



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Maryland

July 25, 2018

Mayor Catherine E. Pugh
Baltimore City Hall
100 N. Holliday St., Rm. 250
Baltimore, MD 21202

Dear Mayor Pugh,

The ACLU of Maryland, as a statutory non-voting member of the Civilian Review Board, *Code of Public Local Laws of Baltimore City* (“PLL”) § 16-43(a)(1)(v), is deeply concerned about recent attempts by the City of Baltimore, through the City Solicitor, to limit the CRB’s access to Baltimore police records, as well as to limit the CRB’s ability to operate transparently and to communicate with the public and other interested parties, such as the Department of Justice or the BPD Monitor. None of these changes is required by law, and all are inconsistent with the City’s past practice, as well as with public demands for greater transparency, accountability, and civilian oversight of the BPD, including in the recent report by the Civilian Oversight Task Force, <https://consentdecreebaltimorecity.gov/sites/default/files/BPD%20-%20COTF%20Report%20063018.pdf>, which you appointed. All of these concerns also reflect a larger concern about the independence of the CRB as an oversight body.

Our detailed concerns are as follows.

Limiting CRB access to information

Our understanding is that the CRB has been told that they cannot subpoena records from the BPD (including records that the BPD is statutorily required to turn over to the CRB within specified deadlines), but must instead request them under the Maryland Public Information Act, like any other member of the public. This flies in the face of the CRB’s statutory authority to subpoena records, *PLL* § 16-46(b)(1)(ii) (authorizing the Board to subpoena “the production of any book, record, or other document”), and of the CRB’s statutory entitlement to the BPD records, *PLL* § 16-45(a) (requiring the BPD to “submit its Internal Investigative Division Report relating to the incident alleged to the Board within 90 days from the date of the complaint”). Moreover, this position is directly contrary to the position the City itself took in *FOP v. BPD*, City Mot. to Dismiss, No. 24-C-16-001479 (Balt. City Cir. Ct., July 12, 2016), when the FOP sued the BPD, the City, and the CRB seeking to prohibit the BPD from sharing internal investigative reports with the CRB, and it is contrary to the Circuit Court’s decision in that case. As the City’s own brief stated, and as the Circuit Court agreed, the CRB statute is a separate source of law that “displaces the MPIA’s default rule of confidentiality [of personnel records] by requiring the BPD to provide the CRB with IAD casebooks.” *Id.* at 12-13. In short, the MPIA does not limit the CRB’s access to BPD records, and a requirement that the Board proceed under the MPIA is contrary to law.

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MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 410
TAKOMA PARK, MD 20912
T/301-270-2258

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
COLEMAN BAZELON
PRESIDENT

DANA VICKERS SHELLEY
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

Our understanding is also that the City Solicitor has told the CRB that they cannot get access to BPD Internal Affairs records other than the casebook for the complaint under investigation, even if the records are relevant to either the CRB's investigation (such as records of past complaint investigations as to help evaluate the officer's credibility) or to its recommendations regarding discipline (which requires knowing an officer's disciplinary history). This again ignores the CRB's state statutory authority to subpoena records, which is, as the City argued in the FOP case, a separate source of law authorizing the CRB's access to BPD records. Gen Prov. § 4-304 ("unless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this part."). In this regard, the CRB's authority is no different than that of any court in Maryland, all of which routinely allow subpoenas for IAD records in appropriate circumstances.

Limiting the CRB's ability to communicate

Our understanding is that the CRB has been told that all communications from the Board to DOJ must come through the City Solicitor's office. It is not clear on what authority the City claims to be able to censor the communications of CRB members, since the CRB is created by state law. If, as Mayor, you are displeased by the substance of what a CRB member has said to the DOJ (or anyone else), you presumably retain the authority to remove them from the CRB, as the appointing authority, but we are not aware of any authority for the proposition that they can be directed to clear their communications with the City Solicitor. This requirement also seems to violate the spirit, if not the letter, of the Consent Decree signed by the City with the Department of Justice, which requires the City to "ensure" that both the DOJ and the Monitor have "timely, full and direct access to all BPD staff [and] employees" Consent Decree ¶ 484. While CRB members are not BPD employees, they are clearly engaged in reviewing the behavior of BPD officers, and we can conceive of no legitimate reason why their communications with the DOJ (or the Monitor, or anyone else) should be restricted.

The City, through the City Solicitor, has also demanded that CRB members sign a confidentiality agreement, which includes the following provisions that are a significant overreach:

The agreement states in ¶ 1, "[a]ll information disclosed to the [Office of Civil Rights and Wage Enforcement], the Board and its members and OCWRWE employees, contractors or volunteers by or on behalf of the BPD, or to which the OCRWE or Board obtains access shall be deemed to be Confidential Information. Confidential Information includes information whether disclosed in writing, electronically, orally or visually."

This asserts that all information disclosed to the CRB is confidential, and thus cannot be discussed in public, which is simply ridiculous, given that Maryland law demands that the CRB conduct its meetings in public. While some information in an investigative file may be confidential, not all is (much of it, like incident reports, Body Worn Camera footage, etc., is routinely disclosed). And as long as names or other identifying information are not disclosed in a public discussion, none of the information is confidential. See, e.g., *Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 430 Md. 179 (2013) (holding that records of police investigations into racial profiling complaints are not personnel records prohibited from disclosure when information identifying a particular subject officer has been redacted from them); *Prince George's County v. Washington Post Co.*, 149 Md. App. 289, 327-332 (2003) (records of human relations commission investigations of allegations of police misconduct are not personnel records because they "were produced by an agency with no supervisory authority over the individual. Instead, HRC is an entity that, after a public hearing, provides 'its comments and recommendations to the Chief of Police and to the Citizen Complaint Oversight Panel.'").

The agreement also states that Board members

shall not disclose the Board's findings and recommendations to any third party, including any other individual person or entity. The Board shall only disclose its findings and recommendations in accordance with the [Public Local Law] only to the head of the appropriate law enforcement unit. After final action on a complaint, the Board may inform the complainant of the conclusion of its investigation and its recommendations and findings to the extent permitted under state and federal law.

This provision is self-contradictory and unclear. It would seem to prevent the Board from discussing anything regarding a case in public, including its reasoning for why it is making a particular determination and the discipline it deems appropriate, and would thus make the Board's public meetings a pointless charade (indeed, the dearth of detail in the Board's current public discussions is already troubling). The provision also seems to suggest that the Board cannot inform a complainant about its recommendations and findings until the Commissioner has taken final action on a complaint. No law requires this, and it makes no sense. The CRB's findings and recommendations are completely independent of the Commissioner's actions (and, indeed, the Commissioner may choose to take no action on a complaint filed initially with the CRB).

Absolutely nothing requires that the Board operate in secret, as long as the personnel records of an identified officer are not disclosed. And, indeed, the Court of Special Appeals has made clear that the records of an investigative body that has no disciplinary authority over an officer (like the CRB) are NOT personnel records, and are subject to disclosure under the MPIA. *Prince George's County v. Washington Post Co.*, 149 Md. App. at 327-332. The Board is thus free to publicly disseminate its conclusions and reasoning. And it is worth noting that in doing so, it has been and would be acting in accordance with the BPD's own past practice of making public the external reviews of several controversial police killings, such as the Select Lounge shooting, <https://www.policefoundation.org/wp-content/uploads/2015/05/Baltimore-after-action-report.pdf>, the death of Tyrone West, <https://www.scribd.com/document/236257430/Baltimore-Police-independent-report-into-Tyrone-West-death>, and other external reviews. In essence, the CRB is a permanent external review board, and, unlike an *ad hoc* board, is statutorily required to investigate, and monitor the BPD's own investigations of, allegations of police misconduct, and make independent recommendations resulting from those reviews. It can, and should, do so in public, with full transparency and accountability.

At the Board's last meeting, on July 19, 2018, the City Solicitor suggested that the Board could not inform complainants of the outcome of the CRB's investigations due to the collective bargaining agreement ("CBA") between the BPD and the FOP. This is incorrect. As noted in the Campaign for Justice, Safety, and Jobs' July 20, 2016 letter to Mayor Stephanie Rawlings Blake concerning the CBA, https://www.aclu-md.org/sites/default/files/cjsj_letter_re_baltimore_fop.pdf, Art. 16K, p.23 of that document limits who can receive notice of BPD disciplinary action. And as further noted in that letter, that provision is inconsistent with changes the General Assembly enacted in 2016, amending Md. Code, Pub. Safety § 3-207(F)(2)(ii) to give complainants a statutory entitlement to learn the outcome of the police internal investigations regarding their complaints. The CBA provision to the contrary is thus void and of no effect, because the City cannot bargain away this statutory right, any more than it could bargain away any other statutory (or constitutional) right held by the public. To the extent the BPD is not currently informing complainants of the outcome of BPD internal investigations (as the City Solicitor indicated during the July 19 CRB meeting), we urge that it immediately begin doing so. Nothing in the CBA (or any other law) prohibits the CRB from informing complainants about the outcome of the CRB's investigation.

Broader Concerns About CRB Independence

As noted at the outset, the City's actions to limit the CRB's investigative powers, communications, and transparency run directly counter to the City's publicly and repeatedly-stated commitments to transparency and accountability. Moreover, the overwhelming public consensus in Baltimore is that we need more police accountability, more independent civilian oversight, and more transparency, not less. And, indeed, that overwhelming consensus is reflected in the recommendations of the Civilian Oversight Task Force. The City's actions seeking to restrict the CRB fly in the face of those recommendations, and are a further demonstration of why the COTF's call for a more independent and fully resourced civilian oversight is so important.

At the July 19 CRB meeting, the City Solicitor indicated that the demand that the CRB (and its staff) sign a new confidentiality agreement was prompted by the fact that the letter to the complainant documenting the CRB's findings regarding the shooting of Keith Davis improperly included the names of officers. But the names of the officers who shot Mr. Davis were already a matter of public record, having been (properly) made public by BPD itself. <http://www.wbalv.com/article/officers-identified-in-police-involved-shooting/7094108>. The disclosure of the officers' names was thus not a violation of even the overbroad confidentiality agreement that the City is demanding that the CRB sign ("[t]he term Confidential Information shall not include information which (i) is or becomes part of the public domain through no act or omission of the OCRWE or Board"). This suggests that current effort to curtail the Board's ability to operate transparently is, rather, a result of disagreement with the conclusions reached in that case. The City Solicitor, and BPD (and anyone else), are, of course, free to disagree with the Board's conclusions in that case, but the City is not free to limit Board's statutory authority, nor should it prevent it from operating transparently. We note that the CRB staff has also been required to sign the same confidentiality agreement that the Board appropriately refused to sign on July 19. Just as the agreement needs to be revised before the CRB should be asked again to sign it, the agreement should be revised for staff as well, for all of the same reasons.

We are also concerned that the staff of the CRB is being held to confidentiality standards that are not applied to any other City employees. Therefore, please also consider this letter a request pursuant to the Maryland Public Information Act for blank copies of all confidentiality agreements in use by City agencies, with an indication of the job titles of the persons who are required to sign them.

Further, the City Solicitor's actions regarding the CRB raise significant questions about that office's ability to serve as counsel to both the CRB and the BPD. At the most general level, as the CRB itself clearly articulated on July 19, the City Solicitor's demands are inconsistent with the CRB's statutory mission to be an independent review body concerning officers' actions and the BPD's investigations of allegations of misconduct. And contrary to the assertions of the proposed confidentiality agreement, the CRB is not a City agency like any other. It is a creation of state law (like the BPD itself), staffed by City employees.

And more particularly, given the apparent dispute over the obligation of the BPD to obey the straightforward statutory command to turn over records to the CRB, the City Solicitor has a clear and irreconcilable conflict of interest at least with respect to CRB subpoenas for BPD records. The City Solicitor cannot represent both the CRB in seeking to enforce its subpoenas in court, *PLL* § 16-46(b)(2), and the BPD as recipient of those subpoenas. In addition, given the City Solicitor's demand that the CRB sign a confidentiality agreement that is improper in multiple respects, the CRB also needs independent counsel regarding the propriety of the confidentiality

agreement. We therefore urge appointment of independent counsel pursuant to Baltimore City Charter, Art. VII, § 24(c). Doing so would be an important first step towards enhancing the independence of the CRB, consistent with the reforms recommended by the COTF.

In short, we urge you to reconsider the decision to make the CRB a part of the Department of Law, reporting to the City Solicitor, urge you to reconsider (and at a minimum revise) the confidentiality agreement being demanded of the CRB (and already required of the CRB's staff), and urge you to authorize the appointment of independent counsel for the CRB. We look forward to your positive response, and are happy to discuss our concerns in greater detail.

Sincerely,



Dana Vickers Shelley
Executive Director



David Rocah
Senior Staff Attorney

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cc: Andre M. Davis, Esq.
Bernard C. "Jack" Young
Dr. Bridal Pearson
Ray C. Kelly