

The “Picnic Day” Incident

Independent Review of the Interim Independent Police Auditor: Findings and Recommendations

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I. Preface

In America, the responsibility of public safety has traditionally been largely delegated to a professional police agency and its leadership. Over the past decade or so, however, that paradigm has shifted, with the public expecting a higher level of engagement and transparency from its police departments. The City of Davis has been near the forefront of that movement, with various forms of police oversight being implemented, modified, and re-evaluated over the years. In fact, the City has very recently engaged consultants and asked them to dialogue with its community in order to further improve upon the City's police oversight program.

The public expects that its police will perform professionally in carrying out its professional safety duties and in the scores of police-public contacts that happen on a daily basis, that is what results. However, in the rare instance in which an incident occurs that raises concerns about the performance of police, the public expects and deserves an unvarnished explication for what happened, how the involved personnel could have performed better, whether accountability occurred, and how the Department learned from the incident so that future law enforcement challenges will be more effectively handled.

This report is intended to address these questions regarding the 2017 Picnic Day incident that resulted in injury to two officers, the arrest of five individuals, and the overarching concern about how the incident was handled by Davis PD. Before we begin, however, it is important to recognize that, as is true every day, there were scores of public contacts that day with Davis Police personnel, some involving arrests and citations, where police performance was professional and the matter was handled "without incident". It is within that context that this incident should be considered and any insight provided as an opportunity for introspection and improvement.

II. Introduction

On April 22, 2017, during the City of Davis' annual Picnic Day celebration, three plain clothes officers attempted to clear a lane by using their undercover van, honking their horn, and then yelling at the assembled crowd. A fracas ensued, and five individuals in the group were charged with being involved in the assault of the police officers. The individuals claimed that they were not initially aware that the individuals in the van were police officers. Eventually, the criminal charges were resolved through a restorative justice process. As a result of concerns raised about the incident regarding the actions of the involved officers, the City of Davis retained an outside investigator to conduct an internal investigation to determine whether any Davis Police Department (DPD) personnel violated policies. That investigation was completed, and in November 2017 findings were submitted to the Chief for consideration.

Meanwhile, though Davis has long had an independent police auditor, there happened to be a six-month vacancy in the position that overlapped with some of these events. That changed in January 2018, when I and my OIR Group colleagues were appointed as the interim police auditor. As part of that appointment, we were asked to independently review the outside investigation conducted by the law firm of Orrick, Herrington, and Sutcliffe (OHS) and to offer any recommendations relating to the Picnic Day incident and DPD's response. This Report is intended to be responsive to that request.

III. Review Protocols

Our evaluation consisted of reviewing the internal investigative report, video evidence, tape recordings of interviews, the DPD criminal investigation, and other documentary evidence. We also talked with representatives of the OHS team and DPD's Chief of Police. All City and DPD stakeholders and the OHS team were extremely responsive to our requests for materials and clarification.

IV. Results of Internal Investigation

Pursuant to California Penal Code 832.7(a), cities are precluded from generally releasing personnel records of peace officers. Because the OHS report is best considered a personnel investigation, the wholesale release of that report is not possible. However, under California Penal Code 832.7(e)(1) a police agency is required to provide written notification to the complaining party of the disposition of the complaint. In an effort to harmonize these two provisions, police agencies have generally provided information to complainants about whether or not allegations were sustained. If yes, there is generally an assurance that "appropriate" remedial action occurred, without details regarding the specific level of discipline imposed. The identity of involved officers is also not disclosed.

Consistent with this guidance, DPD is able to report to the complaining parties that the outside investigators considered a number of potential policy violations stemming from complaints and concerns by identified individuals and the Davis public and made the following key findings:

- Violation of plain clothes policy relating to officer identification: Sustained for two officers
- Violation of policy prohibiting use of rude language: Sustained for two officers
- Violation of use of force policy: Not sustained
- Violation of bias based profiling policy: Not sustained
- Violation of policy on press releases: Sustained against DPD

The Chief, as administrative decision-maker, accepted the findings of the OHS report. We generally concur with the OHS and Chief's findings, as detailed below.¹ However, we also discuss of number of performance issues that were not considered in the analysis of the incident, and which we believe were worthy of additional attention.

V. The Picnic Day Incident and DPD's Response: Independent Auditor Preliminary Observations and Analysis

The below discussion includes a review of the DPD criminal investigation and procedural issues relating to the OHS investigation, including performance issues that were not fully addressed during that investigation. However, we start first with some overarching impressions of the incident. These are based on the information collected from the initial criminal investigation and other DPD materials, as opposed to the contents of the personnel investigation. They focus on the ill-advised initial engagement by involved officers, and the subsequent lapses in communication that exacerbated the incident's fallout.

We begin by noting that the "plan" the involved officers had initially devised to clear the crowd was inherently problematic, and it largely set the stage for what happened next. And while it is fair to say that the aggressive response of some members of the crowd towards the van occupants was also problematic – and formed the basis for subsequent criminal charges – a more thoughtful approach by the involved officers in addressing the blockage of the roadway would likely have limited averted the resulting clash. Better approaches are easy enough to envision. Either the involved officers could have waited for responding uniformed officers to arrive or they all could have donned their tactical gear which would have more identified themselves as police officers, parked the van a near distance, alighted from the van, clearly announced themselves as police officers, and requested the crowd to move up onto the sidewalk.

As it turned out, the poorly devised strategy only served to antagonize. It caused a hostile initial reaction by some crowd members that was both unfortunate and unsurprising: instead of officers, the van's occupants were as or more likely to be perceived as obnoxious civilians interrupting a festive event without justification. The use of profanity by one of the involved officers would only have escalated this impression and response. When one of the involved officers observed what he asserted to be an aggressive move by one of the crowd members, their earlier decisions had precipitated a conflict situation with no good options.

The regrettable result was a melee in which plain clothes officers found themselves at a significant disadvantage, especially given that two of them did not have clearly displayed identification nor chose to don tactical vests; these vests would have both shown their status as officers and better equipped them for the confrontation that followed. Two officers were injured as a result of the fracas, and five individuals ended up being

¹ We also note the lack of evidence that the officers acted with any malice; as detailed below, the issues are more appropriately considered performance-related.

charged for their role in fighting with officers who may not have been initially recognized to them as police.²

As detailed below, two days after the incident, DPD issued a press release that attempted to justify the actions of the officers.³ Almost immediately, though, questions were raised about the accuracy of information contained in the media release. As described below, these challenges were justified: a good deal of the information in the release was inaccurate or eventually not able to be proven. Moreover, while a more nuanced press release was issued almost a month later, it neither directly addressed nor corrected the inaccuracies in the initial account. The damage to the Department's credibility had already been done regardless, and contributed to concerns about DPD's ability to investigate the case objectively.

Meanwhile, the criminal prosecution against the five crowd members continued apace. After two days of a contested preliminary hearing, prosecutors offered the defendants a guilty plea to a misdemeanor and a deferred entry on the felony along with restorative justice program as an alternative to proceeding with the preliminary hearing. The defendants agreed to this arrangement.

Throughout the proceedings, Department leadership did not publicly communicate any concern about officer performance or move to correct the inaccurate information put out in the initial press release. What may have factored in this decision was deference to the District Attorney's Office once criminal charges had been filed. Assignment of the administrative matter to outside investigators also conceivably entered in to the equation.⁴ However, at the time of this writing, almost a year has passed and there has yet to be any effort to publicly acknowledge that officer performance could have been better or to correct the inaccuracies in the initial media release.

Finally, there was a lack of information to Davis' public about the degree to which the investigative report prepared by the outside investigators would be made available to the public. As a result, when there was a change in City leadership and it was finally clarified that the outside investigative report would not and could not be released, this news added to public frustration about the case.

² One witness to the event was quoted by the media as stating: "I just feel like it all could have been avoided if it had been handled the proper way. Officers should have said, hey, we're officers. We need you guys to move along." Our assessment of the incident finds this conclusion compelling.

³ In addition, as discussed below, in the initial days after the incident, DPD personnel made statements to various media outlets that were also inaccurate or not provable.

⁴ In a further complication that also did not help matters, the individual initially assigned to conduct the outside investigation was replaced after it was learned that he had recently publicly made some highly charged comments.

It is hoped that this Report can provide some level of transparency and clarity, within legal limits, about what occurred and how the Department handled it. More importantly, the Report makes recommendations for systemic change designed to improve processes and policies on a going forward basis. We start however, with these important recommendations about public engagement:

Recommendation One: DPD should refrain from releasing information in defense of officers' actions until the information has been verified and vetted.

Recommendation Two: When it is learned that the performance of officers in a critical incident was not consistent with Departmental expectations, DPD should acknowledge this, and should correct any inaccurate information it has previously shared.

VI. Review of DPD Criminal Investigation

In order to support the criminal charges filed against civilians involved in the incident, DPD prepared a criminal investigative report. As part of our assignment, we reviewed the DPD report and found it to be complete and consistent with basic investigative standards. Particularly praiseworthy was the concerted attempt of the Department to enhance the videos of the incident and conduct a frame by frame analysis of what was depicted. Also noteworthy was the review of the recorded telephone calls from the arrested individuals while they were in custody.

However, we have yet to see a perfect investigation in the many hundreds that we have reviewed from a host of agencies. This is more an inevitable reflection of reality than an indictment of law enforcement performance, but it does inform our opinion that each significant investigation merits review for purposes of future improvement. To that purpose, we make the following observations from this case:

Untimely report writing in potential violation of DPD policy. DPD's Policy 2.20-C on Report Writing and Procedure indicates that certain reports are to be completed prior to the end of an officer's shift. Included in the list is any incident where a use of force has occurred or an arrest has been made for resisting arrest, battery on a police officer, or in any case where an officer was injured at the hand of another.

Clearly, the Picnic Day incident qualified as a report that needed to be completed prior to the end of an officer's shift. However, the documentation of one of the involved officers' reports indicates that the report was not prepared until seven days after the incident. While the other two officers dated their reports as the date of the incident, the outside investigation did not thoroughly plumb when the reports were actually completed.

Whether the apparent failure of one (or more) of the involved officers to timely complete their reports amounted to a violation of DPD's report writing policy was not addressed by the OHS investigative team.

Potential violation of DPD protocols relating to documenting use of force. DPD protocols require that whenever an officer uses force he/she is to report the force and the force is to be documented in a use of force report prepared by the watch commander. A review of documentation prepared the day of the Picnic Day incident indicates that one of the involved officers' use of force was documented. However, while it is clear that the other two involved officers also used force, the report does not describe or document the force that they used. The potential violation of DPD protocols relating to documenting use of force was not addressed in the OHS investigation.

Civilian witnesses apparently interviewed together. One of the supplements to the DPD report describes a DPD interview of a married couple who were eyewitnesses to the event. From the summary of the interview, it appears as if the couple was interviewed together. Basic investigative practices disapprove of interviewing two eyewitnesses together because recollection can be consciously or unconsciously contaminated as a result. There is no explanation in the supplemental report for why the two witnesses were interviewed together; nor in approving the report did the supervising detective express any apparent concern for the use of the technique.

Potential critical witness not identified. According to one of the involved officers, he was handed an empty liquor bottle at the scene by an individual who identified the bottle as having been used to strike the officer. While the bottle was recovered and booked into evidence, the involved officer did not obtain the identification of the witness and the witness was never subsequently located. While the involved officer was understandably shaken as a result of having just been injured in the incident, the failure to ascertain the identity of this ostensible witness was a significant lapse in the investigation.

Lack of analysis of fingerprint information. The bottle that was produced by the unidentified civilian witness as being an instrument used during the melee was sent to the crime lab for forensic processing. According to a report in the file, a latent fingerprint was identified. However, there is no documentation to indicate whether there was any follow-up to locate or talk with the individual identified through the fingerprint analysis. This was a significant lead for which there was no apparent follow up.

Involved officers may have viewed video of incident prior to preparing report. It is critical to any assessment of use of force involving an officer that a pure statement is obtained from the officer prior to exposing the officer to any video evidence in the event. Based on the timing of the preparation of the reports, it does not appear that DPD obtained a pure statement of the incident from the involved officers. As a result, the police report eventually prepared by the involved officers was likely either consciously or unconsciously contaminated by video exposure. As a result, DPD surrendered the opportunity to obtain a pure statement about the incident from the officers.

Detective forgot to activate body-worn camera during witness canvass. To its credit, DPD conducted an extensive witness canvass after the incident in an effort to identify

witnesses. However, one of the detectives assigned to the canvass acknowledged that he had forgotten to activate his body-worn camera in contravention of DPD Policy and Procedure 4.12-A (Body-worn camera policy expects that interviews of witnesses will be recorded). As a result, some of the canvass activity was not tape recorded. The OHS investigation did not discuss this potential violation of DPD policy.

Involved officer took photographs of own injury and injury of other involved officer. According to the DPD report, one of the involved officers took photographs of his own injuries and that of the other officer visibly injured as a result of the incident. While additional photographs of the officers' injuries were taken by a DPD evidence technician, the better investigative practice would have been for this duty to have been the sole responsibility of the evidence technicians.

Medical records not included in investigative file. As noted above, one of the charges filed against defendants in this case was felony assault on a peace officer. Two of the involved officers were transported to a local hospital and received medical attention. However, the medical records of that treatment were not included in the DPD investigative file. This key piece of evidence should have been obtained and included in the file.

VII. Review of OHS Investigation

As indicated above the OHS investigation essentially filled the role of an administrative investigation for the City of Davis. Accordingly, the focus here will not involve a substantive review of that investigation, but rather with an eye toward highlighting DPD performance issues that were not addressed, and looking at components of the investigation itself only insofar as they offer learning opportunities for the Department going forward.

To be sure, the OHS investigation spent considerable resources addressing the varied issues and concerns arising from this incident, and accomplished some noteworthy things in that regard. For example, and to its credit, the OHS investigation discovered another video showing an important aspect of the incident that had not previously been captured by other video evidence. In addition, the OHS investigative team spent considerable time reviewing the video evidence and conducting a frame by frame review in an attempt to ascertain what occurred. The Report contains helpful stills distilled from the video and helpful diagrams showing the positioning of individuals.

Nonetheless, whenever we review an investigation, we always find room for improvement – and our own investigative efforts are no exception to this rule. It is within that spirit that we observed the following:

The OHS investigation was unsuccessful in interviewing numerous potential witnesses to/participants in the incident. OHS attorneys reached out to at least sixteen witnesses who declined to cooperate in the investigation, a remarkable number in our experience. Those included some of the defendants who were still under court supervision as a result of the disposition of their case, but the majority was individuals who were only

witnesses to the event but nonetheless declined to participate. Unfortunately, OHS repeated efforts to change this proved unsuccessful.

While we cannot know the precise reasons so many witnesses chose not to participate, a level of distrust about Davis' interest in a fair collection of the facts may have been a factor. As set out above, by the time that the OHS law firm had received the assignment, concerns about the City's initial release of information, the appropriateness of the criminal charges lodged, and the choice of the first investigator had all undermined public sentiment about the official response.

No witness transcripts or summaries prepared. With regard to witnesses actually interviewed, most of them were either video or audio recorded. However, no transcripts or summaries of the witness statements were prepared. Production of transcripts can be a cost factor but routine investigative reports contain at least a summary of what each witness reported. Because not even witness summaries were prepared, any decision maker or auditor who wished to learn what the witnesses' actually said during their interviews was required to listen to the tape recordings.

Most responding officers not interviewed. A number of uniformed DPD officers and at least one officer from another police agency arrived at the location of the incident and were involved in the apprehension and other scene duties upon their arrival. However, most of those officers were not interviewed during the OHS investigation.

Preliminary hearing transcripts of responding and investigating officers not obtained. During two days of hearings, responding DPD officers and detectives testified and were cross-examined regarding their actions at the scene, including their interactions and statements made by the defendants. However, the OHS report did not obtain transcripts of their testimony for inclusion and analysis in the administrative investigation.

Interviews of Chief and Deputy Chief neither taped nor summarized. The OHS investigative report references interviews of the Chief of Police and Deputy Chief of Police in support of several averments. While the Chief and Deputy Chief were interviewed by the OHS team about issues collateral to the actual incident, neither interview was tape-recorded or summarized. As a result, the substance of their statements to investigators was unreviewable.

Hand-drawn sketch not preserved. During his interview, one of the involved officers was asked to sketch the positioning of certain objects. The video-taped interview depicts the officer doing so, but the diagram was apparently neither preserved nor included in the investigative report.

Two witnesses interviewed together. As with the criminal investigation we cite above, a married couple was interviewed together about their observations of the incident. The couple observed a key part of the incident where one of the arrested individuals had reported he was subjected to excessive force. As a result of being interviewed together, the two witnesses answer questions simultaneously and talk over and correct each

other; this results in an interview where each other's recollections are inevitably tainted and influenced. Basic investigative techniques recognize the critical importance of interviewing witnesses separately. No reason was provided in the report about why this was disregarded during this interview.

No individual(s) found to be accountable for inaccuracies in initial press release. As noted above, while the OHS report sustained a finding against the "Department" for violating DPD's Press Release policy, no individual members were held accountable for the violation. It is unclear whether this lack of finding stems from an inability to learn who was responsible for the inaccuracies or whether there was another reason for not holding particular individuals accountable.

Inaccurate public statements to media not identified. The OHS investigation considered and identified inaccuracies in the initial press release about this matter. However, in the days after the incident, similar inaccuracies were published in media outlets that were not addressed by the OHS investigation. For example, in the April 26, 2017 edition of the Davis Press Enterprise, a DPD spokesperson is attributed as saying that one officer was in uniform at the time of the incident, while the other two were in street clothes with their badges and police weapons displayed. In the same article, the spokesperson was quoted as saying that during the incident, one officer was struck with a bottle on the side of his head.

The accuracy of these statements is suspect or ended up not being provable. In fact, none of the three officers was in uniform during the incident; one of them was wearing a tactical vest with "Police" markings. Moreover, when the other two officers first engaged with the crowd, neither their badges nor police weapons were displayed. Finally, while there was initial information that one of the officers had been struck by a bottle, the involved officer had no recollection of the incident occurring and was only told about it by a witness who was never identified. These inaccurate statements to the media were apparently not considered by the OHS investigation.

Import of visit in holding cell by involved officer not fully addressed. One of the arrested persons reported concern about one of the involved officer's commenting to him while he was in the DPD holding cell. OHS' investigation confirmed that one of the officers said "Dude, you f***ed up" to the individual, which later formed the basis for the rude language finding. However, the OHS analysis did not consider the larger question of the inherent inappropriateness of the involved officer gratuitously engaging with the subject of an arrest and force, regardless of whether profanity was used. Officers who are involved in force incidents involving arrested persons should refrain from confronting or lecturing individuals who are in custody. This larger (and arguably more significant) issue was not addressed by the OHS investigation.

Allegations involving DPD visit to serve search warrant not fully addressed. Some days after the incident, DPD sought and obtained a search warrant for property belonging to one of the individuals. In its investigation, OHS addressed and did not sustain the allegation that the warrant was served at gunpoint by DPD officers. However, additional allegations, including that the officers told the individual's mother

that they had forgotten to bring a copy of the search warrant and that the warrant had been served late at night (in violation of the court order) were not addressed by the OHS investigation.⁵

OHS investigation lacks analysis of decision-points and whether officer tactics were consistent with police policies, practices, training and performance expectations.

When a significant use of force incident occurs, progressive police agencies conduct a decision-point analysis to learn whether officer decision-making prior to the use of force was consistent with policy, practices, training, and performance expectations. The analysis is also intended to learn whether any questionable decisions by involved officers made it more likely that force would end up being used. For those agencies, if the determination is that if officer tactics and decisions fell considerably below expectations and training, it could form an independent basis for a policy violation. Importantly, those agencies also remediate sub-optimal decisions and tactics that do not rise to the level of violations of policy through remedial training and briefing.

In this case, a decision-point analysis of tactics was not performed by the OHS investigative team. As a result the following issues identified independently by the Independent Police Auditor were not fully explored by the outside investigation:⁶

--- The involved officers initially decided to clear the roadway the way they did because they were driving a recently acquired undercover van and did not want to “burn” it. However, shortly before the incident, the involved officers responded to a “person with a gun” call. At that time, one of the involved officers alighted from the van wearing a vest with “Police” markings while the other two got out and talked with uniformed officers who were on-scene. While the two detainees arrested as a result of this incident may not have observed the plain clothed officers alight from the van, other civilians who were in the area may well have been able to connect up the officers with the van. The actions taken by the involved officers’ minutes prior to the attempted roadway clearing incident may have not been consistent with keeping the van unknown as a police vehicle.

--- As the van approached the crowd spilling over into the number two lane, one of the involved officers appropriately radioed to dispatch to have marked cars respond to assist in clearing the roadway. However, instead of waiting until the patrol units could respond, the involved officers decided to take action. The radio traffic recordings indicate that two units were dispatched and the dispatcher then asked if additional units were needed to which one of the involved officers replied no. While the presence of heavy traffic may have delayed the response of the marked units, no inquiry was made by the involved officers about the estimated time of arrival, nor was there any request to step up the response because of any particular exigency. The investigation further did

⁵ We were informed that these additional issues were informally addressed by DPD.

⁶ In his own analysis of the incident, the Davis Chief identified some, but not all of these issues.

not ascertain how long it would have taken before the marked units would have arrived on scene.

--- The two officers who were not wearing their tactical vests may have had them stored in the back of their van. However, those two officers did not don their vests with identifying “Police” information prior to driving in the direction of the crowd. If they had done so, they would have been more easily identifiable as police officers once they alighted from the van and had more tools at their disposal as the incident progressed. Officers were not asked about this decision.

--- Video shows that the crowd spill over into the number two lane was not just at the identified intersection but continued for at least a block. The involved officers were not asked whether they intended to clear the rest of the block using the “drive, honk, and yell” maneuver they deployed at the intersection.

--- It is unclear whether the decision to drive, honk, and yell at the crowd by the officers in the front of the van was effectively communicated to the officer seated in the back. Basic tactical principles recognize the importance of such communication so that all understand the plan.

--- The outside investigation failed to sufficiently discuss whether the decision by officers to position the van so close to the crowd left them with no good tactical options once one of the crowd members was believed by the passenger officer to be possibly reaching for a gun. There was also no insufficient discussion about whether the positioning of the van *vis a vis* the crowd made it difficult for any members of the crowd to know that the occupants of the vehicle were police officers.

--- While the outside investigation found the use of profanity by the passenger officer to a crowd member to be a violation of DPD’s rude language policy, it did not also consider whether the statement unnecessarily caused potential confusion to crowd members about whether the occupants of the van were police and unnecessarily escalated the situation contrary to DPD’s training emphasis on de-escalation.

--- The officer in the front of the van reported that he observed one of the members of the crowd make a movement that caused him to believe that he was possibly armed and that he then needed to take action to detain him. Since the van had been positioned close to the crowd, the officer believed his only viable option was to get out of the van. However, officers are trained for officer safety reasons to communicate to their partners if they observe a person to be armed. The officer was not questioned about why he did not alert his partners to this crucial observation.

--- Upon observing the crowd member make a physical motion suggesting he might be armed, the officer alighted from the vehicle to engage the individual. Physically engaging a possibly armed individual is not a preferred tactical option. The independent analysis did not critique whether other options existed, such as the drawing of his own firearm. Because the officer was in plain clothes and had not donned

his tactical vest, many other tools and weapons options that uniformed officers usually have were not available to him.

--- When the driver officer observed the passenger officer alight and become engaged with members of the crowd, he alighted from the van and ran to assist instead of grabbing the radio in the console and requesting immediate backup. The officer was not asked about this tactical decision.

--- To his credit, the officer in the back of the van was wearing a tactical vest with identifying markings when he left the van. However, prior to alighting he placed his backup firearm under the back seat and left his duty weapon behind as he ran to assist his partners. The decision by the officer to leave two unsecured firearms in the van was not addressed in the outside investigation's analysis.

--- After the initial encounter, two of the involved officers decided independently to go into foot pursuit of involved individuals. Foot pursuits are inherently dangerous and many agencies circumscribe the tactic for plain clothes officers because they do not possess the same equipment as uniformed officers. In this case, while the OHS investigation did not focus on the path the officers took in foot pursuit, the officers may have chased over fences, around houses, and for an extended period without the benefit of a radio, firearm, and/or handcuffs. The extent to which these actions clashed with the dictates of officer safety was not analyzed or discussed by the OHS investigation.

--- One of the involved officers, upon observing the detention of a member of the crowd by a uniformed officer, assisted the officer by placing his knee in the upper back/neck area to hold him down. The OHS investigation found this use of force to be in policy, but did not discuss the broader issue of whether non-involved uniform officers were on scene to assist in the arrest. Generally, if an officer has been involved in an initial use of force, it is preferable to have any subsequent detention effectuated by non-involved officers. Insufficient facts were collected by the OHS investigative team to consider this broader issue.

VIII. Systemic Reform: Role of Independent Police Auditor in Outside Investigations

In situations where a DPD case is assigned to an outside investigator to ensure independence, it placed the Chief and the City in a potentially challenging situation in interacting with the independent investigative team. For example, initial discussions about the scope of the investigation might have been interpreted as efforts to limit or shape the breadth of the investigation. More significantly, when the investigation is completed, any requests by the Department or the City to clarify or conduct further inquiry could again be interpreted as efforts to unduly influence an independent investigation.

However, Davis is differently positioned than most police agencies in California in that it retains an independent police auditor that could assist in those roles. The auditor could work with the outside investigator to ensure that the initial scope of work would

address the salient issues. More significantly, the auditor could review the completed investigation for purposes of clarification and suggesting any additional areas of inquiry prior to the case being sent to the Chief for disposition.

In this case, there was a lapse in service whereby there was no Davis auditor to interact with the outside investigators when they started the investigation or as they proceeded. More significantly, when the investigation was completed, the City still had not retained an auditor. As a result, the Chief disposed of the case prior to any review being conducted by an independent auditor. We recommend, on a going forward basis, that when a matter is sent out for an independent investigation, the independent police auditor work with the outside investigator to ensure a thorough investigation that addresses all salient issues.

Recommendation Three: When a DPD matter is forwarded to an outside investigator for an independent investigation, the City of Davis should ensure that the independent police auditor:

- ***Work with the investigator to determine the appropriate scope of the investigation;***
- ***Review the investigation at its completion and have the ability to request the investigator to provide further clarity or conduct additional investigation prior to the case being sent to the Chief for disposition.***

IX. Impact of Issuance of Inaccurate Press Release

As noted above, two days after the incident, DPD issued a press release regarding the incident. As noted above, the OHS investigation found that release to be a violation of the DPD press release policy but did not attribute commission of the violation to any particular Department member.⁷ Because the press release contained information that was clearly inaccurate or had not yet been established by the investigation, it helped to foment public distrust in the Department's ability to fairly evaluate and report on the incident. Following is our independent analysis of the inaccuracies with the press release:

“One officer was wearing police attire with visible badge and the other two were wearing plainclothes, although they had clearly displayed badges on their chests and visible police weapons.”

The above statement is inaccurate in the following ways:

⁷ It is unclear what the sources of information were that formed the basis of the press release. It should be noted that at the time the press release was prepared, the dash cam video had yet to be obtained by DPD which, when received, provided significantly more information about what had occurred. But it is for that very reason that initial information must be carefully vetted and not available for public consumption until that information has been clearly established.

- At least one officer did not have a clearly displayed badge on his chest, at least not during the initial stage of the encounter.
- None of the officers had visibly displayed police weapons.

“Before the officers could act, the unmarked police vehicle was surrounded by a large hostile group and several subjects began to yell threats at the police officers in the car.”

The above statement is inaccurate/incomplete as follows:

- It is more accurate to say that the unmarked police vehicle drew very close to the crowd. While a few individuals may have moved to the front of the van, it is inaccurate to describe the group as surrounding the van.
- The press release fails to acknowledge that the “threats” that certain members of the crowd yelled were “f*** you” and “what’s up” and occurred after the van drove close to the crowd. The press release also fails to note that the passenger officer replied to these remarks by ordering the crowd to “hey, get out of the road” and “get out of the f***ing road.”

“One subject quickly moved to simulate he was pulling a gun on the officers.”

The above statement is imprecise as follows:

- Various DPD witnesses, civilian witnesses, and DPD personnel who viewed video of the incident described the action of this individual as:
 - Lowering hands
 - Reaching quickly in pocket for gun or phone
 - Dropped hands as if to clear his clothes out of the way
 - Left hand began to raise his shirt, and his right hand immediately went beneath his shirt, at his waist line, as if he had a gun.

No witness described the action as the person “simulating” the “pulling” of a gun.

“While on the ground, the officers were kicked, punched in the head, and one officer was struck with a bottle on the side of his head.”

The above statement contained information that was not been proven at the time of the release and was never established. As noted above, while a person provided a bottle to one of the involved officers and told the officer that he had been hit by that bottle, that witness was never identified and the investigation was unable to prove that the officer had been struck by a bottle during the incident.

“The surrounding crowd was hostile and presented a serious threat to the officers, who were easily identifiable by their displayed badges and attire.”

The above statement is inaccurate/misleading as follows:

- As noted above, the crowd did not “surround” the officers.
- Not everyone in the crowd was hostile; many can be described as onlookers.

- Two of the officers were not easily identifiable by their displayed badges and attire, at least not at the beginning of the encounter.

“One [officer] suffered injuries to his eye and face and the other was treated for a bleeding head wound caused by a bottle.”

As noted above, neither at the time of the press release or at any time during the investigation was it able to be proven that the officer was definitively struck with a bottle, let alone that it caused his bleeding head wound.

Approximately two and a half weeks later, DPD issued a subsequent press release which presented a more nuanced update of process relating to the Picnic Day incident. In addition, at some point, DPD removed the initial press release from its website. However, even after concerns about the veracity of statements in the press release had been raised within days by the public and media, there was never a retraction, clarification, or apology provided regarding the inaccurate and misleading statements. As of the writing of this report, there has yet to be a public acknowledgement regarding the inaccuracies contained in the initial release.

To DPD and the City’s credit, we have been informed that the process for release of information has been reformed in the following ways:

- Greater efforts to confirm information from officers or witnesses prior to release.
- Release of information promptly and without partiality.
- All public information will expressly note that the information is preliminary and subject to change as additional investigation is completed.
- Release of information only after review by supervisor and/or involved officer and after review by at least two department administrators.

While the systemic reforms are steps in the right direction, the principles described above should be reduced to writing and included in DPD’s Media Release policy. The policy should also ensure that there is documentation of the review and approval process.

In addition, as belated as it is, DPD should formally retract the initial press release and apologize for the inaccuracies contained therein.

Recommendation Four: The reforms in DPD’s media release procedures should be reduced to written policy, publicly disseminated, and placed on the Department’s website.

Recommendation Five: DPD should formally retract the initial press release relating to the Picnic Day incident and apologize to its public for the inaccuracies contained therein.

X. Systemic Issues: Opportunities for Improvement

To its credit, as issues from this incident became evidence, the leadership of DPD made significant changes in certain policies and protocols. Most significant were changes in the Department's plain clothes policies, that provided helpful guidance to officers assigned to those details. Moreover, as discussed further below, changes were made in how information was to be released to the media and provisions were included to ensure that accurate information was provided to the public.

In addition, our review of the incident revealed a number of additional systemic issues worthy of DPD consideration as follows:

Need to develop video release policy. DPD outfits its patrol officers with body-worn cameras. Video evidence has become more prevalent and important to critical incident analysis as a result of the increased use of body-worn cameras, cell phones, and surveillance cameras. In the Picnic Day incident, a decision was reached to publicly release one video of the incident. However, as in that instance, DPD determines when and whether to release video on an ad hoc basis. Increasingly, police agencies recognize value in establishing a policy for when video of high profile critical incidents will be released. Some agencies go so far as to stipulate a particular time period. Having a policy that guides police agencies on when to release video makes the process more transparent, educates public expectations, and avoids the specter of selective release.

Recommendation Six: With the input of its community, DPD should develop a consistent video release policy for significant incidents.

Need to revise policy regarding body-worn cameras. As noted above, during the witness canvass following the Picnic Day incident, one of the detectives forgot to activate his body-worn camera, resulting in evidence not being recorded. Moreover, the involved officers in this incident were not equipped with body-worn cameras on the date of the incident. We have been informed that all DPD officers, including those regularly assigned to plain clothes duty, are equipped with body cameras and are instructed to wear and activate them when they engage in a planned enforcement action. In this case, while the decision to engage in enforcement was relatively spontaneous, if the involved officers had deployed body-worn cameras prior to approaching the crowd, a wealth of additional helpful information would have been recorded and available for review.

In the current body-worn camera policy, even though there may be training to deploy body worn cameras when appropriate, there is no specific direction provided to plain clothes officers about whether and when to wear and activate the cameras. It would be helpful for the policy to expressly instruct those officers that whenever they decide to take enforcement action, they deploy their body worn cameras, provided there is time to do so.

Under current policy, DPD officers are routinely provided the opportunity to view body camera footage prior to providing a statement about the incident. As noted above, in this case, involved officers likely reviewed video of the event prior to writing their

reports. This policy goes against best investigative practices and denies the Department any ability to gather a “pure statement” from the involved officers. Providing the officers an opportunity to review the video evidence may contaminate their recall with information that they may not have even been privy to during the event. As noted in the DPD policy itself, recordings:

especially video, have limitations, and may depict events differently than as honestly recalled by the involved officers. Specifically, it is understood that recording devices may capture information that may not have been heard or observed by the involved officers, and that officers may see and hear things not captured by recording devices.

However, cognizant of these principles of recall, the policy declines to obtain an initial statement from the officer and allows her/his recollection to be clouded and impacted by external evidence that the officer may not even have observed. Under this practice, it becomes impossible for the reviewer to know what the officer observed prior to being potentially influenced by outside evidence. For that reason, progressive police agencies’ provide for evidence collection of an officer’s pure statement and then allow the officer to observe the video to see whether it refreshes or assists in recollection. Under that protocol, the officer’s actual observations are not consciously or unconsciously influenced by exposure to external evidence.

The current policy places restrictions on using body-worn camera footage for training purposes if the involved officer objects to its usage. Such veto power for an officer severely limits the use of body camera footage for critical training purposes. Certainly, the use of body camera footage should not be used to “ridicule” the officer, but we would expect that the Department’s trainers would present any video footage in a way to constructively critique actions with an eye toward improvement. Surrendering this important training tool that other agencies routinely use effectively is a significant defect in DPD’s current policy.

Recommendation Seven: DPD should revise its body-worn camera policy as follows:

- ***Expressly informing plain clothes officers of the need to outfit and activate a body-worn camera in the event a decision is made to take enforcement action;***
- ***In critical incidents, uses of force, and complaints, officers should be required to provide a “pure statement” prior to reviewing body-worn camera or other video footage.***
- ***DPD should have full discretion to use body camera footage for training purposes.***

Need to document officer responses to critical incidents. DPD soon learned that the Picnic Day use of force was a significant incident. However, not all officers who responded to the scene or who were tasked with matters relating to the incident documented their observations and activities. In a significant incident, it is critical that such documentation be obtained from all responding officers.

To its credit, DPD Policy 2.44-C notes that it is the policy of the Davis Police Department to investigate crimes thoroughly and with due diligence. However, the policy itself is not specific to critical incidents and has no express requirement that all responding officers to a critical incident document their observations and actions. Because critical incidents are so potentially sensitive, we recommend that a specific policy provision be devised that instructs all officers who respond to a critical incident to document their observations and actions.

Recommendation Eight: DPD should develop written protocols requiring all responding officers to a critical incident to fully document their observations and activities.

Providing further guidance by devising foot pursuit policy. One of the most dangerous activities that an officer can engage in is a foot pursuit. When an officer chases a person suspected of criminal activity, the dynamic event can place the officer at a tactical disadvantage and increase her/his threat level, resulting in a decision to use deadly force if the pursued subject takes any action or turn suggesting the production of a firearm. As noted above, having plain clothes officers engage in foot pursuits is particularly discouraged since they often do not have identifying characteristics or tools that uniformed officers possess on their duty belt.

DPD does not have a foot pursuit policy that provides guidance to its officers. We recommend that the Department consider devising one. At a minimum, we suggest that the policy guide officers as follows:

- Discouraging plain clothes officers from going into foot pursuit except in the most exigent of circumstances;
- Not engaging in a foot pursuit of armed or believed-to-be armed suspects;
- Requiring officers to radio location and description of suspect immediately if going in foot pursuit and to discontinue pursuit if radio contact is lost;
- Instructing officers to discontinue pursuit if they lose sight of the suspect;
- Prohibiting officers from partner splitting;
- Prohibiting officers from scaling fences or entering residences during foot pursuit.

Recommendation Nine: DPD should devise a foot pursuit policy consistent with tenets of officer safety.

Brothers working same assignment. Two of the three involved officers in this incident were brothers. While there may be advantages to brothers working together, they are outweighed by potential disadvantages as a result of the familial relationship. While partners may develop bonds as a result of the working relationship, bonds that are already formed as a result of being in the same family may impact the ability of each to function dispassionately or to recognize the need to place loyalty to the Constitutional policing over loyalty to each other. Additionally, they may be subject to attempts at testimonial impeachment based on the familial ties.

Recommendation Ten: DPD should develop internal guidelines discouraging family members from working in the same special assignment or from being partners.

XI. Conclusion

Critical incidents go hand in hand with the difficult job of law enforcement. Even in the best and most progressive agencies, there will be episodes in which unfortunate outcomes and/or performance lapses generate controversy and public concern. And while the scrutiny can be uncomfortable, most people recognize the challenges of modern policing and respect the work that officers do. Accordingly, they do not expect perfection. What they do expect, though, is that the high-profile incidents that do arise are addressed with a proper regard for accountability, transparency, and public outreach.

Here, a case that began with questionable decision-making and some level of public backlash became saddled with additional problems that compounded initial concerns. Fortunately, events like this can be an opportunity as well as a burden. The lessons here – both in terms of substantive performance and subsequent communication, investigation, and remediation – provide opportunities for the Department to adjust and evolve in positive ways.

List of Recommendations

Recommendation One: DPD should refrain from releasing information in defense of officers' actions until the information has been verified and vetted.

Recommendation Two: When it is learned that the performance of officers in a critical incident was not consistent with Departmental expectations, DPD should acknowledge this, and should correct any inaccurate information it has previously shared.

Recommendation Three: When a DPD matter is forwarded to an outside investigator for an independent investigation, the City of Davis should ensure that the independent police auditor:

- ***Work with the investigator to determine the appropriate scope of the investigation;***
- ***Review the investigation at its completion and have the ability to request the investigator to provide further clarity or conduct additional investigation prior to the case being sent to the Chief for disposition.***

Recommendation Four: The reforms in DPD's media release procedures should be reduced to written policy, publicly disseminated, and placed on the Department's website.

Recommendation Five: DPD should formally retract the initial press release relating to the Picnic Day incident and apologize to its public for the inaccuracies contained therein.

Recommendation Six: With the input of its community, DPD should develop a consistent video release policy for significant incidents.

Recommendation Seven: DPD should revise its body-worn camera policy as follows:

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- ***DPD should have full discretion to use body camera footage for training purposes.***

Recommendation Eight: DPD should develop written protocols requiring all responding officers to a critical incident to fully document their observations and activities.

Recommendation Nine: DPD should devise a foot pursuit policy consistent with tenets of officer safety.

Recommendation Ten: DPD should develop internal guidelines discouraging family members from working in the same special assignment or from being partners.