

**Comments from the Maryland Office of the Public Defender for Baltimore City  
Recommendations to Draft PIB Investigations Manual  
September 2019**

The Office of the Public Defender (OPD) provides these comments to the Public Integrity Bureau (PIB) Investigations Manual based on our experience trying to identify and review police misconduct allegations and findings against BPD members who are involved in investigations underlying the prosecution of our clients. Failure to identify and address police misconduct is among the primary reasons why the Gun Trace Task Force members and affiliated officers were able to commit their egregious crimes, the Department of Justice was able to readily observe blatant constitutional violations during their investigation, and many BPD members continue to act improperly with a sense of impunity. Oversight and accountability measures are urgently needed to bring about the necessary culture change for the consent decree and effective police department.

The PIB Investigations Manual details the procedures and includes key principles to ensure that an effective practice – including (but not limited to) eliminating conflicts of interest between investigators and the subjects of an investigation, treating civilian and BPD witnesses equally, and demanding documentation with effective record-keeping. Based on our experience with BPD’s prior practice, several of our recommendations encourage further reiteration or elaboration on these concepts to account for the dramatic shift that they may call for from current practice. Other recommendations address nuances that are under-addressed or overlooked.

Recommendation 1: Do not allow PIB Investigators to investigate any officer with whom they have been on detail within the past 6 months.

It is our understanding that current BPD leadership is working toward ensuring that PIB investigators are not put on detail with anyone outside of PIB. We applaud this best practice, but also recognize that, in the short-term, PIB investigators may not uniformly be exclusively working on PIB cases, and, even in the long-term, a transfer or promotion to PIB will include members who previously worked in another unit. Beyond not investigating someone in their chain of command, PIB investigators should be precluded from investigating a recent colleague.

*Suggested language:* In both Section (I)(D), Conflicts of Interest ¶1.3 (page 5) and Appendix A, IAS Recusal Form item (c) (page 83), amend the first sentence as follows:

“No employee shall be involved in an investigation or make any disciplinary decisions with respect to any person who they directly report to in their chain of command **or with whom they have shared a detail in the past six months.**”

Recommendation 2: Reiterate that a complainant who is not willing to come to PIB must still be interviewed.

The manual notes that the preferred practice is to interview the complainant in the controlled setting of PIB. For a variety of reasons, complainants may not be willing or able to come to PIB, which should have no impact on the investigation. Given the prior practice of BPD members routinely closing cases after failing to interview complainants who did not come to the station, the manual should explicitly and repeatedly make clear that interviewing the complainant (when the complainant is willing to participate in the investigation) remains an important and mandated priority.

*Suggested language:* In Section (IV)(B)(b), Procedures for Contacting and Arranging an Interview of the Complainant (page 15), add the following to the end of ¶1:

**If the complainant is not willing to come to PIB but is otherwise willing to participate in the investigation, the assigned investigator must still conduct the interview at a time and place acceptable to the complainant.**

Recommendation 3: Explicitly address the need to investigate anonymous complaints.

The manual rightfully prioritizes contacting and interviewing complainants and notes that investigations should continue even if the complainant chooses not to participate. It makes no mention of anonymous complaints, however, and should explicitly require that these complaints receive the same level of investigation as other complaints, with equal scrutiny of BPD members and other witnesses.

*Suggested language:* In Section (IV)(B)(c) Procedures for When the Complainant Does Not Wish to Participate (page 16) add the following to the end of the first paragraph:

**In this regard, anonymous complaints will be provided with the same level of effort and scrutiny to verify the allegations as provided to complaints with a named complainant.**

Recommendation 4: For complainants that cannot be located or are not responding, ensure that investigators check to see if they are incarcerated or in the hospital.

Reasonable steps to locate a nonresponsive complainant should include determining whether the person is in jail or the hospital

*Suggested language:* Edit ¶ 1.4 of Section (IV)(B)(c), Procedures for When the Complainant Does Not Wish to Participate (page 17) as follows:

If no response, the investigator should check for an alternative address via law enforcement available databases, **the inmate locator database, hospital admissions, and ~~or~~ public information.**

Recommendation 5: When phone interviews are conducted, require investigators to inform the interviewee that phone interviews are recorded.

The Manual advises against phone interviews, but recognizes that they are sometimes the only option. In those situations, the Manual requires that the call take place on a PIB recorded line. The interviewee should be made aware that this line will be recorded, and provided with an alternate option if they are unwilling to have their interview recorded.

*Suggested language:* Add the following to Section (IV)(C)(a)(3) (page 23):

**At the start of a phone interview, the investigator should inform the person that the conversation is being recorded. If the person refuses to be recorded, the investigator should document the refusal, take thorough notes and prepare a narrative summary for inclusion into IAPro and the investigative file, in accordance with Section (IV)(C)(b)(iii)(4.3).**

Recommendation 6: Clarify that the requirement that adults be interviewed alone does not apply to counsel, who may always be present.

Among the tactics of the Gun Trace Task Force officers was to target individuals with criminal histories who are less likely to seek law enforcement assistance and whose complaints would be less likely to be credited. While not necessarily immunizing every witness, the PIB must still make efforts to root out corruption and misconduct in the Department by allowing relevant sources to share information while protecting their interests. For some, there may be concern of prosecution or other law enforcement activity; for others, there may be consideration of a civil action that warrant legal protection. Regardless of the reason, if a complainant seeks to have counsel present for the interview, their lawyer should be permitted to observe and, when needed, advise their client.

*Suggested language:* Revise Section (IV)(C)(b)(7) (page 25) as follows:

All adult interviewees – whether witness, complainant, respondent or witness officer – shall be interviewed separately and individually. **Interviewees may have their counsel present with them, if requested.** If the person requires an accommodation, see paragraph 8 in Section (IV)(C)(b)(ii) below for accommodations. ...

Recommendation 7: Instruct that the refusal to be recorded should not be a basis to deny an interview or discredit the information provided.

Recorded interviews are the preferred practice in order to document this key component of the investigation. However, an interviewee may have a legitimate concern about providing sensitive information in a recording, particularly in light of the historical use of retaliation by BPD members and conflicted officers conducting investigations. The refusal to be recorded is not related to the veracity of the information provided. Investigators should be encouraged to still

conduct interviews, even if the person refuses to be recorded, and to credit the information to the same extent as it would if it was recorded.

*Suggested language:* In Section (IV)(C)(b)(iii) (page 29) amend ¶ 4.3 as follows:

If consent is not provided, the investigator must document the refusal and take thorough notes during the interview. **An interview should still be conducted to the same level of detail as if it was recorded.** In these circumstances, prepare a narrative summary of the interview immediately after the interview to include in IAPro and the investigative file. **Information derived from an unrecorded interview should be given the same weight and credibility that would be provided if it was recorded.**

Recommendation 8: Clarify that Miranda/LEOBR/Garrity warnings are to be provided at the start of interview

The manual notes that warnings against self-incrimination must be given, but does not specify when they should be provided. To ensure that they do not arise at or after any incriminating information is shared, investigators should be instructed to provide these warnings at the start of the interview.

*Suggested language:* Revise Section (IV)(C)(b)(iv)(1) (page 30) as follows;

Investigators must give all appropriate warnings as required by law **at the start of the interview,** to include, if necessary, warnings required pursuant to Miranda (see Appendix M), LEOBR, and Garrity (see Appendix N). ...

Recommendation 9: PIB investigators should have body-worn cameras (BWCs) and be required to use them as other investigators would.

BWCs are recognized as a best practice for gathering evidence and monitoring police activity, and are increasingly relied upon by BPD and other departments around the state and country. They should be utilized for investigations of police misconduct in the same manner that they are used for other investigations.

The manual makes no mention of PIB investigators using BWCs, instead suggesting that they rely on video and audio equipment at PIB or, if conducted outside of PIB, on a BPD-issued digital audio recorded.

*Suggested action:* PIB investigators should be issued BWCs and instructed to use them in accordance with the Policy 824, Body Worn Camera.

Recommendation 10: Make clearer that administrative investigation decisions are made by the Commissioner and that any prosecutorial investigation is a completely separate investigation.

The Manual provides extensive discussion on the complexity and interaction between administrative and criminal investigations. In doing so, it emphasizes, and potentially overstates, the role of the prosecutor while merely mentioning that the Commissioner has ultimate control over the administrative investigation.

Historically, the prosecutor has helped protect its witnesses from misconduct, delaying issuance of a Garrity Notice such that a factually related administrative investigation could not gather sufficient information, and a criminal investigation was never prosecuted. While prosecutor consultation may be appropriate in certain circumstances, the SAO and the BPD do not always have consistent interests, and to the extent possible, should consider their investigations separate from each other to maintain appropriate levels of independence when concluding investigations and deciding on discipline. As a result, the Manual should make more clear the fact that the Commissioner must retain his authority to ensure an effective investigation that meets the BPD's accountability priorities.

*Suggested language:* Revise Section (V)(A)(4) as follows:

**All decisions to take a compelled statement while a criminal investigation is ongoing must be approved by the Police Commissioner or their designee.** Because the prosecutor is ultimately responsible for prosecuting criminal cases, the internal affairs investigator shall consult with the prosecutor prior to initiating an officer interview in matters that **include a criminal investigation** and shall ~~pay particular attention to consider~~ the prosecutor's **input instructions** concerning the types of interviews to be conducted and procedures to be utilized (e.g., Miranda warning, Garrity warning, etc.). The general practice is for administrative investigators to not pursue a compelled statement while the criminal case is still under investigation. Nevertheless, if it seems appropriate to obtain a compelled statement prior to the close of the criminal investigation, the investigator must consult the prosecutor **and get the approval of the Commissioner.** ~~All decisions to take a compelled statement while a criminal investigation is ongoing must be approved by the Police Commissioner or their designee.~~ Additionally, all decisions regarding compelling an interview, holding any aspect of an administrative investigation in abeyance, and all consultations with the criminal investigator and prosecuting authority must be documented in IAPro.

Conform paragraph 15 of the same Section with paragraph (4) (page 54), referenced above, by continuing to require the Commissioner to determine if an interview will be compelled:

If there is a criminal investigation, the determination about when to compel an interview of the respondent officer is a decision that will require the approval of the **Commissioner Director of PIB**, who will consult the appropriate prosecuting authority. When criminal misconduct is alleged, the investigator must maintain regular contact with the prosecutor to ensure there is agreement on the investigative strategy.

**Recommendation 11: Require investigations of off-duty officers by appropriate BPD unit to have the same conflicts check, including use of recusal form as PIB investigations.**

Whether the allegations occurred while on-duty or off-duty, integrity in an investigation of an officer requires that it be conducted free of an actual or perceived conflict of interest. Similar to PIB matters, BPD officers conducting an investigation of an officer for matters that occurred while off-duty should complete an IAS Recusal Form and follow the conflict of interest protocols required for investigations conducted for allegations of misconduct while on-duty.

*Suggested action:* Amend Section (V)(B)(3) (page 54) to require assigned investigators in the BPD unit handling the investigation to complete an IAS Recusal Form and for the Conflict of Interest protocols delineated in Section (I)(D) to be followed.

Recommendation 12: Include in procedures for review and evaluation, the lack of evidence that should exist.

When meeting the expectations of their job, officers should be creating evidence that will establish their compliance with BPD policies and practices. In particular, BWCs should be recording when they are involved in an investigation and timely reports should be filed of all incidents. The failure to record interactions on their BWC, or to otherwise shield observation (such as by using a personal cell phone for case-related communications in a manner that is intentionally out of view from the camera) are pervasive actions that intentionally limit review and are often indicators of misconduct. Rather than ignoring these omissions, the Manual should advise considering intentional omissions when evaluating statements as inferences against the officer.

*Suggested action:* After Section (VIII)(A)(3.5) add the following:

**3.5.1 The lack of BWC footage or other documentation that is required in the course of duty suggest that misconduct may have occurred. An officer who improperly turns off their BWC or otherwise intentionally shields their actions from observation and oversight, should be presumed not credible unless other objective tangible evidence supports their account.**

Recommendation 13: Be consistent about who makes the final determination in the chain of review.

The sections on Review of the Investigation (Section X) and the Investigative Findings, Charging Documents, and Non-punitive Counseling (Section XI), predominantly suggest that the Deputy Commissioner will conduct the final review of the completed investigation. However, in Section (X)(A), Not Sustained/Unfounded/Exonerated (page 79), the Manual states that the PIB Major will sign off on the investigation and forward to PIB's Administration Section, where the case will then be closed. While noting in a footnote that no further investigation will take place unless directed by the Deputy Commissioner, this section provides no actual review by the Deputy Commissioner to provide this direction. To ensure that biases or conflicts are not resulting in investigations that improperly favor officers, investigations that result in no finding

against the accused officer should have the same level of scrutiny as those resulting in a sustained finding. As with sustained findings, not sustained/unfounded/exonerated findings should also have their final review and sign-off by the Deputy Commissioner.

*Suggested action:* Provide the same process for Deputy Commissioner review in Section (X)(A), Not Sustained/Unfounded/Exonerated, as is provided in Section (X)(B), Sustained Finding.

Recommendation 14: When defining the standards of proof, reiterate when they are each applicable.

While the discussion of each type of finding (unfounded/sustained/not sustained/exonerated) includes the burden of proof, the definition section of the two burdens (Section (IX)(C)(2), page 77) should also provide this context. Particularly since the paragraph starts with the more stringent clear and convincing standard, extra attention is needed to ensure that this standard is not over-applied, such that investigations are disproportionately found not sustained due to insufficient evidence.

*Suggested language:* In Section (IX)(C)(2) (page 77), add the following after the citation to the Maryland Civil Pattern Jury Instruction:

**Unfounded allegations must meet the clear and convincing standard. All other findings are held to a preponderance of the evidence standard.**

Recommendation 15: Specify the standard and process by which the Deputy Commissioner may change the finding of a sustained complaint.

As part of his final review, the Manual authorizes the Deputy Commissioner to unilaterally change a sustained finding (and, in our recommendation 13, above, other findings). However, there is no guidance provided on the basis required for any such change, how it will be documented, and what further steps will take place when the finding is changed.

*Suggested language:* In Section (XI)(B)(3) (page 81) – as well as in Section (XI)(A), if recommendation 13 is adopted – add the following:

**3.1 A change in the finding by the Deputy Commissioner must be based solely on their independent review of the investigative file and a determination that the preponderance of the evidence did not support the finding, or that an unfounded finding was not supported by clear and convincing evidence.**

**3.2 If the Deputy Commissioner changes the finding, they will draft an addendum to the investigative finding in the case file which specifically explains and documents the rationale for their conclusion.**

**3.3 The addendum will further be provided to the PIB Sergeant and Lieutenant for consideration in supervision of the PIB investigators and debriefing of the investigation.**

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The proposed Manual provides much promise for encouraging PIB investigations that are thorough, unbiased, and allow for true oversight and accountability. While not necessarily appropriate for this document, a clear policy and protocol is also needed regarding expungements, including when (if at all) misconduct allegations may be removed from a personnel record, how expungement will be documented, and what process will be in place to ensure that even expunged information is still included in disclosures required under Brady and Giglio.