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MEMORANDUM

TO: Alder Workgroup to Develop Logistics of MPD Oversight

FROM: Michael Haas, City Attorney
Marci Paulson, Assistant City Attorney
John Strange, Assistant City Attorney

DATE: July 8, 2020

RE: Independent Police Monitor/Civilian Oversight Body Discussion Topics

As we have focused more specifically on the ordinances related to the Independent Police Monitor and the Civilian Oversight Body, we have identified several practical questions for the Workgroup's consideration which are outlined below. Some of these issues have legal implications and some are primarily policy or practical questions. After discussing these issues with Alder Moreland, she asked that they be passed along to the full Workgroup. The Workgroup does not need to address all of the issues immediately and possibly decisions on some of them can even be postponed until after the ordinances are enacted and the City is further along in its implementation process. But some of the identified issues are fairly central to the structure and responsibilities of the Monitor position and the Oversight Body, and should either be addressed during the Workgroup's process or flagged for future consideration. This will help to ensure that there are clear parameters and that stakeholders share common expectations regarding the authority, responsibilities and operations of the new entities.

1. Independence of Police Monitor: The Workgroup has had initial discussions regarding the intent of the Ad Hoc Committee in proposing an independent Monitor position in relation to who should supervise the individual. While the Ad Hoc Committee emphasized the importance of maintaining independence for the Monitor and the Body, in creating this independence the Workgroup and Council will need to consider practical and policy issues related to accountability and process. The Monitor presumably will be a full-time managerial City position subject to a 5-year contract, similar to other comparable positions. This would ensure there is not a lack of any checks and balances on the Monitor's authority which includes a substantial amount of discretion related to initiating investigations, possibly issuing

subpoenas, making recommendations related to discipline, as well as the areas of research and data analysis that are pursued. In addition, it may be useful to consider that in the long term, the recommendations of the Ad Hoc Committee will either be implemented or not implemented and the focus of the Monitor's priorities and efforts may shift depending on evolving practices and developments in policing.

To date the options that have been mentioned include direct supervision by the Mayor, the Civilian Oversight Body, or some other panel or combination of City officials. As was briefly discussed at the Workgroup's last meeting, a full time City position requires consideration of routine personnel activities such as creation of an office Work Plan, as well as evaluation of performance and effectiveness, and a determination or recommendation regarding whether or not the Monitor's appointment is to be renewed. Some considerations for the Workgroup may include that 1) most equivalent positions are supervised by the Mayor, 2) alternatively, the concept of empowering civilian oversight might favor supervision by the Oversight Body, and 3) a completely unique model may allow a role for various stakeholders representing the executive branch, the Common Council and residents. In addition, there is the option of creating a hiring decision maker or recommendation panel that is separate from the supervising authority.

2. Investigation Authority: Is the Monitor expected to directly conduct investigations or to supervise investigations conducted by selected investigators? Conducting investigations requires a specific skill set, particularly if it involves the exercise of subpoena power and obtaining sworn statements, and those skills and experience are different from that required for data analysis, review of policies, community engagement, research and creating reports. Also, investigations are often time-sensitive and labor-intensive. It may be worthwhile to give some thought to the division of tasks between the Independent Monitor and other staff in the Monitor's office in order to create the greatest opportunity for success and shared expectations across stakeholders.
3. Outside Investigators: If the Monitor relies on outside investigators to complete investigations, should there be restrictions or qualifications imposed on those individuals or should their selection be left solely to the discretion of the Monitor? For instance, should there be a prohibition on the use of investigators with experience working for MPD or other law enforcement agencies? Does the Oversight Body have any role in approving the use of outside investigators or in the selection of an investigator in a specific case? Should the Monitor be required to choose from a list of outside investigators vetted by the Oversight Body or any other City agencies?
4. Investigation Budget: How is the Independent Monitor's budget for investigations determined, whether conducted in-house or by outside investigators? Is it an unlimited sum-sufficient budget or restricted on an annual basis? Would investigations exceeding a specified cost require approval to continue by the Oversight Body, Mayor or Common Council? The need for investigation of police conduct is unpredictable from year to year, from minimal investigations required in a given year to many requests for or cases warranting investigations.

5. Coordination of Investigations: Exactly how would the Independent Monitor interact with MPD Internal Affairs (PSIA) or the Police and Fire Commission (PFC) when conducting its own investigation or monitoring an investigation by those entities? What procedural safeguards are required to ensure that the integrity of each entity's investigation is protected?
6. Fee Shifting to Prosecute Complaints: The Ad Hoc Committee's recommendations suggest that the Monitor should assist citizen complainants in obtaining legal counsel and that the City should pay for legal fees required to process a complaint before the PFC. In considering this proposal, the Workgroup should be aware that MGO Chapter 5 already provides for a fee shifting mechanism for complaints filed by citizens and processed by the PFC. MGO § 5.15(2)(c) states:

Private Persons Bringing Charges. If a private person brings charges before the PFC and the complaint is successful, the City will reimburse the reasonable legal fees and costs incurred by the private individual. A complaint is successful if the charges are sustained or discipline is imposed. If the PFC found some violation of a legal standard (such as a code of conduct) by the City employee or official but does not sustain the charge or impose discipline, the Council may make a reasonable adjustment in the reimbursement for such findings. Similarly, if the complaint is successful on some claims and not on others, the Council may make a reasonable adjustment in the fees and costs to be reimbursed.

This fee shifting provision applies only to PFC actions and does not apply to an attorney pursuing a lawsuit against the City. If the intent is for the City to pay for legal counsel of any complainant before the PFC, this ordinance will need to be revised. There may also be some legal, liability and ethical considerations related to a City employee such as the Monitor recommending specific attorneys to represent complainants before the PFC, who may also pursue litigation against the City.

7. Police Records: The Police Chief is the custodian of Police Department records. The draft ordinances include provisions related to the Monitor and Oversight Body having access to Department records, including personnel records, and requiring the Monitor and Oversight Body members to keep such records confidential except to the extent necessary to fulfill their responsibilities. The Public Records Law governs access to or withholding of certain governmental records and consideration to those provisions may be required to ensure that the ordinances and procedures related to the Monitor and Oversight Body are consistent with Wisconsin Statutes.

The City Attorney's Office will continue to identify any significant issues to consider to assist the Workgroup and the Common Council in creating the relevant ordinances and other documentation related to oversight of the Police Department. We are available to discuss these issues with the Workgroup or any Alders who have questions.