issuance of the subpoena to the ODPa, who served it to the department on March 12, 2024. This included a request for “Text messages (beyond those publicly available) and or certification/affidavit from officers that no additional records exist” as well as records “between members of the task force and City Manager Dee Williams-Ridley.” Subsequently, Chief Louis informed the ODPa that the BPD did not hold any records beyond those that were publicly produced.

The ODPa and the PAB Chair continued to seek full PAB access to the Swanson Report and audiotaped interviews. Almost a year after the Swanson Report was completed, the ODPa finally received the Report and audiotaped interviews, and PAB Members were given access. We independently spent many hours over several weeks reviewing the Report and interviews.

California Penal Code Section 832.7(a)<sup>31</sup> preclude us from quoting directly from these interviews or attaching officers’ identities to individual responses. Instead, these interviews will be used more generally as background information and collectively as collaborating evidence.

Given the already substantial delay in receiving the records we requested, the PAB has decided to issue this report now, with a potential addendum if additional relevant records are secured.

This lack of full access means that key questions could not be answered in this PAB analysis and accompanying recommendations. These unanswered questions include, but are not limited to, the following:

- Were these racially inappropriate sentiments and other biased expressions previously exhibited by these or other officers?
- Did the BPD have knowledge of such expressions or conduct, and if so, what actions were, or were not, taken to intervene?
- How have possible allegations of a similar nature been handled in the past?

The obstacles encountered in accessing internal records underscore the importance of transparency and cooperation between the City and the PAB. The PAB’s review of the Swanson team’s audiotaped recordings with DTF officers has deepened our conviction that for the PAB to fulfill its Charter-mandated function of providing police accountability, it must routinely have access to documents and records describing actual BPD practices.

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<sup>31</sup> California Penal Code Section 832.7:

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN)

BPD cooperation with the City’s oversight body is critical to ensuring public safety and socially just policing. It is also the fiscally responsible management approach.

## FINDINGS

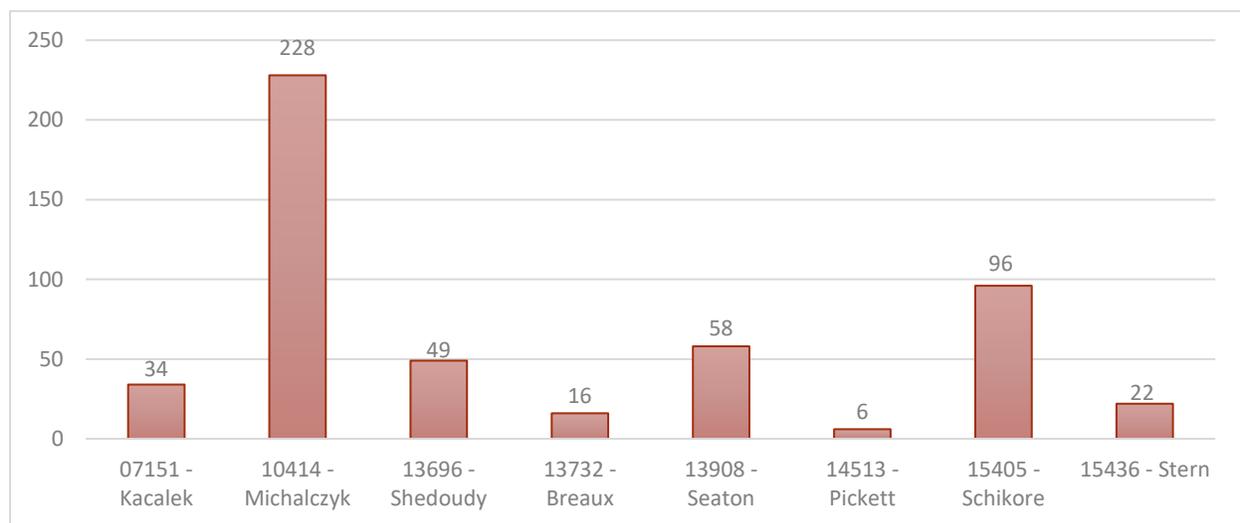
### Authenticated Text Messages

Through the Swanson & McNamara investigation, Mr. Shedoudy's provided text messages were authenticated and are appended as Appendix 2. Mr. Shedoudy submitted his phone to a third-party vendor for extraction of pertinent communications, encompassing text exchanges among DTF members from October 1, 2019, to approximately March 1, 2023.

### Statistical Analyses

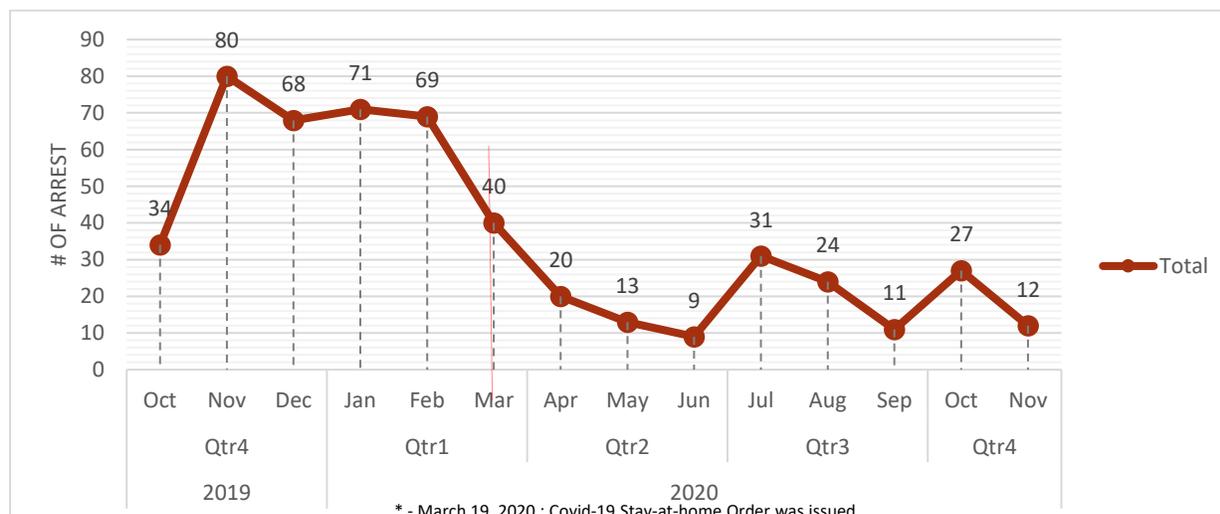
The average number of arrests per DTF officer in the period from October 1, 2019 to November 22, 2020—the period during which these text messages were sent—far exceeded that of the average number of arrests for other BPD officers. The eight officers in the DTF averaged 64 arrests that year, compared to the overall BPD average of 17. In addition, the number of arrests per DTF officer varied greatly from 6 arrests by one member to 228 by another.

**FIGURE 1. NUMBER OF ARREST BY OFFICER OF THE DOWNTOWN TASK FORCE AND BIKE UNIT**



Similarly, the number of DTF arrests varied substantially by month, peaking in November 2019 as DTF members were being pressured to reach 100 (“81 arrests! We can do 19 by Friday for sure!” “I was thinking whoever gets the least arrests today does the waxing.”).

**FIGURE 2. DOWNTOWN TASK FORCE ARREST NUMBERS BY MONTH**

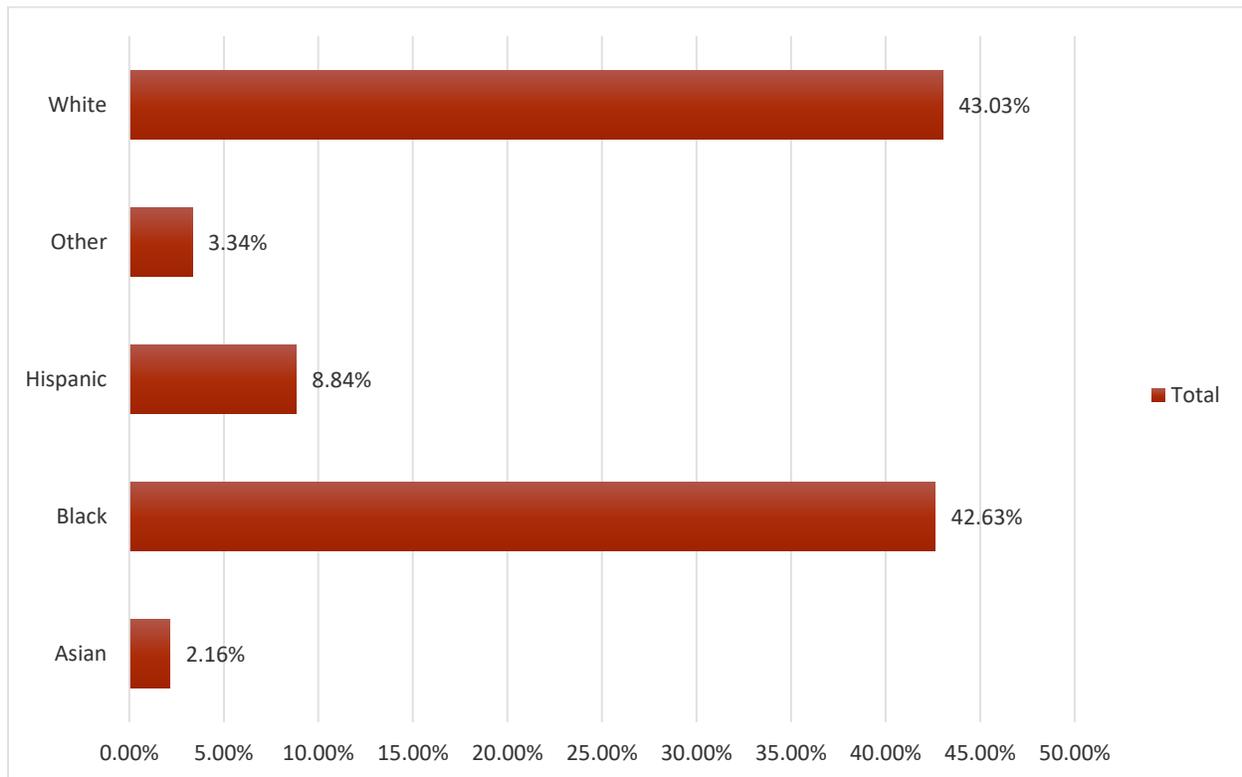


These arrest numbers, together with the text messages, leave little doubt that pressure—more or less explicit, perhaps informal, seemingly jocular--was exerted to maximize arrest figures, sometimes the specific number of 100. The spike in arrests was so dramatic during some periods that, according to the Swanson team and some of the interviewed officers, jail staff complained they couldn't keep up with their booking and detention.

Approximately an equal proportion of these arrests involved Black individuals (42.63%) and White individuals (43.03%), while Latino/a individuals accounted for 8.84% of the total. According to the 2020 census<sup>32</sup>, the number of White individuals residing in Council District 4 which encompasses the downtown is approximately four times the number of Black residents in the area, suggesting that the arrest rate for Black people was almost four times as high as for White people. However, it is difficult to be precise about the racial disparity since the census may undercount the unhoused who were often the focus of DTF activity.

<sup>32</sup> United States Census Bureau 2020 Census Data for Berkeley, California:  
<https://www.census.gov/quickfacts/fact/table/berkeleycitycalifornia/SBO030217>

**FIGURE 3. RACE OF INDIVIDUALS ARRESTED BY THE DOWNTOWN TASK FORCE/BIKE UNIT (OCT.2019 TO NOV.2020)**

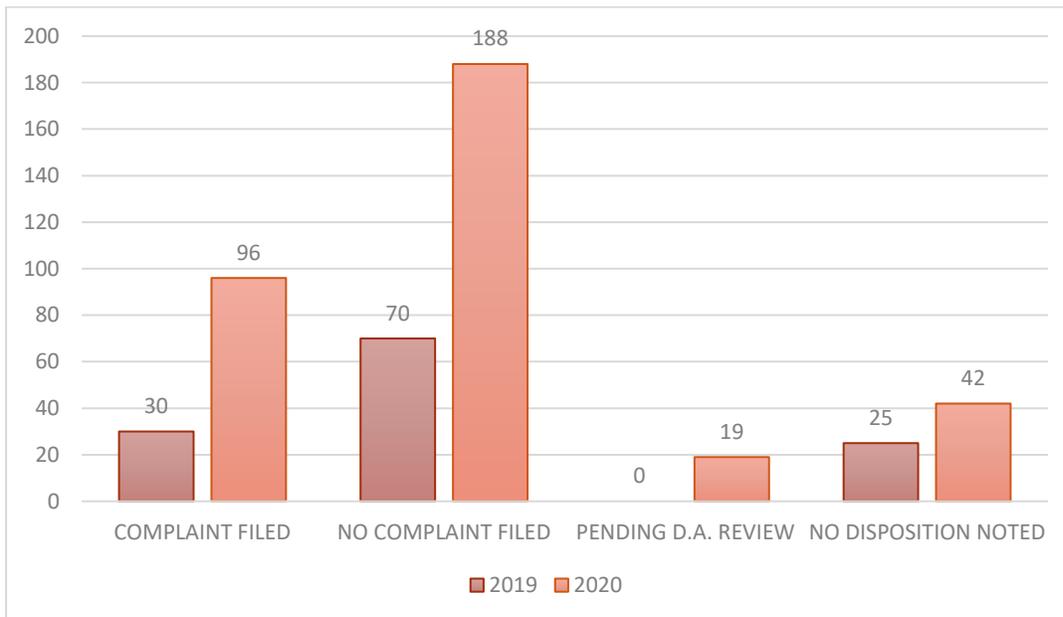


Additionally, 20.63% of the 509 arrests made by the DTF during this period were for contempt of court (California Penal Code 166<sup>33</sup>), typically considered a misdemeanor. Of these, 96 out of 105 contempt of court arrests also included a probation violation. Given the relatively large size of the unhoused population and its proximity to the UC campus and downtown businesses, it is likely that a significant portion of these arrests were at least in part for violations of stay-away orders. This is supported by audiotaped interviews with DTF officers, which indicate that stay-away orders are central to their enforcement actions. In some cases, officers even requested that judges impose stay-away orders, facilitating subsequent arrests. Without closely reviewing individual incident reports and probationary conditions imposed on arrested individuals, it is difficult to determine how many of these violations were specifically for stay-away orders as distinct from other probation violations.

A considerable number of DTF arrests were dismissed outright with no complaint filed by the Alameda County District Attorney, with dismissed cases rising from 70 in 2019 to 188 in 2020.

<sup>33</sup> California Penal Code Section 166:  
[https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=PEN&sectionNum=166](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=166).

**FIGURE 4. DOWNTOWN TASK FORCE ARREST SENT TO ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE (OCT. 1, 2019 – NOV. 22, 2020)**



Finally, it is notable that as documented in the City Auditor’s 2022 report on BPD overtime, in 2020 the BPD outspent its overtime budget by more than \$5 million<sup>34</sup>. While much of this was due to contracts with outside entities, some was also the result of the “chain reaction” of compensatory time. As the Auditor explained, when an officer does overtime, they may receive either overtime pay or compensatory time off. When they choose the latter, another officer fills in with overtime, who then may choose compensatory time, and so on, eventually magnifying many times over the effect of the original overtime.

The text messages revealed by Shedoudy suggest that overtime work was liberally authorized. Sgt. Kacalek enthused that if his officers “kick ass” and “arrest people” they “will never [be] jam[med] up about overtime.” The DTF interviews corroborate the essentially open-ended, unlimited access to overtime.

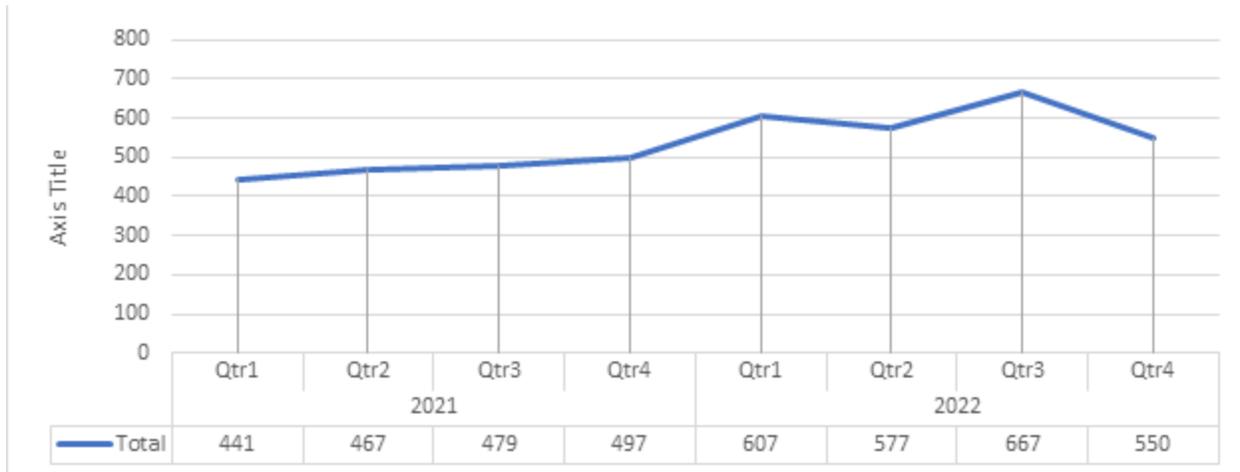
The data presented above represent a moment in time. Because this report is forward-looking and is focused on policy and practices, it is important to examine the subsequent state of DTF operations. Seven of the original officers<sup>35</sup> were on the Downtown Task Force/Bike Unit for all eight quarters from January 2021 to December 2022; Sgt. Kacalek was on DTF duty for five of those quarters.

<sup>34</sup> City Auditor Report “Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities” [https://berkeleyca.gov/sites/default/files/2022-04/Berkeley Police - Improvements Needed to Manage Overtime and Security Work for Outside Entities.pdf](https://berkeleyca.gov/sites/default/files/2022-04/Berkeley_Police_-_Improvements_Needed_to_Manage_Overtime_and_Security_Work_for_Outside_Entities.pdf)

<sup>35</sup> These were officers Breaux, Michalczyk, Pickett, Schikore, Seaton, and Stern, all of whom were also on the earlier DTF.

Once again, the number of arrests by these seven officers ranges substantially from sixteen for one officer to 265 for another. Further, the 585 arrests by these eight officers constitute a significant portion of the 4,285 arrests made by the BPD during this period.

**FIGURE 5. ARREST MADE BY THE BPD (JAN. 2021 - DEC. 2022)**



Racial disparities in arrests by the DTF increased substantially in this period, with Black individuals constituting 46.9% of arrests, while White individuals made up 29.2% of arrests, and Latino/a people were 15.3% of those arrested.

### **Policy and Practices Deficiencies and Recommendations**

These qualitative and quantitative findings strongly suggest that policy changes are necessary. Among the policies the PAB recommends strengthening are policies on:

- fair and impartial policing (Policy 401);
- the use of personal communication devices such as cellphones (Policy 701);
- employee speech, expression and social networking (Policy 1029);
- the early warning system (Policy 1041);
- standards of conduct (Policy 321); and
- overtime compensation requests (Policy 1019).

In addition, the PAB recommends:

- adding a stand-alone policy prohibiting implicit or explicit arrest quotas that go beyond the California Vehicle Code (Section 41600-41603) on vehicle stops<sup>36</sup> and
- consideration of an official standard for the enforcement of stay-away orders.

<sup>36</sup> California Vehicle Code. Section 41600-41603. Chapter 7. Arrest Quotas:  
[https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=)

Before proceeding to these policy reviews, it is important to emphasize that policy changes are meaningless if they are not enforced or if BPD officers are not sufficiently informed on policy matters. In our review of the evidence and audiotaped interviews, it was clear that DTF officers in some cases engaged in practices that were not consistent with policy and in other cases expressed confusion as to what those policies were.

We turn now to specific concerns and preliminary recommendations for reform of existing policies. Following that, we offer recommendations for a new policy prohibiting all arrest quotas; consideration of a standard for enforcement of stay-away orders; and additional training. The PAB presents these preliminary policy recommendations with the intention of collaborating with the BPD to refine and enhance the necessary reforms, ensuring they effectively address the needs of the Berkeley community.

### **Fair and Impartial Policing, Policy 401**

BPD data have consistently shown that Black and Latino/a motorists, cyclists and pedestrians are far more likely to be stopped, arrested and searched than are White people. The 2018 Center for Policing Equity (CPE)<sup>37</sup> report commissioned by the City found that Black motorists were 6.5 times more likely to be stopped by Berkeley police than White motorists and that Black pedestrians were 4.5 times more likely to be stopped.

Subsequent to this CPE report, Mayor Arreguin convened a Working Group on Fair and Impartial Policing. It met for almost two years and submitted a package of recommendations to City Council on February 23, 2021. The recommendations, which were passed largely intact, were wide-ranging and significant and included, among many other proposals, recommendations for a requirement that intensive training focused on implicit bias be administered annually, and for reforms of the Early Warning System.

Data in the BPD Transparency Hub reveal that the disparities reported by the CPE remain entrenched. According to the 2024 PAB report on the Implementation of Fair and Impartial Policing directives<sup>38</sup>, for the period from April 2021 to October 2023, Black motorists were 5.8 times more likely to be stopped by the BPD than White motorists; 10 times more likely to be searched; and 10 times more likely to be arrested. Black pedestrians were 8 times more likely to be stopped than their White counterparts. Overall, Black residents of Berkeley were 6.55 times more likely to be stopped by BPD than White Berkeley residents.

As noted earlier, it is challenging to calculate with precision the racial disparities in arrests in the downtown area. What we do know, however, is that the racial disparity in

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<sup>37</sup> Report, “The Science of Justice: Berkeley Police Department National Justice Database City Report May 2018”: <https://rentboard.berkeleyca.gov/sites/default/files/documents/Berkeley-CPE-Report-May-2018.pdf>

<sup>38</sup> Police Accountability Board Report “Fair and Impartial Policing Implementation”: [https://berkeleyca.gov/sites/default/files/documents/2024%20PAB%20Report\\_FIP%20Implementation\\_Final.pdf](https://berkeleyca.gov/sites/default/files/documents/2024%20PAB%20Report_FIP%20Implementation_Final.pdf)

arrests has increased substantially from 2019-2020 when approximately equal numbers of Black people and Whites were arrested by the DTF, to 2021-2022 when the percentage of arrestees who were White had fallen to 29.2% and Blacks and Latinos made up more than 62%.

We know too that the text messages from 2019-2020 reveal open racial animus among at least some officers. As Sgt. Kacalek joked derisively when watching a blurry video of a distillery, “Shedoudy’s Obama phone fucked up the video” (presumably ridiculing a program that provided free cell phones to eligible low-income households).

In a subsequent text, Sgt. Kacalek wrote about a media report of a particular incident and the alleged perpetrator: “Interesting how he listed him as ‘Dennis Daniels, male, 51 years old, no address’. I guess he isn’t black or no one could decipher his race and he isn’t homeless or even unhoused, just no address. #Iwantthecoldhardtruth.”

The disdain extended to the unhoused people Sgt. Kacalek patrolled: “Stern [DTF patrol officer] is gonna come back with a new strain that wipes out the homeless pop. We will just ride by the bodies!”

Despite these inappropriate expressions of racial animus and disdain for the unhoused it appears that no DTF officers reported the inappropriate conduct and expressions until the terminated officer Shedoudy disclosed the text messages to City Council. DTF members interviewed by the Swanson team pushed back against the notion that such messages were inappropriate, viewing them instead as intended as humor and not to be taken seriously—suggesting a jarring disconnect between the public reaction to the racist undertone of these texts and their matter-of-fact reception by DTF members.

In light of these quantitative and qualitative findings, the PAB recommends the following additions to the Fair and Impartial Policing Policy (#401):

- A provision explicitly clarifying that the policy refers to both conduct and speech or expression and
- A provision that mandates annual intensive implicit bias training as called for in the Council directive in the Fair and Impartial Policing reforms of 2021<sup>39</sup>

See Attachment 1 for the current Fair and Impartial Policing Policy, with recommended changes highlighted in red.

### **Personal Communication Devices, Policy 701**

The cellphones used by the DTF to send these text messages were officers’ personal devices. While the department issues personal communication devices (in this case, cellphones) to all sworn members and encourages their use for work-related issues

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<sup>39</sup> Report and Recommendations from Mayor’s Fair and Impartial Policing Working Group: <https://berkeleyca.gov/sites/default/files/documents/2021-02-23%20Special%20Item%2001%20Report%20and%20Recommendations.pdf>

when radio communication is not feasible, the policy allows wide discretion. As was the case in the Swanson & McNamara investigation, the fact that the messages in question were sent on officers' own personal devices—not those issued by the Department--complicated considerably investigators' access. Furthermore, some of the interviewed DTF members were not aware of *any* policy on this issue. The PAB therefore recommends:

- strengthening Policy 701 to stipulate that PCDs are to be used *only* when radio communication is not feasible;
- that members using a PCD be required to use department-issued PCDs, absent exigent circumstances;
- adding a provision making it clear that the prohibition on inappropriate use of a PCD, whether on duty or off-duty on work-related issues, includes any expression that damages the mission, function, reputation or professionalism of the BPD; and
- providing additional training on the use of PCD's.

See Attachment 2 for the current Personal Communication Devices with recommended changes highlighted in red.

### **Employee Speech, Expression, and Social Networking, Policy 1029**

The text messages that were exchanged among members of the DTF expressed racial animus and disdain for the unhoused. In this, they appear to have violated the BPD policy on employee speech and expression. Specifically, the policy prohibits any speech “pursuant to an official duty that tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees.” The meaning of this policy appears to be clear; however, in the context of DTF members' interpretation of the messages in question as jesting, the PAB recommends not only the implicit bias training referred to above, but also:

- adding further specificity to leave no doubt about its meaning, explicitly including reference to its application whether the speech is transmitted through a personal or department-issued electronic device and whether the member is on or off-duty.

See Attachment 3 with the current Employee Speech, Expression, and Social Networking Policy, with recommended changes highlighted in red.

### **Early Warning System, Policy 1041**

An Early Warning System (EWS), sometimes referred to as an Early Intervention and Risk Management System, was a central component of the directives of the City Council, following the recommendation of the Mayor's Working Group on Fair and Impartial Policing. As the Working Group stated in its recommendation to Council in February 2021, an effective system involves “identifying officer outliers in stops, searches, and use of force...and examining the reasons for racial disparities.” “Outliers” is a term of art that refers to those whose performance on certain indicators is outside the Department

average. The system does not focus on discipline but rather on identifying behavior that may be problematic as early as possible. Such programs include monitoring, mentoring, training and, where appropriate, counseling.

In addition to enhancing public safety and officer welfare and safeguarding against bias, effective systems are a financially responsible approach. According to a report by the *Washington Post*, twenty-five cities paid out more than \$3.2 billion in settlements for police misconduct between 2010 and 2020, with claims for officers charged in more than one misconduct case accounting for \$1.5 billion.<sup>40</sup> Over the past decade, the City of Berkeley has paid \$1,242,860.97 across 471 claims in such settlements, with a total incurred cost of almost \$2 million, including the cost of processing these claims.

The current EWS in Berkeley does not have an effective way of systematically identifying outliers on indicators such as numbers of stops, arrests and searches. While random audits of a few officers on a quarterly basis have been instituted, the small number randomly singled out is unlikely to have an effective impact or to identify significant outliers, nor is it consistent with the directive from Council based on the Mayor's Working Group on Fair and Impartial Policing.

As criminologist Carol Archbold, who specializes in police accountability, said in the context of the *Nature Human Behavior* report on the contagiousness of misconduct, early intervention systems can be effective: "The spread [of misconduct] can be stopped if it's tracked, and if something is done about it."<sup>41</sup>

If an effective Early Warning System had been in effect, it is probable that, based on the statistics cited above—particularly the spike in arrests during certain periods—some members of the DTF would have been audited as outliers and the scrutiny could have minimized the damage.

In April 2023, City Council referred \$100,000 to the June 2023 budget to hire a consultant for the design and help with implementing a new Early Intervention and Risk Management System. It will take some time before that project is complete and a new system put in place. In the interim, the PAB recommends:

- quarterly audits of officers with unusually high numbers of stops, arrests, and/or searches, for people of color and the unhoused, instead of the current random audits of several officers

See attachment 4 for the current Early Warning System Policy 1041, with recommended changes outlined in red.

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<sup>40</sup> "The Hidden Billion Dollar Cost of Repeated Police Misconduct," *The Washington Post*, March 9, 2022.

<sup>41</sup> "Study Finds Misconduct Spreads among Police Officers Like Contagion," Nova KQED, May 27, 2019. <https://www.pbs.org/wgbh/nova/article/police-misconduct-peer-effects>.

## **Standards of Conduct, Policy 321**

As Mayor Arreguin stated in his press release following the statements of City Spokesperson Chakko, “What is clear from a plain reading of the texts is that the behavior was unprofessional and does not meet the standards to which we should hold our City employees.... This episode further demonstrates the need to implement reforms.”

These authenticated texts reveal conduct that was clearly at odds with the official policy and underscore the need for explicit statements regarding the duty of all officers to report inappropriate conduct or violations of policy. It is of great concern that some DTF officers were not even aware of any mechanism for reporting observed misconduct.

The PAB is pleased that the Chief has adopted the Active Bystander for Law Enforcement (ABLE) program for which training will soon commence. That program will train officers to intervene when they witness their peers engaging in inappropriate conduct.

In addition to this important ABLE program, the reforms we recommend to this Standards of Conduct policy will:

- make it clear that any behavior or expressions that bring disrepute to the Department—whether an officer is on or off-duty—will not be tolerated, and
- Members have an obligation to report any such behavior or expressions by any other member, consistent with Policy 1010.9 concerning 'Employee Responsibility' to file a personnel complaint if misconduct by a BPD colleague is observed.

See Attachment 5 for the current Standards of Conduct Policy with recommendations highlighted in red.

## **Overtime Compensation Requests, Policy 1019**

The police overtime issue is a longstanding concern. A 1998 report by the National Institute of Justice declared, “There is a sense both inside and outside the law enforcement community that overtime is overused, misused, and only halfheartedly controlled.”<sup>42</sup>

On March 23, 2022, the Berkeley City Auditor submitted a report entitled “Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities.”<sup>43</sup> The report found that “BPD does not adhere to their overtime policies and controls.” In fiscal year 2020, 21% of officers worked more than their weekly overtime limit

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<sup>42</sup> Bayley, David and Robert Worden. 1998. “Police Overtime: An Examination of Key Issues.” National Institute of Justice, U.S. Department of Justice. Washington DC.

<sup>43</sup> Berkeley City Auditor, “Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities,” March 3, 2022. The report won an excellence award from the Association of Local Government Auditors.

of 44 hours at least once, risking their own health and safety and the safety of others. One officer exceeded the limit in eleven weeks during 2020. Further, the Auditor’s report stated that the BPD did not “have an effective system to enforce their policy and manage overtime.”

The Auditor’s report further noted that “overtime was the biggest reason” why the BPD consistently spent more than their budget allocation. In order to align the overtime budget with actual outlays, in 2021 the City’s overtime budget allocation was raised to \$5.3 million and another \$1 million was put in reserve.

The Auditor noted that there are many legitimate reasons for the police use of overtime—for example, a call that comes in at the end of a shift or the need to cover for absences or vacancies. However, excessive overtime imposes significant physical, mental, and fiscal risks. She also noted that compensatory time for overtime worked sets off a “chain reaction” of overtime expenses, and that while such comp time is limited by policy it was unclear “whether this policy is being enforced” (p. 16). On June 25, 2024, Chief Louis gave Council an update on implementation of the Auditor’s twelve recommendations. She reported that five had been implemented and that the others were in process. However, we note that none of these recommendations deal squarely with the issue of the broad discretion related to overtime.

The Auditor advanced twelve recommendations—importantly, including improved security contracts with the outside entities that make up a large percentage of overtime hours. The Auditor’s final report included responses from the Department indicating that many of the recommendations are in the process of being implemented. Among these BPD responses was a “proposed implementation plan” to “review existing policy and ensure that any policy updates or clarification are completed.”

BPD policy on overtime requests and the verification of overtime worked relies on broad discretion and appears open to misuse. This wide discretion and potential for misuse are apparent in this text from Sgt. Kacalek: “I was at Kevin Reece’s birthday party just now and Dave was there and we briefly talked about DTF. He said just kick ass, arrest people, have fun, and get results and I will never jam you about overtime.” Indeed, the audiotaped interviews of DTF members suggest that DTF officers worked overtime at will.

While some supervisory discretion is inevitable and necessary, the current policy leaves wide gaps through which such misuse can proliferate. For example, Section 1019.1.1 of the Overtime Compensation Requests policy states, “All requests to work overtime shall be approved in advance by a supervisor.” However, this clear mandate is followed by the broad exemption that “if circumstances do not permit prior approval,” approval can be sought after the fact when the overtime is completed.

The PAB does not offer specific policy reforms here. Instead, we recommend that the review of existing policies referred to in the BPD response to the Auditor be robust

and foreground the need to narrow this broad discretion. Importantly, for example, among other provisions it might:

- stipulate what circumstances, or types of circumstances, would comprise the need to bypass the otherwise straightforward directive that “all requests shall be approved in advance...” and
- consider excessive overtime as a factor triggering an Early Warning System audit.

While discretion and flexibility are inevitable, the conditions under which discretion is applied need to be described. The current policy perhaps unintentionally sends a message of virtually unlimited flexibility--a flexibility that some DTF officers interpreted as open-ended. See Attachment 6 for the current Overtime Compensation Policy.

### **Prohibition on Arrest Quotas**

The legislative issue of police arrest quotas, though often obscured and scattered across many states, has its origins in Berkeley—a city renowned for its progressive and forward-thinking stance in shaping societal norms and legal frameworks (Ossei-Owusu, 2021).

Significant legislative activity on arrest quotas emerged in the 1970s, with Black Democratic Assemblyman John Miller introducing California's bill in 1975. Miller, often described as a "progressive independent in local politics," demonstrated a keen political acumen, underpinning his support for quota bans with inclusive rhetoric (Id.). His district, which encompassed the diverse cities of Oakland and Berkeley, provided a unique perspective, one that resonated with concerns for both police officers and the public.

Miller articulated the inherent injustice in quotas, deeming them "unfair, undemocratic, and unjust."<sup>44</sup> He was troubled by the notion that an officer's failure to meet quotas could lead to demotion, while simultaneously expressing concerns for "the average California driver," who might find themselves disbelieved by a "rubber stamp traffic court system."<sup>45</sup>

California's statute, based on a convergence of bipartisan concerns, remains relevant today, specifically in the City of Berkeley. It serves as a historical testament to the enduring pursuit of justice and fair play, core tenets that guide our efforts to maintain police accountability, foster public trust, and safeguard civil rights.

While most people assume that a ban on police arrest quotas is already enshrined in the California Penal Code, it is limited to the California Vehicle Code. This is an oversight that needs to be corrected, both locally and at the State level.

The brief summary of the Swanson report provided to the public by the City of Berkeley appears to absolve the DTF of establishing formal arrest quotas. However, the

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<sup>44</sup> See Ossei-Owusu, 2021 citing *Measure to Outlaw CHP's Ticket Quotas*, *supra* note 69, at 1.

<sup>45</sup> Id.

Swanson report stipulates that while no formal arrest quotas were established, there was an expectation that a certain number of arrests was to be aimed for. The text messages quoted above are replete with explicit and implicit references to “Operation 100” in which DTF patrol officers were encouraged by Sgt. Kacalek to achieve at least 100 arrests per month. “How’s Operation 100 going?”, he asks. And, “81 arrests! We can do 19 by Friday for sure!” And, by way of a (presumably) teasing reminder, “I was thinking whoever gets the least arrests today does the waxing.” DTF members who were interviewed consistently eschewed the term “quota”, but they acknowledged an expectation of high arrest numbers as an indication that they were being proactive and doing their job.

A spike in arrests attests to the seriousness of the Operation 100 expectation and its implicit quota.

Given the legislative history of arrest quotas, their (incorrectly) assumed ban in California, and their potential impact on our most marginalized community members, the PAB recommends that the BPD, in collaboration with the PAB develop a new, freestanding policy prohibiting all arrest quotas whether they refer to vehicles, cyclists, or pedestrians, whether formal, informal, or implicit, and whether they are enforced with formal disciplinary measures or solely incentives/disincentives. A sample arrest quota prohibition is attached in Appendix 3.

### **Stay-away Orders**

Violation of a stay-away order is considered a contempt of court misdemeanor under California Penal Code 166(c)(1). While the DTF text messages do not explicitly reference stay-away orders, BPD data indicate that over 20% of DTF arrests during this period were for violations of court orders. Among these cases, 91.4% were linked in part to violations of probation. Without a detailed review of individual incident reports, it is difficult to ascertain how many arrests stemmed primarily from a violation of a stay-away order.

Currently, BPD lacks a specific policy regarding stay-away orders. Some interviewed officers assert that enforcement allows no discretion, while others maintain that some discretion exists. Given the significant impact of stay-away orders on UC Berkeley property and downtown businesses, and officers' ability to request these orders post-arrest from a judge, the PAB strongly recommends that BPD establish a comprehensive stay-away order policy and provide training consistent with state law.

The current resources of the PAB do not allow for a detailed examination of the circumstances surrounding stay-away arrest. However, we recommend that BPD investigate the frequency and context of these arrests, and assess whether the district attorney's high dismissal rate (as noted earlier for DTF cases) is disproportionately related to stay-away orders.

## RECOMMENDATIONS FOR CITY COUNCIL ACTION

1. Pass an ordinance or otherwise affirm the Police Accountability Board’s ability to access documents and records in furtherance of its central “accountability” function, consistent with Charter Amendment Section 125.

The policy reforms recommended above are an important first step in ensuring that the kind of inappropriate conduct and expression revealed in the DTF text messages do not recur. However, policy reforms are only a first step. No policy is effective if it is not fully implemented and enforced. Real law—real policy—takes place on the ground where it is literally “enacted” every day through practice.

The PAB “policy and practices review” of the texting incidents of concern here are a case in point. The content of the audiotaped interviews of DTF Members which were accessed by the PAB only after persistent and lengthy efforts have underscored how critical such authority is if the PAB is to fulfill its function of Police Department accountability and transparency. Without such access, our oversight would be largely limited to formal policies, with no meaningful “practices” oversight.

The Charter Amendment creating the PAB established as one of its primary purposes the promotion of “public trust through independent, objective, civilian oversight of the Berkeley Police Department,” including “setting and reviewing Police Department, policies, **practices**, and procedures...” (Section 125 (1); emphasis added)<sup>46</sup>.

If the Police Accountability Board is to fulfill its Charter-mandated function of police oversight and accountability, it must have the ability to access the internal records of the BPD that track its actual practices. This would include, but not be limited to, Internal Affairs Bureau records of internal and external complaints and their processing, Early Warning System records, body-worn camera footage, and police reports.

It should be noted further that the inability of this oversight body to provide oversight of daily BPD practices limits its ability to prevent or forestall the kinds of misconduct that went undisclosed for more than two years before being exposed by an individual who was no longer part of the police force.

This restriction on the PAB oversight function plays out in other incidents of interest as well, including serious allegations of significant misconduct—incidents that we as the police oversight body sometimes only learn about from press reports months or years after the fact. We fully understand that the PAB is not authorized to recommend discipline outside of individual complaints. What is important is *patterns of practice* that may be revealed in a PAB investigation and that are integral to the PAB exercising its Charter-mandated oversight of not only BPD policy, but practices.

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<sup>46</sup> Berkeley City Charter Section 125(1): [https://berkeley.municipal.codes/Charter/125\(1\)](https://berkeley.municipal.codes/Charter/125(1))

To this end, the PAB recommends that City Council pass an ordinance or otherwise ensure that the PAB has the authority to access BPD records that attest to how formal policies are being implemented and enforced, both through BPD procedures and in daily practice on the ground. This recommendation addresses the core of our Charter-mandated function of oversight, accountability, and the promotion of trust.

In 2023, City Council passed its priority list for legislative activity at the state and federal levels, a list which authorizes its lobbyists to act on its behalf to champion legislation consistent with Berkeley's values and interests. That list included a directive to "support efforts to increase peace officer accountability...". "Peace officer accountability" was once again a lobbying priority for Berkeley in 2024.

An ordinance to ensure that the PAB may self-initiate investigations of alleged incidents of serious misconduct will allow it to fulfill its Charter-mandated function of oversight. This would be consistent with the City's lobbying efforts to "support efforts to increase peace officer accountability."

**2. Adopt a robust resolution ensuring full and meaningful accountability for sworn officers—whether on-duty or off-duty—who engage in misconduct of any kind but especially actions or expressions of racial or other types of bias.**

Disciplinary actions imposed on sworn officers who engage in policy violations are not revealed to the public, consistent with California Penal Code 832.7. This lack of disclosure, combined with the inevitable rumor mill that works to fill the gap, has threatened to erode public trust. The erosion of trust has been furthered by revelations in the press that one recent incident resulted in a seeming exoneration by the BPD Internal Affairs Bureau, despite what Mayor Arreguin called his "shock and outrage" at the alleged incident.<sup>47</sup> Council could help ensure accountability by adopting a resolution underscoring its support for robust and meaningful accountability for officers, whether on or off-duty, who engage in misconduct of any kind, but with a special emphasis on racial or other types of bias.

**3. Direct the City Manager to work with the BPD, PAB and ODPa to create a public repository to fulfill the vision of California Penal Code Section 832.7<sup>48</sup> (b)(1) to allow for transparency in cases of sustained allegations of officer racism or other discriminatory conduct or expressions.**

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<sup>47</sup> See "'Don't give me that Black crap': Video from 2017 shows embattled Berkeley sergeant" (berkeleyscanner.com. September 13, 2023): <https://www.berkeleyscanner.com/2023/09/14/policing/berkeley-police-sergeant-dave-marble-lawsuit-video/>

<sup>48</sup> California Penal Code Section 832.7: [https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN)

The Penal Code that protects peace officers' personnel records from public disclosure (Section 832.7) has been amended several times. These amendments now exempt the following records from protection:

1. Discharge of a Firearm: Any incident where a peace officer discharges a firearm at a person (Section 832.7(b)(A)(i)).
2. Use of Force: Any use of force resulting in death or great bodily injury (Section 832.7(b)(A)(ii)).
3. Sexual Assault: Any sustained finding that a peace officer engaged in sexual assault (Section 832.7(b)(B)(i)).
4. Dishonesty: Any sustained finding of dishonesty by a peace officer made by any law enforcement or oversight agency (Section 832.7(b)(C)).

The most recent amendment further allows the disclosure of records related to “any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status” (Section 832.7(b)(D)).

The Berkeley City Council should direct the City Manager to collaborate with the Berkeley Police Department (BPD), the Police Accountability Board (PAB), and the Office of the Director of Police Accountability (ODPA) to implement these amendments. Specifically, they should:

1. Create a public repository that proactively publishes relevant findings within 30 days of their conclusion, regardless of Public Records Act (PRA) requests; and
2. Ensure full transparency in cases of sustained allegations and other incidents eligible for public disclosure.

This action will fulfill the vision of the amendments to California Penal Code Section 832.7 as outlined in Senate Bill 16 (SB 16)<sup>49</sup>, Senate Bill 1421 (SB 1421)<sup>50</sup>, and Assembly Bill 748 (AB 748)<sup>51</sup>.

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<sup>49</sup> Senate Bill 16, Skinner. Peace officers: release of records:

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB16](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB16)

<sup>50</sup> Senate Bill 1421, Skinner. Peace officers: release of records:

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB1421](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1421)

<sup>51</sup> Assembly Bill 748, Ting. Peace officers: video and audio recordings: disclosure:

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB748](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB748)

**4. Call on California state legislators to extend the prohibition on arrest quotas, which are currently limited to the California Vehicle Code (Section 41600-41603).**

Most people assume that a ban on police arrest quotas is already enshrined in California law, but it is limited to vehicle stops. This is an oversight that needs to be corrected, both locally and at the State level. Given the legislative history of arrest quotas, their (incorrectly) assumed ban in California's Penal Code, and their potential impact on our most marginalized community members, the PAB recommends that Council call on the legislature to correct that oversight by extending the prohibition on arrest quotas, whether they be implicit or explicit, in the Penal Code.

Whatever the findings of the Swanson & McNamara team, the DTF text messages as well as the spikes in arrests during that month, drew the PAB's attention to arrest quotas and, eventually, to the absence of their general prohibition in the Penal Code. Once again, Berkeley could take the lead on spearheading a remedy for this apparent oversight.

**SUMMARY**

The Police Accountability Board is charged by the City Charter with oversight of the Berkeley Police Department's policies, practices, and procedures, in the interest of promoting accountability, transparency and public trust.

This report was triggered by a series of text messages sent among sworn officers of the BPD's Downtown Task Force and Bike Unit, and its goal is to fulfill—to the extent possible under current restrictions--its Charter-mandated oversight functions. The report is forward-looking, providing recommendations for policy and practice changes that may help prevent such harmful incidents in the future.

We draw our recommended policy reforms from implications of the text messages themselves, publicly available statistical data, the Swanson & McNamara Report, and DTF officers' audiotaped interviews.

The policies focused on in this report are Fair and Impartial Policing (#401); Personal Communication Devices (#701); Employee Speech, Expression, and Networking (#1029); Standards of Conduct (#321); the Early Warning System (#1041); and Overtime Compensation Requests (#1019). In addition, the PAB recommends a freestanding prohibition on all arrest quotas, implicit or explicit, and a clear policy on the enforcement of stay-away orders.

These policy reforms are one important step. However, policy reforms are only meaningful to the extent that they are fully understood, implemented, and robustly enforced. The PAB thus recommends, as a key priority, that City Council enact an ordinance or other mechanism to ensure that this oversight body—which has sworn an

oath of confidentiality--has the authority to access internal BPD records in the interest of preventing such damaging practices in the future.

Less significant perhaps, but of great symbolic value, the PAB recommends that Council pass a resolution affirming its strong support for full and meaningful accountability for officers who have engaged in misconduct whether they are on or off-duty.

The PAB also recommends that the Council call on the State Legislature to 1) add an exemption in cases of sustained racism or other bias, to 832.7 which protects police records from public disclosure; and 2) rectify an oversight with regard a prohibition on arrest quotas--which is currently limited to the California Vehicle Code—by extending that prohibition in the California Penal Code. By doing so, the City of Berkeley can exhibit its leadership on these important social justice issues.

The text messages that were sent among officers of the Downtown Task Force were harmful to the community and arguably demoralizing to the many BPD officers who find such sentiments repugnant. This report is necessarily forward-looking and aims to provide an environment in which transparency, accountability, and justice can flourish. This cannot be accomplished through policy changes alone. It requires collective efforts by the PAB, BPD and its leadership, the City Manager, and City Council. The PAB looks forward to this collaboration.

## ATTACHMENTS

## **ATTACHMENT 1. Fair and Impartial Policing: POLICY 401 (with recommended changes in red).**

### **401.1 PURPOSE AND SCOPE**

This policy is intended to reaffirm the commitment of the Berkeley Police Department to fair and impartial policing; to clarify the circumstances in which dispatchers and officers can consider race, ethnicity and other demographics; and to reinforce procedures that serve to assure the public that we are providing service and enforcing laws in an equitable way, including identifying, intercepting, and documenting profiling by proxy.

California Penal Code Section 13519.4(e) prohibits racial profiling by law enforcement officers. This policy explicitly prohibits racial profiling and other biased policing. This policy describes the limited circumstances in which members can consider race, ethnicity, national origin, gender, age, religion, sexual orientation/identity or socio-economic status in making law enforcement decisions.

#### **401.1.1 DEFINITIONS**

Definitions related to this policy include:

**Bias-based policing** - Any police-initiated action that relies on the race, ethnicity or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being engaged in criminal activity.

### **401.2 POLICY**

Investigative detentions, traffic stops, arrests, searches and property seizures by officers will be based on a standard of reasonable suspicion or probable cause. Officers must be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause.

Officers shall not consider race, ethnicity, national origin, gender, age, religion, sexual orientation/ identity or socio-economic status in establishing either reasonable suspicion or probable cause, or when carrying out other law enforcement activities except when officers are:

1. Seeking specific person(s) who have been described in part by any of the above listed characteristics, or
2. The person(s) are being sought for a specific law enforcement purpose.

Discrimination or harassment based on a trait or class described above is considered a “serious allegation” of misconduct.

### **401.3 RESPONSIBILITY TO REPORT AND TAKE CORRECTIVE ACTION**

Employees who become aware of another employee engaging in biased policing—**including both conduct and speech or expression—shall** report it and shall adhere to reporting procedures set forth in the Personnel Complaints Policy.

A supervisor or command officer who becomes aware of biased policing shall adhere to notification and administrative procedures set forth in the Personnel Complaints Policy.

All reports of biased policing shall be investigated in accordance with the Personnel Complaints Policy.

### **401.4 PROFILING BY PROXY**

Bias, racism or profiling by proxy occurs in a call for service when an individual call the police and makes false or ill-informed claims about persons they dislike or are biased against. Dispatchers and Officers have a role in mitigating bias-based calls for service (CFS), and proper handling of these calls is important to maintain and build trust between the police and the community.

Call takers have a responsibility to do an initial screen and triage of all calls to ensure they are accurately entered as the correct CFS with the appropriate priority attached. Call takers should ask questions and explore whether there are concrete, observable behaviors that form the basis of the suspicious activity or crime the RP is reporting. Calls for service (CFS) should focus on behaviors of involved parties, not appearance. Reports of suspicious activity require the reporting party (RP) to articulate something criminal or reasonably suspicious about a person's behavior.

If a Call Taker believes an RP is making a bias-based call for service, they should:

1. Create a call for service,
2. Enter the details provided by the RP in the call narrative
3. In the Nature of Call field enter: "Supervisor review required" which will ensure that the call is not ready for dispatch, and
4. Notify the on-duty supervisor. Supervisor will review the merits of the call for service and either approve for dispatching or notify a Watch Commander (or designee)
5. Watch Commander will determine if a response will be provided and/or follow-up up with the RP for more information.

## **401.5 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE**

The Chief of Police or the authorized designee shall ensure that all data required by the California Department of Justice (DOJ) regarding complaints of racial bias against officers is collected and reported annually to the DOJ (Penal Code § 13012; Penal Code § 13020).

### **401.5.1 DEMOGRAPHIC DATA PROCEDURES**

All sworn officers shall provide demographic statistical data once for each individual as listed below:

1. All vehicle and bicycle detentions.
2. All pedestrian detentions
3. Anytime anyone is detained, regardless of the cause
4. Anytime anyone is searched regardless of the cause.

Officers shall provide demographic statistical data pursuant to the requirements of the RIPA statute, AB 953.

## **401.6 ADMINISTRATION**

Each year, the Operations Division Captain shall review the efforts of the Department to prevent racial or biased based profiling and submit an overview, including public concerns and complaints, to the Chief of Police.

The annual report should not contain any identifying information about any specific complaint, member of the public or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors should review the annual report and discuss the results with those they are assigned to supervise.

## **401.7 TRAINING**

Training on racial or bias-based profiling and review of this policy should be conducted as directed by the Personnel and Training Bureau.

All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of racial or bias-based profiling.

Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.

Each sworn member of this department who received initial racial or bias-based profiling training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial, identity and cultural trends (Penal Code § 13519.4(i)).

**All sworn members of the Department will be required to receive annual intensive implicit bias training.**

## **ATTACHMENT 2. Personal Communication Devices: POLICY 701 (with recommended changes in red)**

### **701.1 PURPOSE AND SCOPE**

The purpose of this policy is to establish guidelines for the use of mobile telephones and communication devices, whether issued or funded by the Department or personally owned, while on-duty or when used for authorized work-related purposes.

This policy generically refers to all such devices as Personal Communication Devices (PCDs) but is intended to include all mobile telephones, personal digital assistants (PDAs), wireless capable tablets and similar wireless two-way communications and/or portable Internet access devices. PCD use includes, but is not limited to, placing and receiving calls, text messaging, blogging and microblogging, emailing, using video or camera features, playing games and accessing sites or services on the Internet.

### **701.2 POLICY**

The Berkeley Police Department allows members to utilize department-issued or funded PCDs and to possess personally owned PCDs in the workplace, subject to certain limitations. **PCDs shall only be used in the workplace on work-related matters when radio communication is not feasible. Further, personally owned PCDs shall only be used on non-work-related issues, absent exigent circumstances.** Any department-issued PCD used while on-duty, or used off-duty in any manner reasonably related to the business of the Department, will be subject to monitoring and inspection consistent with the standards set forth in this policy.

**The inappropriate use of a PCD while on-duty may impair officer safety.** Additionally, members are advised and cautioned that the use of a personally owned PCD either on-duty or after duty hours for business-related purposes may subject the member and the member's PCD records to civil or criminal discovery or disclosure under applicable public records laws. **Inappropriate use of a PCD, whether on duty or off-duty on work-related issues, includes but is not limited to any expression or speech that compromises or damages the mission, function, reputation or professionalism of the BPD.**

Members who have questions regarding the application of this policy or the guidelines contained herein are encouraged to seek clarification from supervisory personnel.

### **701.3 PRIVACY EXPECTATION**

Members forfeit any expectation of privacy with regard to any communication accessed, transmitted, received, or reviewed on any PCD issued or funded by the Department and

shall have no expectation of privacy in their location should the device be equipped with location-detection capabilities. This includes records of all keystrokes or web-browsing history made on the PCD. The fact that access to a database, service, or website requires a username or password will not create an expectation of privacy if it is accessed through department PCDs or networks (see the Information Technology Use Policy for additional guidance).

Members have no expectation of privacy regarding any communications while using a personally owned PCD for department-related business or when the use reasonably implicates work-related misconduct.

### **701.3.1 CALIFORNIA ELECTRONIC COMMUNICATIONS PRIVACY ACT (CALECPA)**

No member is authorized to be the sole possessor of a department-issued PCD. Department-issued PCDs can be retrieved, reassigned, accessed or used by any member as directed by a supervisor without notice. Member use of a department-issued PCD and use of a personal PCD at work or for work-related business constitutes specific consent for access for department purposes. Prior to conducting an administrative search of a PCD, supervisors should consult legal counsel to ensure access is consistent with CalECPA (Penal Code § 1546; Penal Code § 1546.1).

### **701.4 DEPARTMENT-ISSUED PCD**

Depending on a member's assignment and the needs of the position, the Department may, at its discretion, issue or fund a PCD. Department-issued or funded PCDs are provided as a convenience to facilitate on-duty performance only. Such devices and the associated telephone number shall remain the sole property of the Department and may be subject to inspection or monitoring (including all related records and content) at any time without notice and without cause.

#### **701.4.1 CITY OF BERKELEY AR 2.15 - CITY ISSUED COMMUNICATION EQUIPMENT POLICY**

Pursuant to City of Berkeley Administrative Regulation 2.15, text messages held on Department-issued or funded PCDs are to be maintained on the communication device for no less than 30 days from the date sent or received. PCDs that have text features enabled will be set to retain text message history for 30 days. Employees are not permitted to alter the text message history setting or to manually delete saved text messages.

## **701.5 PERSONALLY OWNED PCD**

Members may carry a personally owned PCD while on-duty, subject to the following conditions and limitations:

- a. Permission to carry a personally owned PCD may be revoked if it is used contrary to provisions of this policy.
- b. The Department accepts no responsibility for loss of or damage to a personally owned PCD.
- c. The PCD and any associated services shall be purchased, used and maintained solely at the member's expense.
- d. The device shall not be utilized to record or disclose any business-related information, including photographs, video or the recording or transmittal of any information or material obtained or made accessible as a result of employment with the Department, without the express authorization of the Chief of Police or the authorized designee.
- e. All work-related documents, emails, photographs, recordings or other public records created or received on a member's personally owned PCD should be transferred to the Berkeley Police Department and deleted from the member's PCD as soon as reasonably practicable but no later than the end of the member's shift.

Except with prior express authorization from their supervisor, members are not obligated or required to carry, access, monitor or respond to electronic communications using a personally owned PCD while off-duty. If a member is in an authorized status that allows for appropriate compensation consistent with policy or existing memorandum of understanding or collective bargaining agreements, or if the member has prior express authorization from his/her supervisor, the member may engage in business-related communications. Should members engage in such approved off-duty communications or work, members entitled to compensation shall promptly document the time worked and communicate the information to their supervisors to ensure appropriate compensation. Members who independently document off-duty department-related business activities in any manner shall promptly provide the Department with a copy of such records to ensure accurate record keeping.

## **701.6 USE OF PCD**

The following protocols shall apply to all PCDs that are carried while on-duty or used to conduct department business:

- a. Members may use a PCD to communicate with other personnel **only** in situations where the use of radio communications is either impracticable or not feasible. PCDs should not be used as a substitute for, as a way to avoid, or in lieu of regular radio communications.
- b. Members are prohibited from taking pictures, audio or video recordings or making copies of any such picture or recording media unless it is directly related to official department business. Disclosure of any such information to any third party through any means, requires the express authorization of the Chief of Police or the authorized designee.
- c. Members will not access social networking sites for any purpose that is not official department business. This restriction does not apply to a personally owned PCD used during authorized break times.
- d. Using PCDs to harass, threaten, coerce or otherwise engage in inappropriate conduct with any third party is prohibited. Any member having knowledge of such conduct shall promptly notify a supervisor.

#### **701.7 SUPERVISOR RESPONSIBILITIES**

The responsibilities of supervisors include, but are not limited to:

- a. Ensuring that members under their command are provided appropriate training on the use of PCDs consistent with this policy.
- b. Monitoring, to the extent practicable, department-issued PCD use in the workplace and taking prompt corrective action if a member is observed or reported to be improperly using a department-issued PCD.
  - 1. An investigation into improper conduct should be promptly initiated when circumstances warrant.
  - 2. Before conducting any administrative search of a member's personally owned device, supervisors should consult with the Chief of Police or the authorized designee.

#### **701.8 USE WHILE DRIVING**

The use of a PCD while driving can adversely affect safety, cause unnecessary distractions and present a negative image to the public. Officers operating emergency vehicles should restrict the use of these devices to matters of an urgent nature and should, where practicable, stop the vehicle at an appropriate location to use the PCD.

Members who are operating department vehicles that are not authorized emergency vehicles shall not use a PCD while driving unless the device is specifically designed and

configured to allow hands-free use. In an emergency, a wireless phone may be used to place an emergency call to the Department or other emergency services agency (Vehicle Code § 23123; Vehicle Code § 23123.5). Hands-free use should be restricted to business-related calls or calls of an urgent nature.

### **701.9 OFFICIAL USE**

Members are reminded that PCDs are not secure devices and conversations may be intercepted or overheard. Caution should be exercised while utilizing PCDs to ensure that sensitive information is not inadvertently transmitt

## **ATTACHMENT 3. Employee Speech, Expression and Social Networking: POLICY 1029 (with recommended changes in red)**

### **1029.1 PURPOSE AND SCOPE**

This policy is intended to address issues associated with employee use of social networking sites and to provide guidelines for the regulation and balancing of employee speech and expression with the needs of the Department.

Nothing in this policy is intended to prohibit or infringe upon any communication, speech or expression that is protected or privileged under law. This includes speech and expression protected under state or federal constitutions as well as labor or other applicable laws. For example, this policy does not limit an employee from speaking as a private citizen, including acting as an authorized member of a recognized bargaining unit or officer associations, about matters of public concern, such as misconduct or corruption.

Employees are encouraged to consult with their supervisor regarding any questions arising from the application or potential application of this policy.

#### **1029.1.1 APPLICABILITY**

This policy applies to all forms of communication including, but not limited to, film, video, print media, public or private speech, use of all Internet services, including the World Wide Web, email, file transfer, remote computer access, news services, social networking, social media, instant messaging, blogs, forums, video and other file-sharing sites.

### **1029.2 POLICY**

Public employees occupy a trusted position in the community, and thus, their statements have the potential to contravene the policies and performance of this department. Due to the nature of the work and influence associated with the law enforcement profession, it is necessary that employees of this department be subject to certain reasonable limitations on their speech and expression. To achieve its mission and efficiently provide service to the public, the Berkeley Police Department will carefully balance the individual employee's rights against the Department's needs and interests when exercising a reasonable degree of control over its employees' speech and expression.

### **1029.3 SAFETY**

Employees should consider carefully the implications of their speech or any other form of expression when using the Internet. Speech and expression that may negatively affect

the safety of the Berkeley Police Department employees, such as posting personal information in a public forum, can result in compromising an employee's home address or family ties. Employees should therefore not disseminate or post any information on any forum or medium that could reasonably be anticipated to compromise the safety of any employee, an employee's family or associates. Examples of the type of information that could reasonably be expected to compromise safety include:

- Disclosing a photograph and name or address of an officer who is working undercover.
- Disclosing the address of a fellow officer.
- **Otherwise disclosing where another officer can be located off-duty.**

#### **1029.4 PROHIBITED SPEECH, EXPRESSION AND CONDUCT**

To meet the department's safety, performance and public-trust needs, the following are prohibited unless the speech is otherwise protected (for example, an employee speaking as a private citizen, including acting as an authorized member of a recognized bargaining unit or officer associations, on a matter of public concern). **These prohibitions pertain whether the device is department-issued or personal and whether the member is on or off duty:**

- a. Speech or expression **related to** an official duty that tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees.
- b. Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Berkeley Police Department and tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees. Examples may include:
  1. Statements that indicate disregard for **Berkeley policies**, the law or the state or U.S. Constitution.
  2. Expression that demonstrates support for criminal activity.
  3. Participating in sexually explicit photographs or videos for compensation or distribution.
  4. **Expressions or speech that may reasonably be interpreted as exhibiting animus toward any racial group, gender identity, nationality, religion, disability, or housing status.**
- c. Speech or expression that could reasonably be foreseen as having a negative impact on the credibility of the employee as a witness. For example, posting statements or expressions to a website that glorify or endorse dishonesty, unlawful discrimination or illegal behavior.
- d. Speech or expression of any form that could reasonably be foreseen as having a negative impact on the safety of the employees of the Department. For example,

a statement on a blog that provides specific details as to how and when prisoner transportations are made could reasonably be foreseen as potentially jeopardizing employees by informing criminals of details that could facilitate an escape or attempted escape.

- e. Speech or expression that is contrary to the canons of the Law Enforcement Code of Ethics as adopted by the Berkeley Police Department.
- f. Use or disclosure, through whatever means, of any information, photograph, video or other recording obtained or accessible as a result of employment with the Department for financial or personal gain, or any disclosure of such materials without the express authorization of the Chief of Police or the authorized designee.
- g. Posting, transmitting or disseminating any photographs, video or audio recordings, likenesses or images of department logos, emblems, uniforms, badges, patches, marked vehicles, equipment or other material that specifically identifies the Berkeley Police Department on any personal or social networking or other website or web page, without the express authorization of the Chief of Police.
- h. Accessing websites for non-authorized purposes, or use of any personal communication device, game device or media device, whether personally or department-owned, for personal purposes while on-duty, except in the following circumstances:
  - 1. When brief personal communication may be warranted by the circumstances (e.g., to inform family of extended hours).
  - 2. During authorized breaks, in which case such usage should be limited as much as practicable to areas out of sight and sound of the public and shall not be disruptive to the work environment.

Employees should take reasonable and prompt action to remove any content, including content posted by others, that is in violation of this policy from any web page or website maintained by the employee (e.g., social or personal website).

#### **1029.4.1 UNAUTHORIZED ENDORSEMENTS AND ADVERTISEMENTS**

While employees are not restricted from engaging in the following activities as private citizens or as authorized members of a recognized bargaining unit or officer associations, employees may not represent the Berkeley Police Department or identify themselves in any way that could be reasonably perceived as representing the Berkeley Police Department in order to do any of the following, unless specifically authorized by the Chief of Police (Government Code § 3206; Government Code § 3302):

- a. Endorse, support, oppose or contradict any political campaign or initiative.
- b. Endorse, support, oppose or contradict any social issue, cause or religion.
- c. Endorse, support or oppose any product, service, company or other commercial entity.

- d. Appear in any commercial, social or nonprofit publication or any motion picture, film, video, public broadcast or on any website.

Additionally, when it can reasonably be construed that an employee, acting in his/her individual capacity or through an outside group or organization (e.g., bargaining group or officer associations), is affiliated with this department, the employee shall give a specific disclaiming statement that any such speech or expression is not representative of the Berkeley Police Department.

Employees retain their right to vote as they choose, to support candidates of their choice and to express their opinions as private citizens, including as authorized members of a recognized bargaining unit or officer associations, on political subjects and candidates at all times while off duty.

However, employees may not use their official authority or influence to interfere with or affect the result of an election or a nomination for office. Employees are also prohibited from directly or indirectly using their official authority to coerce, command or advise another employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes (5 USC § 1502).

#### **1029.5 PRIVACY EXPECTATION**

Employees forfeit any expectation of privacy with regard to e-mails, texts or anything published or maintained through file-sharing software or any Internet site (e.g., Facebook, MySpace) that is accessed, transmitted, received or reviewed on any department technology system.

The Department reserves the right to access, audit and disclose for whatever reason any message, including attachments, and any information accessed, transmitted, received or reviewed over any technology that is issued or maintained by the Department. This includes the department e-mail system, computer network or any information placed into storage on any department system or device.

It also includes records of all key strokes or web-browsing history made at any department computer or over any department network.

The fact that access to a database, service or website requires a user name or password will not create an expectation of privacy if it is accessed through a department computer or network. However, the Department may not require an employee to disclose a personal user name or password or open a personal social website, except when access is reasonably believed to be relevant to the investigation of allegations of work related misconduct (Labor Code § 980).

## **1029.6 CONSIDERATIONS**

In determining whether to grant authorization of any speech or conduct that is prohibited under this policy, the factors that the Chief of Police or authorized designee should consider include:

- a. Whether the speech or conduct would negatively affect the efficiency of delivering public services.
- b. Whether the speech or conduct would be contrary to the good order of the Department or the efficiency or morale of its members.
- c. Whether the speech or conduct would reflect unfavorably upon the Department.
- d. Whether the speech or conduct would negatively affect the member's appearance of impartiality in the performance of his/her duties.
- e. Whether similar speech or conduct has been previously authorized.
- f. Whether the speech or conduct may be protected and outweighs any interest of the Department.

## **1029.7 TRAINING**

Subject to available resources, the Department should provide training regarding employee speech and the use of social networking to all members of the Department.

## **ATTACHMENT 4. EARLY WARNING SYSTEM: POLICY 1041 (recommended changes in red)**

### **1041.1 PURPOSE**

The purpose of this Order is to establish policy and procedures for an informal performance review and intervention program, the “Early Warning System” (EWS). The program monitors employee performance that may be inconsistent with professional police conduct and cooperatively engages employees to resolve areas of concern. The goal of EWS is early identification of employee performance issues and correction of these issues through constructive counseling sessions rather than the formal disciplinary process.

### **1041.2 POLICY**

All employees shall participate in the EWS program and comply with the guidelines set forth in this Order.

Participation in the EWS program shall not be deemed punitive, nor **is it** a formal disciplinary process.

- a. Notwithstanding the initiation of the EWS process, the Department retains its right and responsibilities with regard to investigation of policy violation and enforcement of employee discipline.

### **1041.3 PROCEDURES**

Employee behavior or performance that is subject to EWS review includes, but is not limited to:

- a. **Racial, housing status, or other demographic disparities on stop, arrest, and/or search data that are higher than the department average;**
- b. Poor attendance and/or abusive use of leave;
- c. Multiple formal sustained or not sustained complaints;
- d. Multiple informal complaint inquiries;
- e. Multiple use of force incidents;
- f. Multiple obstructing/resisting arrest incidents;
- g. Multiple vehicle collisions; and,
- h. Substandard conduct/performance concerns observed by a superior officer.

The Racial and Identify Protection Act (RIPA) data will be available to supervisors in the form of an electronic data dashboard. This will provide supervisors and commanders with

the ability to review stop data created by officers assigned under their span of control. The individual stop data for individual officers should be considered a personnel record as it may provide supervisory guidance for specific officer stop data, if necessary. The public release of any RIPA data will remain anonymized as previously agreed upon Meet and Confer with the Berkeley Police Association and provisions of Government Code 3300 et.al.

Supervisors, commanders and managers shall monitor the activity of their subordinate employees to identify actual or perceived unprofessional behavior and/or substandard performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police via the Chain of Command.

Personnel assigned to the Internal Affairs Bureau (IAB) shall monitor all formal and informal allegations of employee misconduct received by their office for behavior or performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police.

Personnel assigned to the Support Services Division Report Review Detail shall forward to the Chief of Police copies of all reports pertaining to:

- a. Obstruction/resisting arrests cases (i.e., Penal Code §§148, 69, etc.)

Administrative reports regarding use of force shall be forwarded to the Chief of Police as directed in Policy 300.

Quarterly audits will be conducted of employees whose behavior or performance includes any of the factors included in (a) through (h) above.

#### **1041.4 MANAGEMENT OF PROGRAM RECORDS**

The Office of the Chief of Police shall be responsible for aggregation and administrative management of information, data and records associated with the EWS program.

- a. The administrative assistant assigned to the Office of the Chief of Police shall be responsible for preparing a quarterly report summarizing information and activities associated with the EWS program for use in administrative review.

Information, data and records associated with the EWS program are used for personnel purposes. Accordingly, they are confidential personnel files and not public records.

Documents, data and records shall be maintained by the Office of the Chief of Police for a period of two (2) years.

Access to EWS records shall be restricted to the supervisor, commander and/or manager involved in the monitoring of a particular employee, subject to the approval of the Chief of Police.

- a. An individual employee may be granted access to EWS records that pertain to him/her.

#### **1041.5 ADMINISTRATIVE REVIEW BOARD**

The Chief of Police will convene a quarterly Review Board comprised of all Division Commanders to review program records to determine if initiation of the EWS Program is recommended.

Upon consideration of the Review Board's recommendation, the Chief of Police may direct an employee to participate in the EWS program.

#### **1041.6 INITIATION OF EWS PROGRAM**

Upon the direction of the Chief of Police, an informal counseling meeting will be held that may include:

- a. The subject employee;
- b. The employee's supervisor;
- c. An Internal Affairs Bureau sergeant;
- d. The employee's Lieutenant; and,
- e. The employee's Division Commander, who shall preside over the meeting.

Unless impractical, the counseling meeting shall be held during the employee's regularly scheduled working hours.

- a. If the meeting cannot be scheduled during the employee's regularly scheduled working hours, personnel participating while off-duty shall be compensated with compensatory time (minimum time as may be authorized by the employee's MOU) or, with Division Commander approval, allowed to flex an equal amount of time within that same work week.

The subject employee may have one fellow employee accompany him/her to the counseling meeting.

- a. The accompanying employee's presence is allowed to offer general support to the subject employee, not to be an active participant in the counseling meeting.

As in general supervisor counseling meetings, the employee shall be informed of the behavioral and/or performance concern(s) at issue, and he/she shall be allowed an opportunity to offer a response.

The subject employee may be given information regarding the City of Berkeley Employee Assistance Program.

No formal document will be generated referencing this meeting, and the meeting shall not be deemed a punitive or disciplinary proceeding against the employee. There shall be no permanent record of the meeting.

## **ATTACHMENT 5. STANDARDS OF CONDUCT: Policy 321 (with recommended changes in red)**

### **321.1 PURPOSE AND SCOPE**

This policy establishes standards of conduct that are consistent with the values and mission of the Berkeley Police Department and are expected of all department members. The standards contained in this policy are not intended to be an exhaustive list of requirements and prohibitions but they do identify many of the important matters concerning conduct. In addition to the provisions of this policy, members are subject to all other provisions contained in this manual, as well as any additional guidance on conduct that may be disseminated by this department or a member's supervisors.

### **321.2 POLICY**

The continued employment or appointment of every member of the Berkeley Police Department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure to meet the guidelines set forth in this policy, whether on- or off-duty, may be cause for disciplinary action.

### **321.3 DIRECTIVES AND ORDERS**

Members shall comply with lawful directives and orders from any department supervisor or person in a position of authority, absent a reasonable and bona fide justification.

#### **321.3.1 UNLAWFUL OR CONFLICTING ORDERS**

Supervisors shall not knowingly issue orders or directives that, if carried out, would result in a violation of any law or department policy. Supervisors should not issue orders that conflict with any previous order without making reasonable clarification that the new order is intended to countermand the earlier order.

No member is required to obey any order that appears to be in direct conflict with any federal law, state law, local ordinance, or policy. Following a known unlawful order is not a defense and does not relieve the member from criminal or civil prosecution or administrative discipline. If the legality of an order is in doubt, the affected member shall ask the issuing supervisor to clarify the order or shall confer with a higher authority. The responsibility for refusal to obey rests with the member, who shall subsequently be required to justify the refusal.

Unless it would jeopardize the safety of any individual, members who are presented with a lawful order that is in conflict with a previous lawful order, department policy or other directive shall respectfully inform the issuing supervisor of the conflict. The issuing supervisor is responsible for either resolving the conflict or clarifying that the lawful order is intended to countermand the previous lawful order or directive, in which case the member is obliged to comply. Members who are compelled to follow a conflicting lawful order after having given the issuing supervisor the opportunity to correct the conflict, will not be held accountable for disobedience of the lawful order or directive that was initially issued.

The person countermanding the original order shall notify, in writing, the person issuing the original order, indicating the action taken and the reason.

### **321.3.2 SUPERVISOR RESPONSIBILITIES**

Supervisors and managers are required to follow all policies and procedures and may be subject to discipline for:

- a. Failure to be reasonably aware of the performance of their subordinates or to provide appropriate guidance and control.
- b. Failure to promptly and fully report any known misconduct of a member to his/her immediate supervisor or to document such misconduct appropriately or as required by policy.
- c. Directing a subordinate to violate a policy or directive, acquiesce to such a violation, or are indifferent to any such violation by a subordinate.
- d. The unequal or disparate exercise of authority on the part of a supervisor toward any member for malicious or other improper purpose.

### **321.4 GENERAL STANDARDS**

Members shall conduct themselves, whether on- or off-duty, in accordance with the United States and California Constitutions and all applicable laws, ordinances, policies, and rules enacted or established pursuant to legal authority.

Members shall familiarize themselves with policies and procedures and are responsible for compliance with each. Members should seek clarification and guidance from supervisors in the event of any perceived ambiguity or uncertainty.

Employees shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentive and respectful and shall exercise patience and discretion in the performance of their duties.

Discipline may be initiated for any good cause. It is not mandatory that a specific policy or rule violation be cited to sustain discipline. This policy is not intended to cover every possible type of misconduct.

### **321.5 CAUSES FOR DISCIPLINE**

The following are illustrative of causes for disciplinary action. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for violation of other rules, standards, ethics and specific action or inaction that is detrimental to efficient department service.

#### **321.5.1 LAWS, RULES AND ORDERS**

- a. Violation of, or ordering or instructing a subordinate to violate any policy, procedure, rule, order, directive, requirement or failure to follow instructions contained in department or City manuals.
- b. Disobedience of any legal directive or order issued by any department member of a higher rank.
- c. Violation of federal, state, local or administrative laws, rules, **policies**, or regulations.

#### **321.5.2 ETHICS**

- a. Using or disclosing one's status as a member of the Berkeley Police Department, **whether on duty or off-duty**, in any way that could reasonably be perceived as an attempt to gain influence or authority for non-department business or activity.
- b. The wrongful or unlawful exercise of authority on the part of any member for malicious purpose, personal gain, willful deceit or any other improper purpose.
- c. The receipt or acceptance of a reward, fee or gift from any person for service incident to the performance of the member's duties (lawful subpoena fees and authorized work permits excepted).
- d. Acceptance of fees, gifts or money contrary to the rules of this department and/or laws of the state.
- e. Offer or acceptance of a bribe or gratuity.
- f. Misappropriation or misuse of public funds, property, personnel or services.

#### **321.5.3 DISCRIMINATION, OPPRESSION, OR FAVORITISM**

Discriminating against, oppressing, or providing favoritism to any person because of actual or perceived characteristics such as race, ethnicity, national origin, religion, sex,

sexual orientation, gender identity or expression, age, disability, economic status, cultural group, veteran status, marital status, housing status, and any other classification or status protected by law, or intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power, or immunity, is unlawful.

#### **321.5.4 RELATIONSHIPS**

- a. Unwelcome solicitation of a personal or sexual relationship while on-duty or through the use of one's official capacity, **whether on duty of off-duty**.
- b. Engaging in on-duty sexual activity including, but not limited to, sexual intercourse, excessive displays of public affection or other sexual contact.
- c. Establishing or maintaining an inappropriate personal or financial relationship, as a result of an investigation, with a known victim, witness, suspect or defendant while a case is being investigated or prosecuted, or as a direct result of any official contact.
- d. Associating with or joining a criminal gang, organized crime and/or criminal syndicate when the member knows or reasonably should know of the criminal nature of the organization. This includes any organization involved in a definable criminal activity or enterprise, except as specifically directed and authorized by this department.
- e. Associating on a personal, rather than official basis with persons who demonstrate recurring involvement in serious violations of state or federal laws after the member knows, or reasonably should know of such criminal activities, except as specifically directed and authorized by this department.
- f. Participation in a law enforcement gang as defined by Penal Code § 13670. Participation is grounds for termination (Penal Code § 13670).

#### **321.5.5 ATTENDANCE**

- a. Leaving the job to which the member is assigned during duty hours without reasonable excuse and proper permission and approval.
- b. Unexcused or unauthorized absence or tardiness.
- c. Excessive absenteeism or abuse of leave privileges.
- d. Failure to report to work or to place of assignment at time specified and fully prepared to perform duties without reasonable excuse.
- e. Failure to sign in/out for duty on the timesheet, unless specifically authorized by a supervisor.

### **321.5.6 UNAUTHORIZED ACCESS, DISCLOSURE OR USE**

- a. Unauthorized and inappropriate intentional release of confidential or protected information, materials, data, forms or reports obtained as a result of the member's position with this department.
  - 1. Members of this department shall not disclose the name, address or image of any victim of human trafficking except as authorized by law (Penal Code § 293). (b)
- b. Disclosing to any unauthorized person any active investigation information.
- c. The use of any information, photograph, video or other recording obtained or accessed as a result of employment or appointment to this department for personal or financial gain or without the express authorization of the Chief of Police or the authorized designee.
- d. Loaning, selling, allowing unauthorized use, giving away or appropriating any Berkeley Police Department badge, uniform, identification card or department property for personal use, personal gain or any other improper or unauthorized use or purpose.
- e. Using department resources in association with any portion of an independent civil action. These resources include, but are not limited to, personnel, vehicles, equipment and non-subpoenaed records.

### **321.5.7 EFFICIENCY**

- a. Neglect of duty.
- b. Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or the instructions of supervisors without a reasonable and bona fide excuse.
- c. Concealing, attempting to conceal, removing or destroying defective or incompetent work.
- d. Unauthorized sleeping during on-duty time or assignments.
- e. Failure to notify the Department within 72 hours of any change in name, residence address or contact telephone number(s).

### **321.5.8 PERFORMANCE**

- a. Failure to disclose or misrepresenting material facts, or making any false or misleading statement on any application, examination form, or other official document, report or form, or during the course of any work-related investigation.
- b. The falsification of any work-related records, making misleading entries or statements with the intent to deceive or the willful and unauthorized removal,

alteration, destruction and/or mutilation of any department record, public record, book, paper or document.

- c. Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.
- d. Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority or official standing of this department or its members.
- e. Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this department or subverts the good order, efficiency and discipline of this department or that would tend to discredit any of its members.
- f. Unlawful gambling or unlawful betting at any time or any place. Legal gambling or betting under any of the following conditions:
  - 1. While on department premises.
  - 2. At any work site, while
  - 3. on-duty or while in uniform, or while using any department equipment or system.
  - 4. Gambling activity undertaken as part of an officer official duties and with the express knowledge and permission of a direct supervisor is exempt from this prohibition.
- g. Entering any place of amusement while on duty, except when necessary in the performance of duty or periodic inspection.
- h. Improper political activity including:
  - 1. Unauthorized attendance while on-duty at official legislative or political sessions.
  - 2. Solicitations, speeches or distribution of campaign literature for or against any political candidate or position while on-duty or, on department property except as expressly authorized by City policy, the memorandum of understanding, or the Chief of Police.
- i. Engaging in political activities during assigned working hours except as expressly authorized by City policy, the memorandum of understanding, or the Chief of Police.
- j. Joining or participating in any employee organization except an employee organization which is composed solely of peace officers which concerns itself solely and exclusively with the wages, hours, working conditions, welfare and advancement of academic and vocational training in furtherance of the police profession and which is not subordinate to any other organization.

- k. Failure to secure the permission of a Commanding Officer before placing any material on a Departmental bulletin board.
- l. Using departmental business cards for anything other than official business.
- m. Any act on- or off-duty that brings discredit to this department.

### **321.5.9 CONDUCT**

- a. Failure of any member to promptly and fully report activities on his/her part or the part of any other member where such activities resulted in contact with any other law enforcement agency that may result in criminal prosecution or discipline under this policy.
- b. **Failure of any member to report conduct or expressions of any other member that are in violation of Department policy, state law, or the Constitution.**
- c. Unreasonable and unwarranted force to a person encountered or a person under arrest.
- d. Exceeding lawful peace officer powers by unreasonable, unlawful or excessive conduct.
- e. Unauthorized or unlawful fighting, threatening or attempting to inflict unlawful bodily harm on another.
- f. Engaging in horseplay that reasonably could result in injury or property damage.
- g. **Engaging in** discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this department or the City.
- h. Use of obscene, indecent, profane or derogatory language while on-duty or in uniform, **or while off-duty in a way that brings discredit on the Department.**
- i. **Engaging in** criminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.
- j. Unauthorized possession of, loss of, or damage to department property or the property of others, or endangering it through carelessness or maliciousness.
- k. Attempted or actual theft of department property; misappropriation or misuse of public funds, property, personnel or the services or property of others; unauthorized removal or possession of department property or the property of another person.
- l. Activity that is incompatible with a member's conditions of employment or appointment as established by law or that violates a provision of any memorandum of understanding or contract to include fraud in securing the appointment or hire.
- m. Initiating any civil action for recovery of any damages or injuries incurred in the course and scope of employment or appointment without first notifying the Chief of Police of such action.

- n. Incurring unauthorized expense - Employees shall not knowingly and intentionally incur any unauthorized Departmental expense or liability without approval of a superior officer or supervisor when necessary under emergency conditions.
- o. Failure to provide information to citizens - Employees shall comply whenever possible with requests by citizens for public information. If necessary, they shall direct such persons to the nearest location where information may be obtained.
- p. Failure to Identify - Employees on official business shall identify themselves as Berkeley Police employees or officers. When requested, employees shall promptly state their name, rank and badge number, except when disclosure of identity could compromise safety and/or an investigation (i.e., riot situations, undercover operations, etc.).
- q. Failure to maintain communication, when on duty or officially on call - Employees who are on duty or officially on call shall be directly available by normal communication or shall keep their office, supervisor, or commanding officer informed of the means by which they may be reached when not immediately available.
- r. Any other on-- or off--duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

### **321.5.10 SAFETY**

- a. Failure to observe or violating department safety standards or safe working practices.
- b. Failure to maintain current licenses or certifications required for the assignment or position (e.g., driver license, first aid).
- c. Failure to maintain good physical condition sufficient to adequately and safely perform law enforcement duties.
- d. Unsafe firearm or other dangerous weapon handling to include loading or unloading firearms in an unsafe manner, either on- or off- duty.
- e. Carrying, while on the premises of the work place, any firearm or other lethal weapon that is not authorized by the member's appointing authority.
- f. Unsafe or improper driving habits or actions in the course of employment or appointment.
- g. Any personal action contributing to a preventable traffic collision in the course of employment or appointment.
- h. Concealing or knowingly failing to report any on-the-job or work-related accident or injury as soon as practicable but within 24 hours.

### **321.5.11 INTOXICANTS**

- a. Reporting for work:
  - 1. Reporting for work or being at work while intoxicated or when the member's ability to perform assigned duties is impaired due to the use of alcohol, medication or drugs, whether legal, prescribed or illegal.
- b. Possession:
  - 1. Possession or use of alcohol at any work site or while on-duty, except as authorized in the performance of an official assignment. A member who is authorized to consume alcohol is not permitted to do so to such a degree that it may impair on-duty performance.
  - 2. Unauthorized possession, use of, or attempting to bring a controlled substance, illegal drug or non-prescribed medication to any work site.
- c. Intoxicants on-duty:
  - 1. Use of Intoxicants. Except as necessary in the performance of an official assignment, having the odor of an alcoholic beverage on the person, clothing, or breath, being under the influence of alcohol or other intoxicants, or the consumption of alcohol or other intoxicants while on duty is strictly prohibited.
  - 2. A Command Officer must give prior approval for any use of alcohol in the performance of an official assignment.
- d. Prescription medication:
  - 1. Employees may use prescription medications, except medical marijuana, while on duty pursuant to the specific instructions of a physician who has advised the employee that the prescribed medication in the amount actually ingested does not adversely affect the employee's ability to safely perform their duties, including tasks that require physical coordination, mental alertness and sound judgment, such as, operating office equipment and driving a vehicle, or, in the case of sworn officers, making detentions/arrests and handling weapons.
- e. Use of marijuana:
  - 1. Possession of marijuana, including medical marijuana, or being under the influence of marijuana on or off-duty is prohibited and may lead to disciplinary action.
- f. Intoxicants in uniform:
  - 1. No employee off duty and in uniform, or in any part of uniform dress, shall:
    - i. Consume any alcoholic beverage or other intoxicant in public view or in any place accessible to the public;
    - ii. Be in public with the odor of an alcoholic beverage on the person, clothing, or breath; or
    - iii. Be under the influence of alcohol or other intoxicants.

g. Intoxicants off-duty:

1. No off-duty employee shall consume any alcoholic beverage or other intoxicant to an extent which renders one unfit to report for one's next regular tour of duty (including having the odor of an alcoholic beverage on the person), which results in the of violation of any law, or which results in the commission of an obnoxious or offensive act which might tend to discredit the Department.

## **ATTACHMENT 6. Overtime Compensation Requests: Policy 1019**

**The PAB does not recommend specific changes here; however, the policy should stipulate the circumstances, or types of circumstances, that would necessitate bypassing the otherwise straightforward directive in Section 1019.1.1 of this policy that “all requests to work overtime should be approved in advance.” Additionally, excessive overtime should be included as a factor that triggers an early system audit.**

### **1019.1 PURPOSE AND SCOPE**

It is the policy of the Department to compensate non-exempt salaried employees who work authorized overtime either by payment of wages as agreed and in effect through the Memorandum of Understanding (MOU), or by the allowance of accrual of compensatory time off. In order to qualify for either, the employee must complete and submit an Extraordinary Duty Report as soon as practical after overtime is worked.

#### **1019.1.1 DEPARTMENT POLICY**

Because of the nature of police work, and the specific needs of the Department, a degree of flexibility concerning overtime policies must be maintained.

Non-exempt employees are not authorized to volunteer work time to the Department. All requests to work overtime shall be approved in advance by a supervisor. If circumstances do not permit prior approval, then approval shall be sought as soon as practical during the overtime shift and in no case later than the end of shift in which the overtime is worked.

Short periods of work at the end of the normal duty day (e.g., less than one hour in duration) may be handled unofficially between the supervisor and the employee by flexing a subsequent shift schedule to compensate for the time worked rather than by submitting requests for overtime payments. If the supervisor authorizes or directs the employee to complete a form for such a period, the employee shall comply.

The individual employee may request compensatory time (aka "comp time") in lieu of receiving overtime payment.

### **1019.2 TYPES OF OVERTIME AND COMPENSATION**

Time spent in a pay status but not actually worked (e.g., sick leave, vacation leave, comp time, holiday leave, etc.) shall be considered "time worked" in computing the basic forty-hour week. However, employees shall be eligible to work in an overtime capacity while

actually on such absence, but only in accordance with the provisions of the current MOU between the City of Berkeley and the employee's working group.

When a City recognized holiday falls within the workweek, the employee's basic workweek is reduced by eight hours for each holiday.

If an employee commences or terminates employment with the City within the workweek or is on suspension or leave of absence without pay during the workweek, the employee is not eligible for overtime benefits until hours worked exceed forty hours during that week.

With the exception of court overtime situations, an employee's name and overtime worked shall be reflected on a time sheet.

Unless specifically stated otherwise, all overtime is awarded at time and a half.

- a. Non-sworn personnel receive double time after 12 hours in any 24-hour period.
- b. Sworn personnel receive holiday overtime at the straight time rate;
- c. Non-sworn personnel receive double time for Christmas and Thanksgiving.
- d. An explosives technician shall receive double time for time spent (from call to completion) in dealing with explosives, whether on or off duty.
- e. Special Response Team members shall receive an additional 5% pay when involved in an active SRT incident, either on or off duty.
- f. Field Training Officers shall receive an additional 10% differential when actually working as a Field Training Officer.
- g. The Field Training Program Sergeant shall receive a 5% salary differential while occupying that position.
- h. The Homicide Sergeant shall receive a 4% salary differential. Homicide detectives shall receive a 3% salary differential.

Those holding the classification of Captain are excluded from overtime benefits.

### **1019.3 REQUEST FOR OVERTIME COMPENSATION**

#### **1019.3.1 EMPLOYEES RESPONSIBILITY**

Employees shall complete the Extraordinary Duty Reports immediately after working the overtime and turn them in to their immediate supervisor or the Watch Commander. Employees submitting Extraordinary Duty Reports for on-call pay when off duty shall submit the forms to their supervisor the first day after returning for work.

#### **1019.3.2 SUPERVISORS RESPONSIBILITY**

The supervisor who verifies the overtime earned shall verify that the overtime was worked before approving the request.

After approval, the Extraordinary Duty Report shall be forwarded to the employee's Division Captain for final approval.

### **1019.3.3 DIVISION CAPTAIN RESPONSIBILITY**

The Division Captain, after approving payment, shall then forward the report to the Payroll Clerk for review.

### **1019.4 ACCOUNTING FOR OVERTIME WORKED**

Employees are to record the actual time worked in an overtime status. In some cases, the Memorandum of Understanding provides that a minimum number of hours will be paid, (e.g., four hours for Court). The supervisor will enter the actual time worked.

#### **1019.4.1 ACCOUNTING FOR PORTIONS OF AN HOUR**

When accounting for less than a full hour, time worked shall be rounded up to the nearest quarter of an hour as indicated by the following chart:

<u>TIME WORKED</u>	<u>INDICATE ON CARD</u>
1 to 15 minutes	.25
16 to 30 minutes	.50
31 to 45 minutes	.75
46 to 60 minutes	1 hour

#### **1019.4.2 VARIATION IN TIME REPORTED**

Where two or more employees are assigned to the same activity, case, or court trial and the amount of time for which payment is requested varies from that reported by the other officer, the Watch Commander or other approving supervisor may require each employee to include the reason for the variation on the Extraordinary Duty Report.

### **1019.5 RECOVERY / COMPENSATORY OVERTIME (COMP TIME)**

Recovery / Compensatory overtime (comp time) is overtime credited with time rather than pay.

To obtain comp time credit the employee shall promptly submit a completed Extraordinary Duty Report for approval by both the employee's supervisor and commanding officer.

It is City and Police Department policy that employees not be permitted to accumulate excessive comp time.

- a. Sworn employees are allowed to accrue up to 120 hours of comp time.
- b. Non-sworn employees are allowed to accrue up to 90 hours of comp time.

Employees may be allowed comp time off only when that amount of time has been previously accumulated.

An employee who wishes to use accumulated comp time shall make such request on an Absence Report submitted to his/her supervisor, who shall determine if the absence would hinder the unit's operation and either approve or deny the request. Within the Operations Division, the final decision rests with the Patrol Staffing Lieutenant.

#### **1019.6 OVERTIME / SHIFT EXTENSION**

Overtime shall be defined as time worked by an employee in excess of 40 hours per week. For paid overtime to be credited, an employee is required to submit an Extraordinary Duty Report immediately following the overtime assignment.

An Extraordinary Duty Report requires approval from the employee's supervisor and commanding officer, both of whom must check the report for accuracy, ensuring that the "reason" and the paid overtime budget designations are properly stated.

- a. Completed Extraordinary Duty Reports must be routed to the Division Captain for final approval.
- b. Completed reports must be routed to the Payroll Clerk no later than 1400 hours on the Monday before the payday in order to be included in that pay period.

#### **1019.7 HOLIDAY OVERTIME**

Holiday overtime is earned in lieu of taking the time off during the same week of a holiday or when an employee works any part of a recognized City of Berkeley holiday or has that day as a regularly scheduled day off.

Holiday overtime is awarded at time for time for sworn employees; for non-sworn employees it is awarded at time and a half, however on Thanksgiving and Christmas it is awarded at double time.

Holiday overtime may be received as either paid overtime or compensatory overtime (if the maximum accrual of compensatory overtime has not been reached).

- a. Sworn employees have the option of either pay or compensatory overtime.

- b. Non-sworn employees require Division Captain approval for compensatory overtime.

In lieu of pay or comp time, an employee may be allowed an alternative day off during the same calendar week as the holiday with supervisor approval.

When a holiday occurs during an employee's vacation leave, the holiday shall not be charged as vacation leave and the employee's leave may be extended accordingly, with supervisor approval.

The choice of comp time or holiday pay shall be computed by the Payroll Clerk from information provided on the timesheets.

### **1019.8 COURT OVERTIME**

Court overtime is defined as that overtime worked in connection with an assigned appearance before any criminal or civil court, Police Review Commission meeting or Board of Inquiry, BPD Board of Review, and any other specially approved appearance on behalf of another City department or commission.

Unless otherwise approved by a Commanding Officer, all court overtime shall be paid.

A sworn employee who makes an off-duty court appearance shall receive a minimum of four hours overtime unless his or her scheduled duty reporting time, regular shift or overtime shift is less than four hours after the scheduled court appearance in which case the employee will receive overtime in the lesser amount.

Non-sworn employees shall receive a minimum of three hours overtime unless their scheduled duty reporting time is less than three hours after the scheduled court appearance in which case the non-sworn employee will receive overtime in the lesser amount.

Overtime spent conferring with the prosecuting attorney will be considered as court overtime and part of the court session only if the employee's presence is required in court shortly after the conference.

For off duty, out of town court appearances, travel constitutes court overtime and is determined by the round-trip time from the Public Safety Building.

An employee required to attend two or more court sessions on the same day is eligible for overtime compensation during the period between the sessions if subpoenaed on his/her day off (limited to a maximum of two hours between each session) but is not eligible for session break compensation if court appearance falls on a regular duty day.

To receive court overtime credit an employee shall submit an Extraordinary Duty Report.

- a. The subpoena should be attached and case number indicated if either or both are available.
- b. The overtime report is to be completed by the employee and should specify the amount of time required for "testifying/conferring" or "time waiting" or indicate that they were "not needed".
- c. The employee's supervisor shall review the report for accuracy and complete the lower boxed area, indicating the court paid overtime budget code, the activity code and the proper project designation.

#### **1019.9 COURT OVERTIME - TELEPHONE STANDBY**

- a. Sworn employees who are placed on telephone standby for court will be given comp time (in accordance with the current MOU between the City of Berkeley and the Berkeley Police Association) as follows:
  1. Duty Day: One-hour minimum comp time and hour for hour thereafter.
  2. Day Off: Two-hour minimum comp time and hour for hour thereafter.
- b. To receive compensatory overtime credit for telephone standby an officer shall submit an Extraordinary Duty Report.
  1. The subpoena should be attached and case number indicated if either or both are available.
  2. The report is to be completed by the officer and shall specify the case number and the name of the Deputy District Attorney placing him/her on telephone standby.

#### **1019.10 TRAINING OVERTIME**

Training overtime is earned when an employee is assigned to attend a class, conference or seminar during off duty hours. Training overtime shall be reported on an Extraordinary Duty Report. To receive credit for the time spent training, a Training Time Credit Record shall be completed and routed to Personnel and Training.

Employees attending schools or classes away from the PSB will normally be credited with an eight-hour day even though the number of hours may vary due to the nature of the instruction, see also the Attendance at Conferences and Meetings Policy.

#### **1019.11 EMERGENCY / EMERGENCY ON-CALL OVERTIME**

An employee shall be paid or given comp time off for being placed on emergency on-call status as follows:

- a. An employee who is placed on emergency on-call status on his or her regularly scheduled work day shall be paid for a minimum of one hour and at a one quarter ( $\frac{1}{4}$ ) time rate.
- b. An employee who is placed on emergency on-call status on his or her regularly scheduled day off shall be paid for a minimum of two hours and at a one quarter ( $\frac{1}{4}$ ) time rate.
- c. Emergency Overtime - An employee is guaranteed at least three hours overtime when called to emergency overtime duty from his or her residence. If the employee's regular reporting time is less distant than the guaranteed overtime the employee will receive overtime in that lesser amount.

## APPENDIX

**Appendix 1. City of Berkeley Contract for services with Swanson & McNamara LLP,  
Vendor Contract #32300109**

**Contract Number:** 32300109

**Contractor Name:** Swanson & McNamara

**Contract Link:**

<https://records.cityofberkeley.info/PublicAccess/api/Document/AU3fuyqXQXXZ%C3%81TG8am4tuCPyplZzCFLJZsbxFqBxmJ3aQZTBcxS%C3%89E7ECp9r6A30gZuhAlmseUFcNLLtKRrEId7g%3D/>

**CONTRACT**

**THIS CONTRACT** is entered into on November 28, 2022, between the CITY OF BERKELEY ("City"), a Charter City organized and existing under the laws of the State of California, and Swanson & McNamara LLP ("Attorneys"), who agree as follows:

**WHEREAS**, the City of Berkeley requires the services for legal advice and consultation with the City Attorney's office concerning issues arising out of text messages allegedly sent by Sgt. Darren Kacalek, including but not limited to whether such messages were sent, who was aware of the messages and what action they took in response, whether there existed an "arrest quota" as described in the purported text messages, if so who was aware of the arrest quota and involved in its implementation, and to recommend to the appropriate authority whether and what discipline should be imposed as a result of our findings, and

**WHEREAS**, Attorneys are willing to be retained by the City in connection with said legal issues; and

**NOW, THEREFORE**, in consideration of the mutual promises contained herein, City and Attorneys agree as follows:

1. **SCOPE OF SERVICES**

Attorneys designated herein will consult and provide legal advice and shall use the best professional skill and ability therein to the end that the most favorable results may be attained on behalf of City. The advice will be provided by Edward Swanson as lead counsel with the assistance of other associates.

2. **PAYMENT**

a. The City agrees to pay the designated attorneys at the following rates:

Edward W. Swanson	\$750.00 per hour
Mary McNamara	\$750.00 per hour
August Gugelmann	\$650.00 per hour
Britt Evangelist	\$600.00 per hour
Audrey Barron	\$575.00 per hour
Carly Bittman	\$550.00 per hour
Paralegal	\$120.00 per hour

b. Attorneys shall furnish monthly statements to the City Attorney of City showing the number of hours devoted to said matter/s and all expenses paid during said period. Said statements shall conform as closely as practicable to the format attached hereto as Exhibit A. City shall pay Attorneys the amounts shown thereon upon approval thereof by the City Attorney of the City as soon as possible after receipt of such statements. Payment for services by non-designated attorneys will be denied, unless approved in advance by the City Attorney or his delegate.

c. The entire fees and expenses pursuant to this Contract shall not exceed the amount of \$50,000 without amendment hereto. Attorneys shall not earn fees for services or incur expenses in excess of the aforesaid amount prior to executing with the City a written amendment to this contract increasing the amount payable hereunder. Attorneys shall notify the City as soon as practicable that a contract amendment increasing the amount payable may be necessary.

3. **TERM**

a. This Contract shall begin on the date it is executed by all parties and continue until Attorneys' services are no longer required by the City.

b. The City may terminate this Contract at any time upon five (5) days written notice to the other party. In the event of such termination, Attorneys will be paid a fee for services performed prior to the time of termination as specified in Paragraph 2 of this Contract, except that in no event will the amount paid exceed the full amount in Paragraph 2, as amended from time to time.

c. A written notice is deemed served when a party sends the notice in an envelope addressed to the other party to this Contract and deposits it with the U.S. Postal Service, registered mail, postage prepaid. For purposes of this Contract, all notices to City shall be addressed as follows:

City Attorney  
City of Berkeley  
2180 Milvia Street, 4<sup>th</sup> Fl.  
Berkeley, CA 94704

For purposes of this Contract, all notices to Attorneys shall be addressed as follows:

Edward W. Swanson  
Swanson & McNamara LLP  
300 Montgomery Street, Suite 1100  
San Francisco, CA 94104

4. **INDEMNIFICATION**

Attorneys, for itself and its heirs, successors and assigns, agree to release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from and against any and all claims, demands, liability, damages, lawsuits or other actions arising out of the negligent acts or willful misconduct in the performance of this Contract by Attorneys or its officers, employees, partners, directors, subcontractors or agents.

5. **CONFORMITY WITH LAW AND SAFETY**

a. Attorneys shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the scope of services, including all provisions of the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health Regulations, and all other applicable federal, state, municipal and local safety regulations. All services performed by Attorneys must be in accordance with these laws, ordinances, codes and regulations. Attorneys shall release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from any and all damages, liability, fines, penalties and consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.

b. If a death, serious personal injury or substantial property damage occurs in connection with the performance of this Contract, Attorneys shall immediately notify the City's Risk Manager by telephone. If any accident occurs in connection with this Contract, Attorneys shall promptly submit a written report to City, in such form as the City may require. This report shall include the following information: 1) name and address of the injured or deceased

person(s); 2) name and address of Attorney's subcontractor, if any; 3) name and address of Attorney's liability insurance carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or materials were involved.

6. **NON-DISCRIMINATION**

Attorneys hereby agree to comply with the provisions of Berkeley Municipal Code ("B.M.C.") Ch. 13.26 as amended from time to time. In the performance of this Contract, Attorneys agree as follows:

a. Attorneys shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. Attorneys shall permit the City access to employment advertisements, blank application forms, EEO-1 forms, affirmative action plans and any other documents, which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision. In addition, Attorneys shall fill-out, in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

7. **INDEPENDENT CONTRACTOR**

For purposes of this Contract and for the duration of this Contract, Attorneys shall be an independent contractor and not an employee of the City. The City shall not have the right to control when, where or how the service is rendered, but shall have the right to specify the results of the service rendered pursuant to this Contract.

8. **CONFLICT OF INTEREST PROHIBITED**

a. In accordance with Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Ch. 3.64, neither Attorneys nor any employee, officer, director, partner or member of Attorneys, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this Contract.

b. In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 *et seq.*, no person who is a director, officer, partner, trustee, employee or consultant of the Attorneys, or immediate family member of any of the preceding, shall make or participate in a decision made by the City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Attorneys.

c. Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 *et seq.*, its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Ch. 3.64.

d. Immediately upon discovering a breach of this paragraph City may terminate this Contract. Additionally, City may deem Attorneys a non-responsible bidder for five (5) years from the date the Contract is terminated.

9. **OPPRESSIVE STATES CONTRACTING PROHIBITION**

Unless a written exemption has been approved by the City Manager, the following provisions will apply for this agreement:

a. In accordance with Resolution No. 59,853-N.S., Attorneys certify that they have no contractual relations with, and agree during the term of this Contract to forego contractual relations to provide personal services to, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. Appendix A to Resolution No. 59,853-N.S. designates the following as Oppressive States for the purposes of this Contract: Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang.

c. Attorneys' failure to comply with this section shall constitute a default of this Contract and City may terminate this Contract pursuant to Section 3. In the event that the City terminates Attorneys due to a default under this provision, City may deem Attorneys a non-responsible bidder for five (5) years from the date this Contract is terminated.

10. **SETOFF AGAINST DEBTS**

Attorneys agree that City may deduct from any payments due to Attorneys under this Contract any monies that Attorneys owe City under any ordinance, contract or resolution for any unpaid taxes, fees, licenses, unpaid checks or other amounts.

11. **NUCLEAR FREE BERKELEY**

Attorneys agree to comply with B.M.C. Ch. 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

12. **GOVERNING LAW**

The laws of the State of California shall govern this Contract.

13. **AMENDMENTS**

The terms and conditions of this Contract shall not be altered or otherwise modified except by a written amendment to this Contract executed by City and Attorneys.

14. **CONSULTANTS TO SUBMIT STATEMENTS OF ECONOMIC INTEREST**

The City's Conflict of Interest Code, Resolution No. 51,425-N.S., as amended, requires every consultant to disclose conflicts of interest by filing a Statement of Economic Interest (Form 730). Attorneys serving as consultants to the City under this Contract agree to file such statements with the City Clerk at the beginning of the contract period and upon termination of the Contract.

15. **CITY BUSINESS LICENSE, PAYMENT OF TAXES, TAX I.D. NUMBER**

Attorneys have obtained a City business license as required by B.M.C. Ch. 9.04, and its license number is written below; or, Attorneys are exempt from the provisions of B.M.C. Ch. 9.04 and have written below the specific B.M.C. section under which it is exempt. Attorneys shall pay all state and federal income taxes and any other taxes due. **Attorneys certify under penalty of perjury that the taxpayer identification number written below is correct.**

Business License No. [application submitted]  
Taxpayer Identification No. 94-3309866

16. **RECYCLED PAPER FOR WRITTEN REPORTS**

If Attorneys are required by this Contract to prepare a written report or study, Attorneys shall use recycled paper for said report or study when such paper is available at a cost of not more than ten percent more than the cost of virgin papers, and when such paper is available at the time it is needed. For the purposes of this Contract, recycled paper is paper that contains at least 50% recycled product. If recycled paper is not available, Attorneys shall use white paper. Written reports or studies prepared under this Contract shall be printed on both sides of the page whenever practical.

17. **INSURANCE**

a. Attorneys shall maintain at all times during the performance of this Contract a professional liability insurance policy in the minimum amount of \$1,000,000 to cover any claims arising out of Attorneys' performance of services under this Contract. Attorneys shall provide an original Certificate of Insurance evidencing the required coverage.

b. If Attorneys employ any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days written notice to the City Attorney; 2) provide for a waiver of any right of subrogation against City to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the Risk Manager.

c. Attorneys shall forward all insurance documents to:

City Attorney  
City of Berkeley  
2180 Milvia St., 4<sup>th</sup> Floor  
Berkeley, CA 94704

18. **BERKELEY LIVING WAGE ORDINANCE**

a. Attorneys hereby agree to comply with the provisions of the Berkeley Living Wage Ordinance, B.M.C. Chapter 13.27. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, as indicated by the Living Wage Certification form, attached hereto, Attorneys will be required to provide all eligible employees with City mandated minimum compensation during the term of this Contract, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein. Attorneys expressly acknowledge that, even if Attorneys are not currently subject to the Living Wage Ordinance, cumulative contracts with City may subject Attorneys to the requirements under B.M.C. Chapter 13.27 in subsequent contracts.

b. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, Attorneys shall be required to maintain monthly records of those employees providing service

under the Contract. These records shall include the total number of hours worked, the number of hours spent providing service under this Contract, the hourly rate paid, and the amount paid by Attorneys for health benefits, if any, for each of its employees providing services under the Contract. Attorneys agree to supply City with any records it deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 20.

c. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, Attorneys shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subcontracts in which Attorneys engages to execute its responsibilities under this Contract. All subcontractor employees who spend 25% or more of their compensated time engaged in work directly related to this Contract shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

d. If Attorneys fail to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Attorneys' failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this Contract pursuant to Section 3. In the event that City terminates Attorneys due to a default under this provision, City may deem Attorneys a non-responsible bidder for not more than five (5) years from the date this Contract is terminated.

In addition, at City's sole discretion, Attorneys may be responsible for liquidated damage in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Attorneys failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Attorneys' breach. City may deduct any assessed liquidated damages from any payments otherwise due Attorneys.

19. **BERKELEY EQUAL BENEFITS ORDINANCE**

a. Attorneys hereby agree to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Attorneys are currently subject to the Berkeley Equal Benefits Ordinance, as indicated by the Equal Benefits Certification form, attached hereto, Attorneys will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this contract, as well as comply with the terms enumerated herein.

b. If Attorneys are currently or becomes subject to the Berkeley Equal Benefits Ordinance, Attorneys agree to provide the City with all records the City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 20.

c. If Attorneys fail to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Attorneys' failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this contract pursuant to Section 3. In the event the City terminates this contract due to a default by Attorneys under this provision, the City may deem Attorneys a non-responsible bidder for not more than five (5) years from the date this

Contract is terminated.

In addition, at City's sole discretion, Attorneys may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Attorneys' failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Attorneys' breach. City may deduct any assessed liquidated damages from any payments otherwise due Attorneys.

20. **SANCTUARY CITY CONTRACTING**

Contractor hereby agrees to comply with the provisions of the Sanctuary City Contracting Ordinance, B.M.C. Chapter 13.105. In accordance with this Chapter, Contractor agrees not to provide the U.S. Immigration and Customs Enforcement Division of the United States Department of Homeland Security with any Data Broker or Extreme Vetting Services as defined herein:

- a. "Data Broker" means either of the following:
  - i. The collection of information, including personal information about consumers, from a wide variety of sources for the purposes of reselling such information to their customers, which include both private-sector business and government agencies;
  - ii. The aggregation of data that was collected for another purpose from that for which it is ultimately used.
- b. "Extreme Vetting" means data mining, threat modeling, predictive risk analysis, or other similar services. Extreme Vetting does not include:
  - i. The City's computer-network health and performance tools;
  - ii. Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer based activity.

21. **AUDIT**

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Attorneys' financial, performance and compliance records maintained in connection with the operations and services performed under this Contract. In the event of such audit, Attorneys agree to provide the City Auditor with reasonable access to Attorneys' employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Attorneys an opportunity to discuss and respond to any findings before a final audit report is filed.

22. **ENTIRE CONTRACT**

a. The terms and conditions of this Contract, all exhibits attached and any documents expressly incorporated by reference represent the entire Contract between the parties with respect to the subject matter of this Contract.

b. This Contract shall supersede any and all prior contracts, oral or written, regarding the subject matter between City and Attorneys. No other contract, statement, or promise relating to the subject matter of this Contract shall be valid or binding except by a written amendment to this Contract.

c. If any conflicts arise between the terms and conditions of this Contract and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this Contract shall control.

**IN WITNESS WHEREOF**, City and Attorneys have executed this Contract as of the date written on the first paragraph of this Contract.

CITY OF BERKELEY

By:   
City Attorney

Registered by:

\_\_\_\_\_  
City Auditor

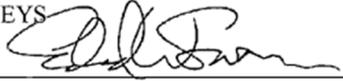
Attest:

  
ASST. City Clerk

Registered on behalf of the City Auditor:

  
Finance Department

ATTORNEYS



---

By Edward W. Swanson  
Swanson & McNamara LLP

Taxpayer Identification No.

Incorporated: Yes (X) No ( )

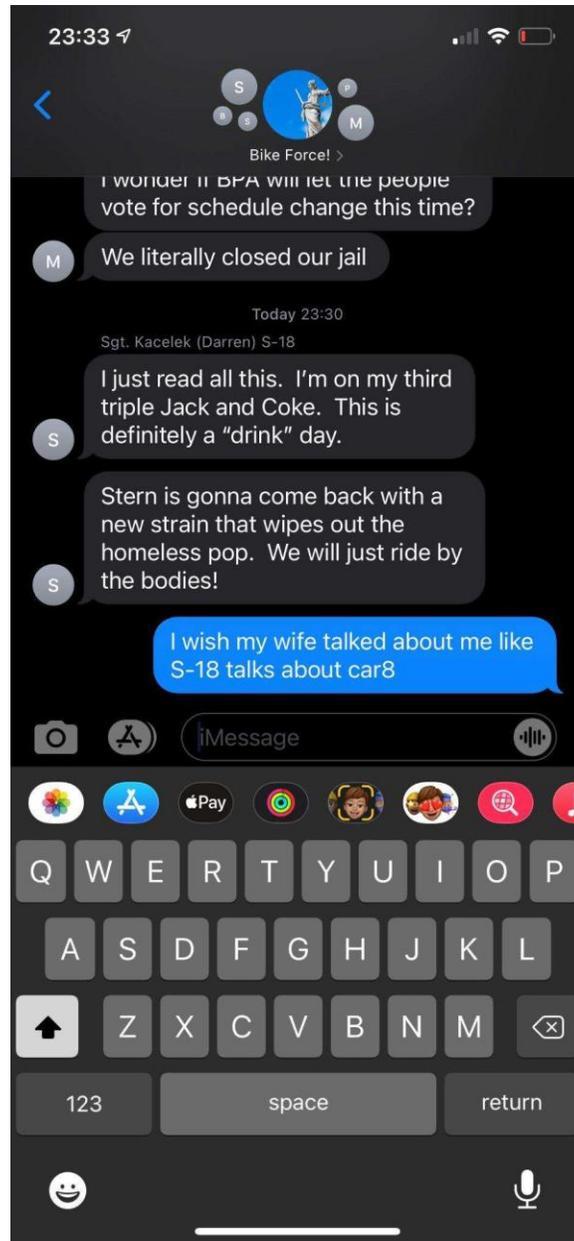
Certified Woman Business Enterprise: Yes ( ) No (X)

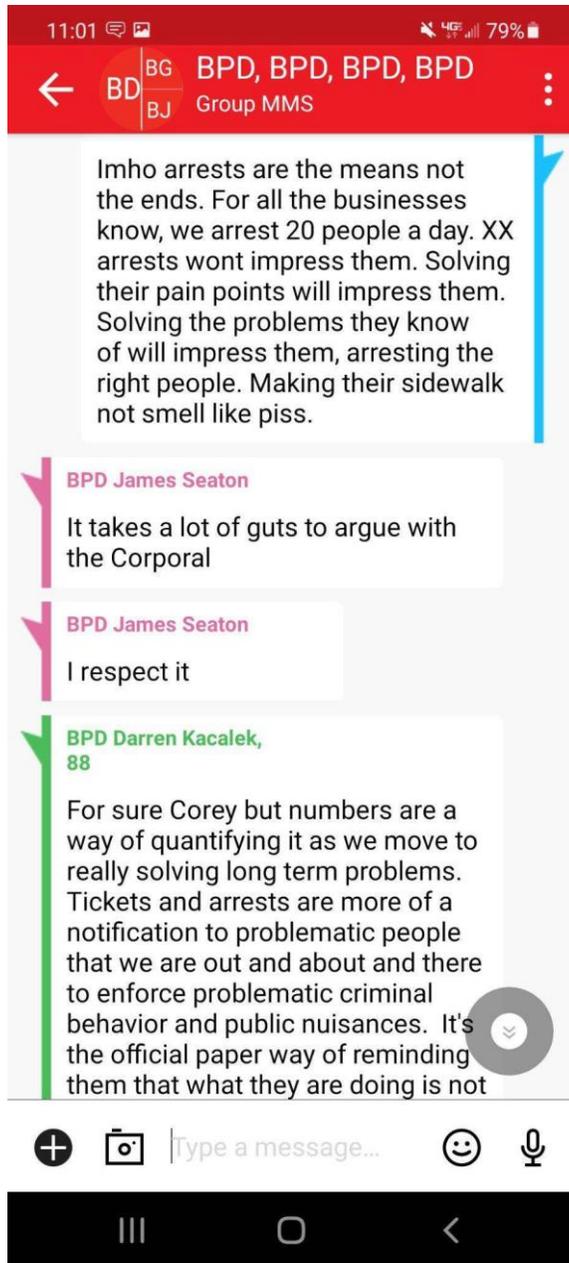
Certified Minority Business Enterprise: Yes ( ) No (X)

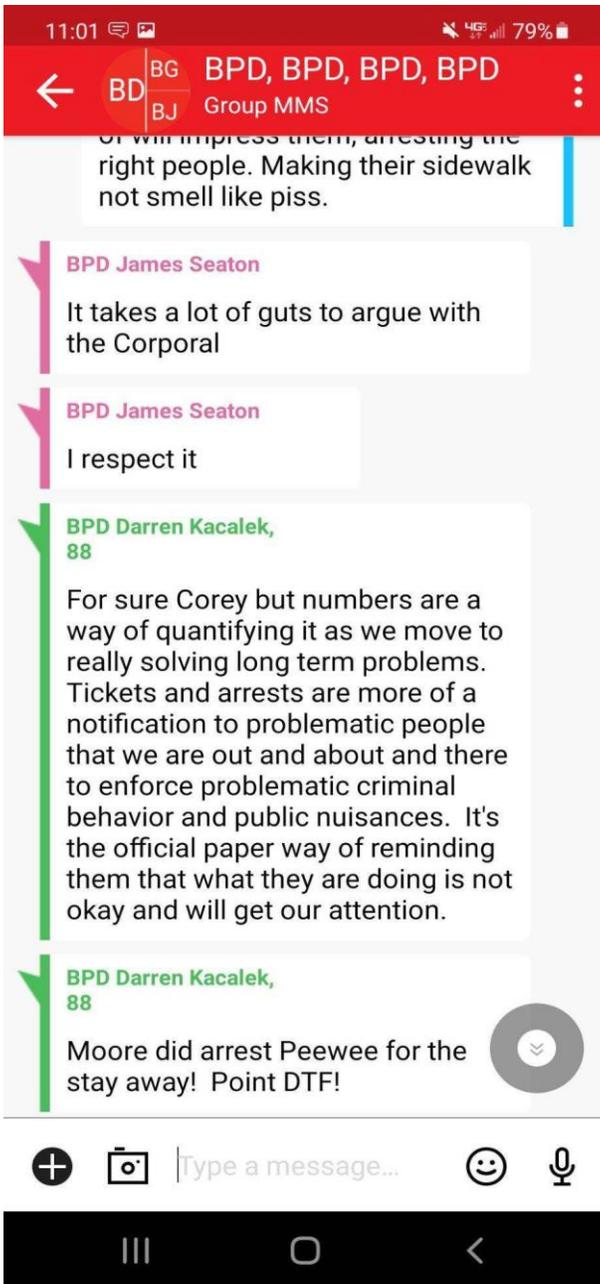
If yes, state ethnicity: \_\_\_\_\_

Certified Disadvantaged Business Enterprise: Yes ( ) No (X)

## Appendix 2. Text Messages Sent by the Downtown Task Force and Bike Unit Members









BD

BPD Darren...  
Mobile



I like that way of thinking. I'm gonna come with a bike force board game. You do shit around the city to go forward. I'll come up with a cool award for the winner. Maybe like a week long challenge. Famous people arrested you get extra points.

11:10

4G 77%



BPD, BPD, BPD, BPD

Group MMS



11/12/19 9:51 PM

**BPD Darren Kacalek, 88**

81 arrests! We can do 19 by Friday for sure!

11/12/19 10:00 PM

**BPD Greg Michalczyk, 9**

Hell yeah

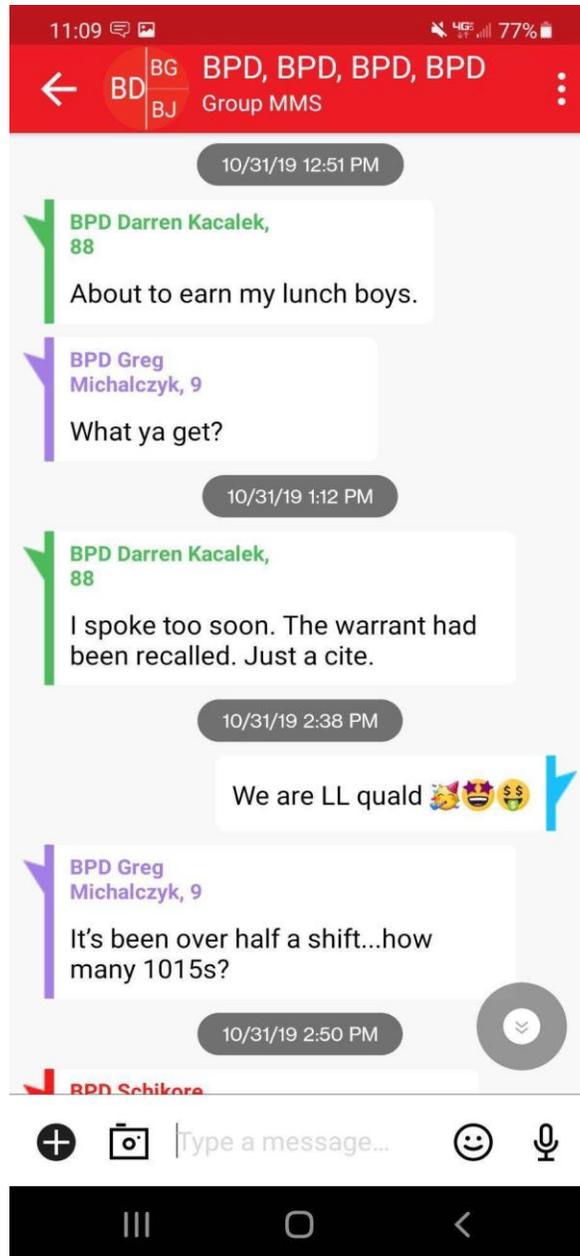
**BPD Greg Michalczyk, 9**

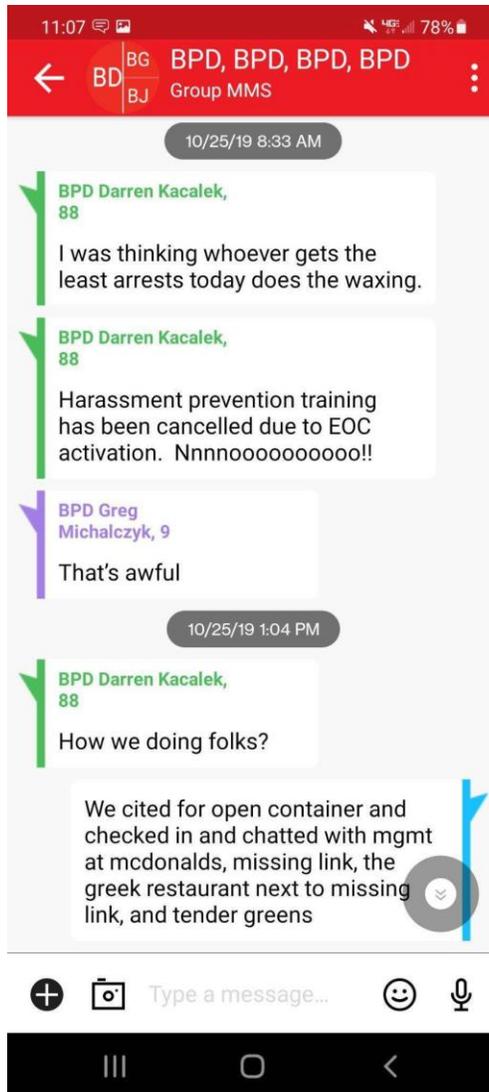
And DQ might have just found shooting car!

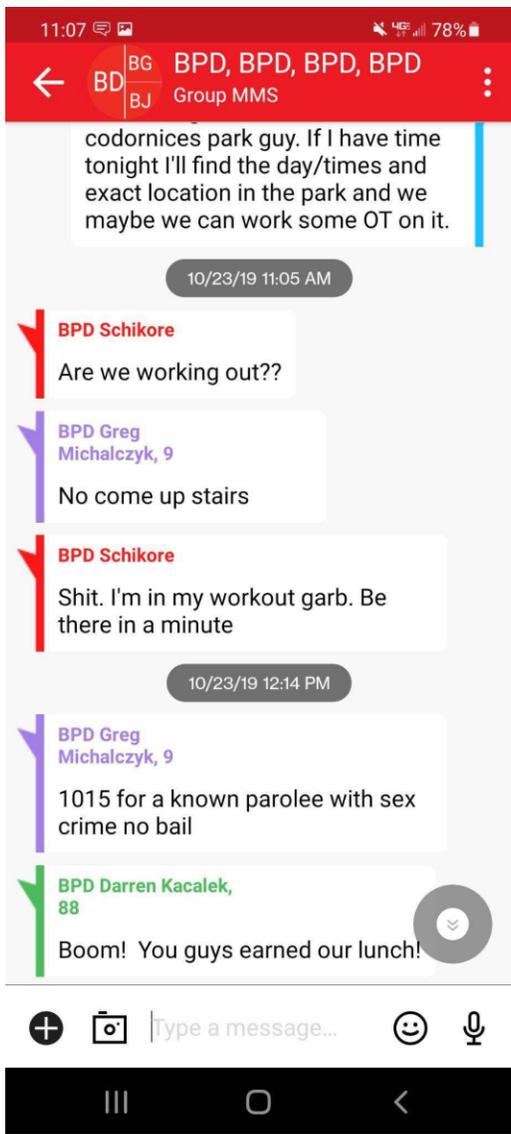
11/12/19 10:10 PM

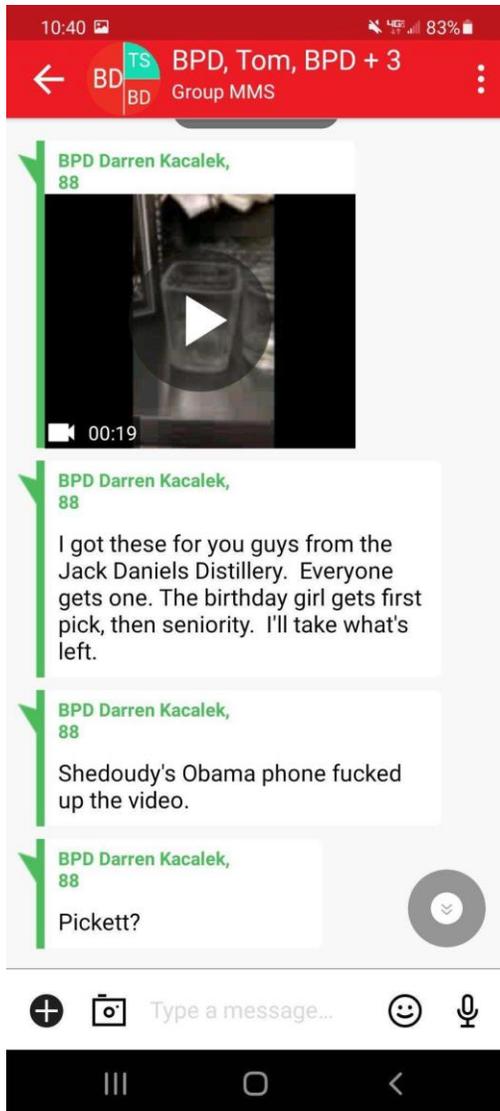
**BPD James Seaton**

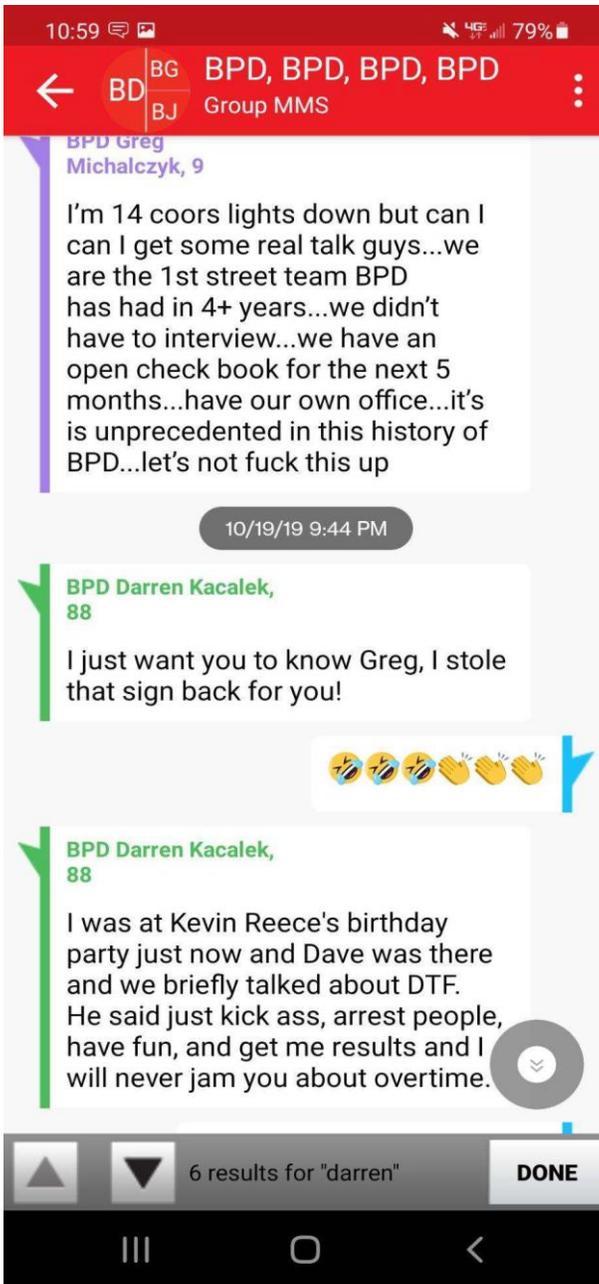
Yeah a Honda

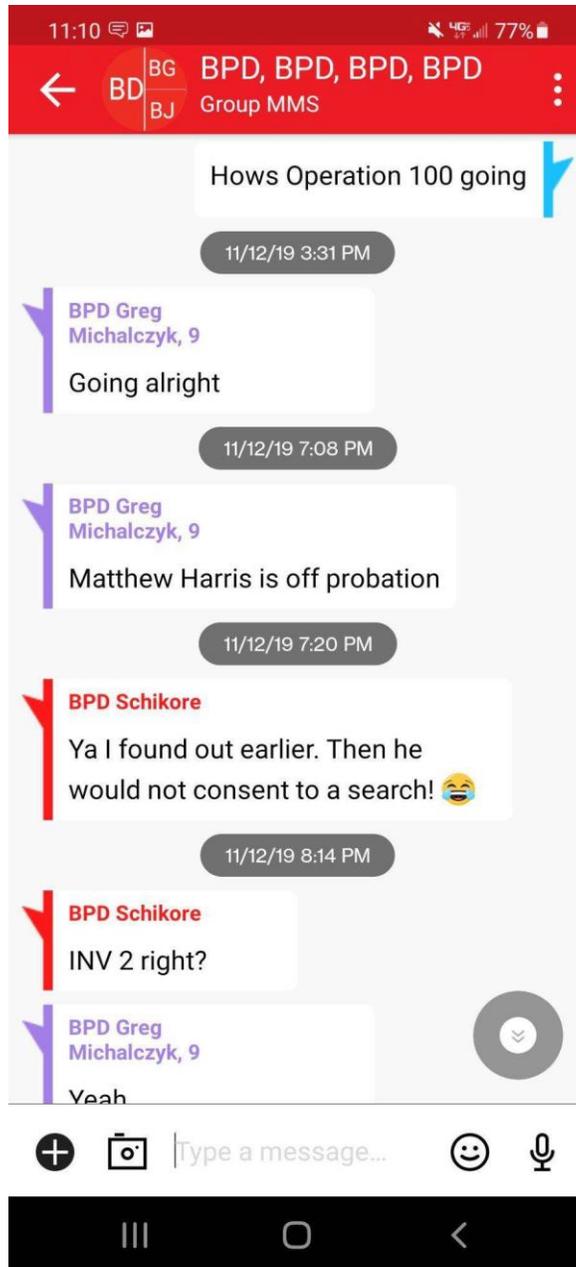


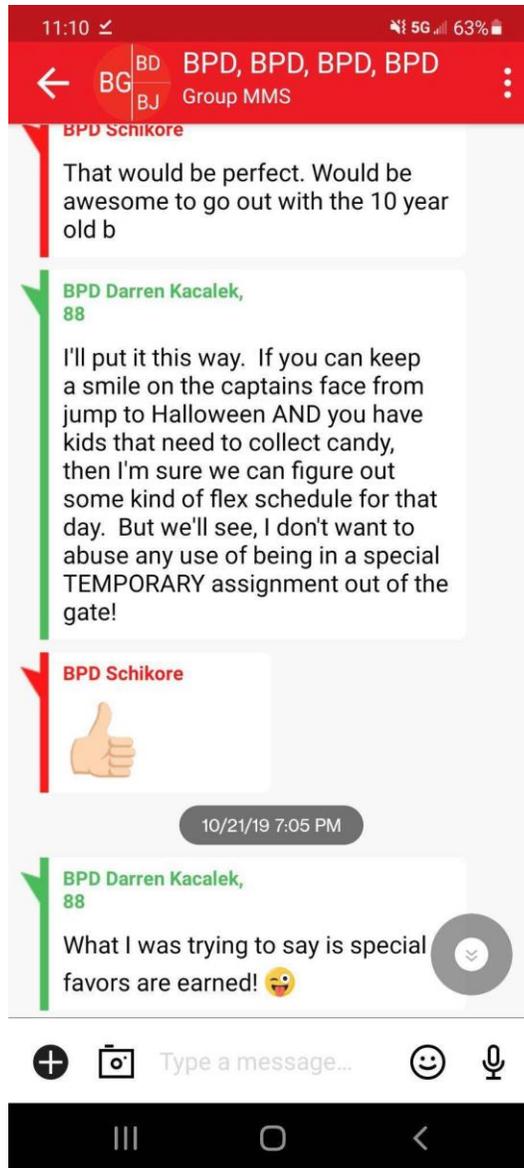


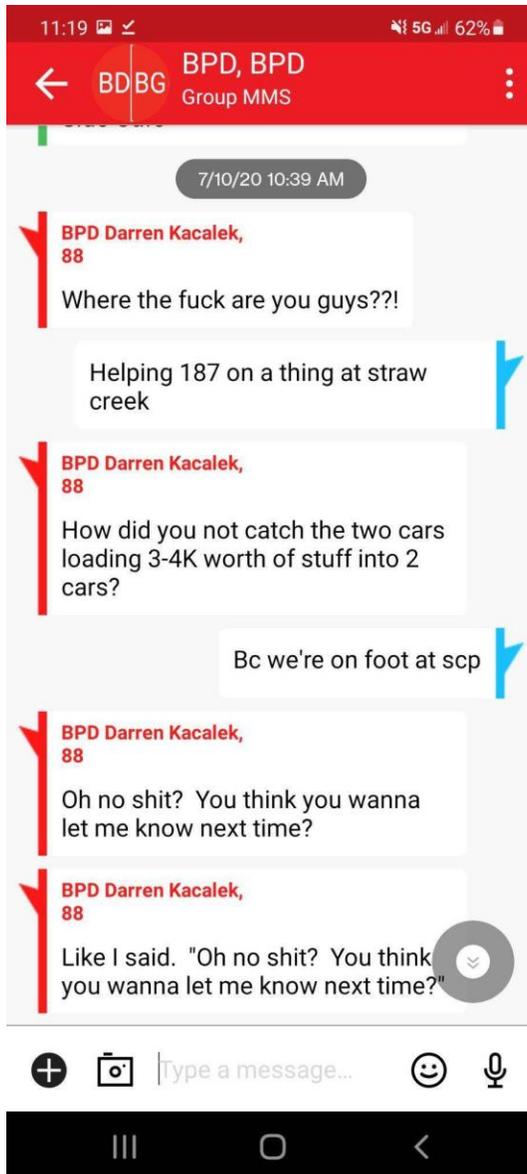


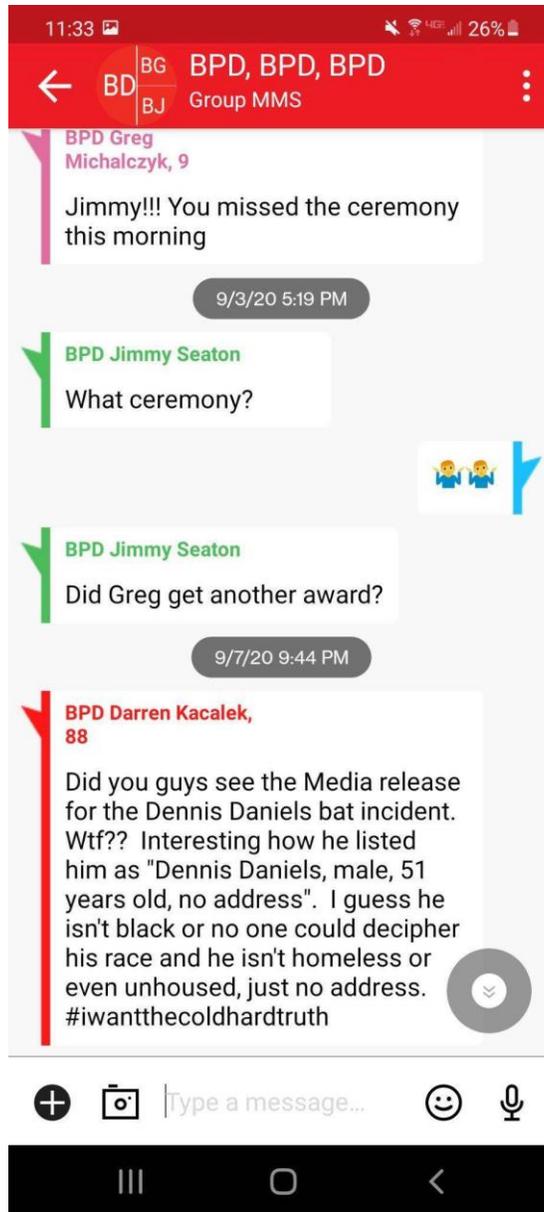


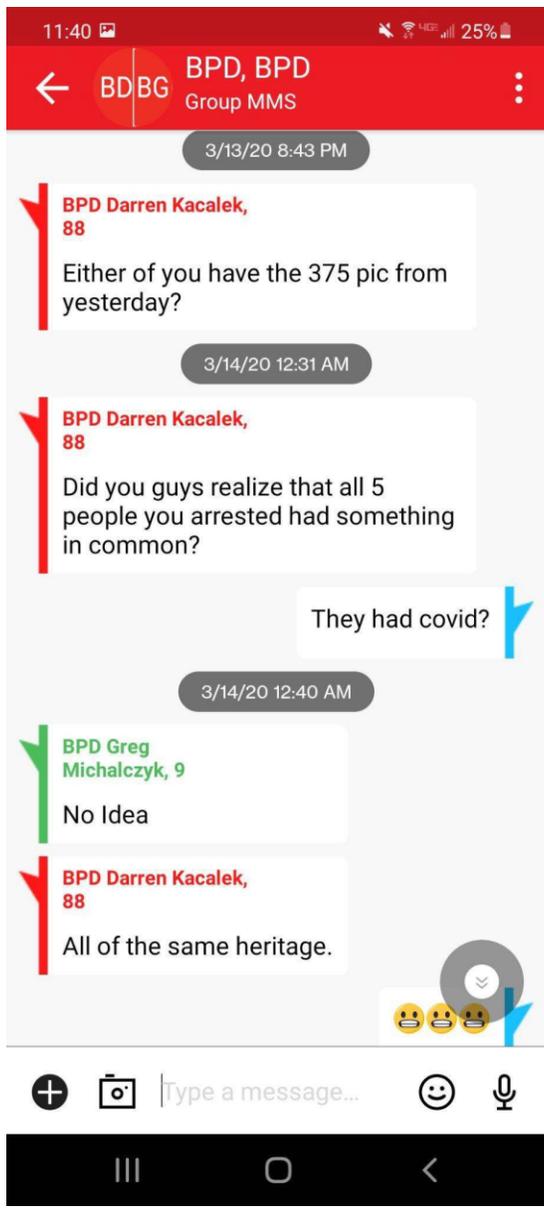


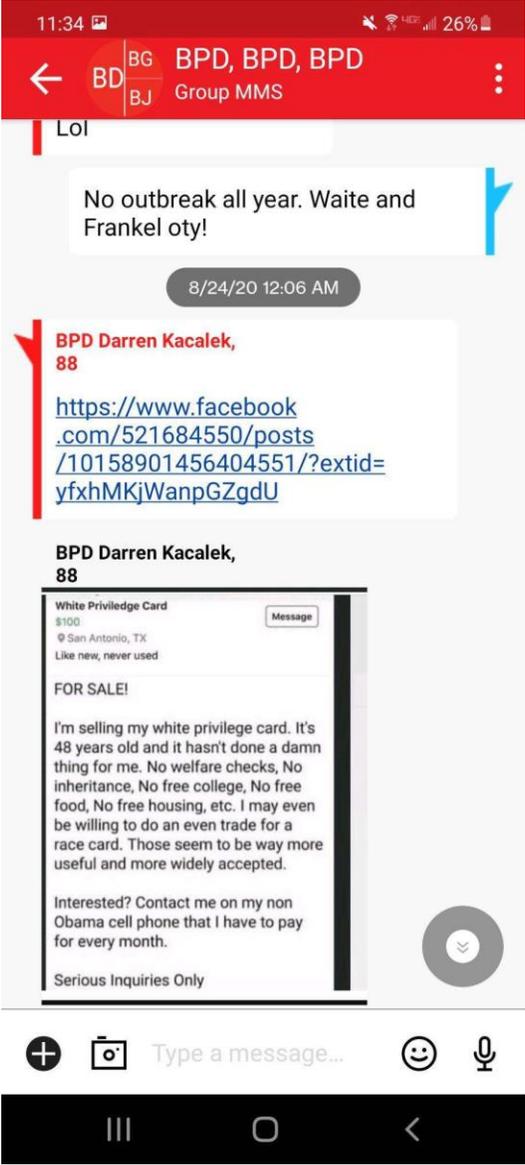


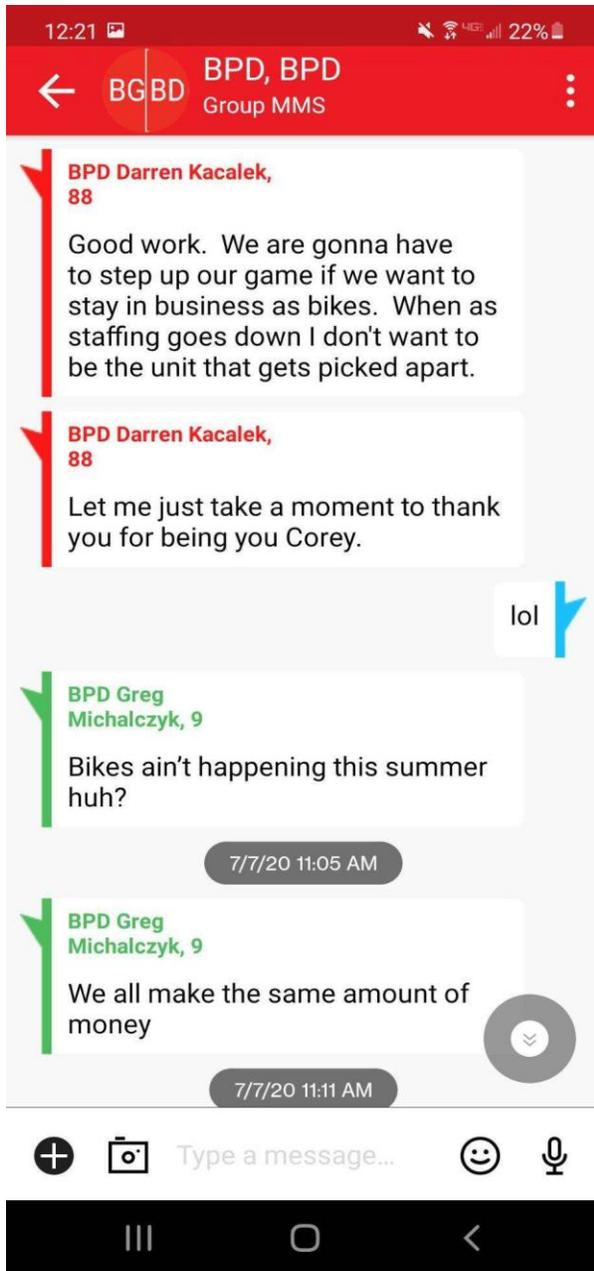












## Appendix 3. Sample Quota Ban Policy

### STOP, ARREST, AND TICKET QUOTAS PROHIBITION

#### XXX.1 PURPOSE AND SCOPE

The Berkeley Police Department (BPD) is committed to fostering fair and equitable law enforcement practices that prioritize public safety and community well-being. The purpose of this policy is to explicitly prohibit the imposition of stop, ticket, and arrest quotas in any law enforcement activities conducted by the Berkeley Police Department. This goes beyond the parameters defined in the California Vehicle Code § 41603.

Stop, ticket and arrest quotas, whether formal or informal, establish numerical targets for officers, compelling them to issue citations or make arrests based on predetermined numbers rather than legitimate law enforcement needs. This policy aims to uphold the values of fairness, impartiality, and community-focused policing, ensuring that enforcement actions are driven by genuine circumstances and the safety needs of our community.

This policy reflects the Berkeley Police Department's unwavering dedication to maintaining high standards of ethical conduct and professionalism while serving and safeguarding the interests of the Berkeley community.

#### XXX.2 POLICY

This policy unequivocally prohibits the use of quotas (**whether informal or formal**) to require or encourage officers to meet predetermined numerical targets for stops, tickets, or arrests.

The Berkeley Police Department is committed to promoting public trust, transparency, and accountability in all law enforcement endeavors. This policy serves as a cornerstone in guiding our officers to conduct themselves with integrity, professionalism, and a commitment to community service, devoid of the imposition of arbitrary enforcement quotas that could compromise these principles.

Officers are encouraged to prioritize public safety and law enforcement compliance based on objective circumstances and genuine enforcement necessities, fostering a culture of equitable and community-oriented policing.

### XXX.3 DEFINITION

The following words and terms shall have these assigned meanings throughout the Policy Manual, unless it is apparent from the content that they have a different meaning:

#### **STOP, ARREST AND TICKET QUOTAS PROHIBITION**

**Arrest quota** means any policy, practice, or directive that explicitly requires or pressures a peace officer or parking enforcement employee to make a certain number of arrests.

**Ticket quota** means any policy, practice, or directive that explicitly requires or pressures a peace officer or parking enforcement employee to issue a certain number of citations or tickets.

**Informal quota** means any policy, practice, or directive that implicitly requires or pressures a peace officer or parking enforcement employee to make a certain number of arrests or issue a certain number of citations. This includes, but is not limited to, the following:

- (a) Talking about specific stop, arrest, or citation targets in a way that suggests they are important.
- (b) Linking performance evaluations or promotions to arrest or citation numbers.
- (c) Providing incentives such as barbecue (BBQ), pizza, gift cards, car wash coupons, and trophies to officers who meet quotas.
- (d) Offering overtime.
- (e) Establishing adverse employment actions such as denial of days off, transfers, undesirable assignments, and termination.
- (f) Creating a competitive environment where officers are encouraged to make more arrests or issue more citations than their colleagues.
- (g) Making jokes or innuendos that incentivize achieving a specific number of stops, arrests, or tickets.