Seattle Office of Inspector General

Date: Oct. 26, 2018

To: Councilmember M. Lorena González, Chair, Gender Equity, Safe Communities, New Americans, and Education Committee
From: Lisa Judge, Inspector General for Public Safety
Re: Response to memo dated October 22, 2018

I appreciate the opportunity to discuss potential impacts of the tentative agreement (TA) between the Seattle Police Officers Guild (SPOG) and the City on the operations of the Office of Inspector General for Public Safety (OIG). At the outset, it is of paramount importance that I stress the objective, independent mission of OIG and the corresponding need, to the extent possible, to maintain a neutral posture with all partners in the accountability structure. That said, I respect the need of the City to take into account community interests in continued reform, respective negotiation efforts, and need for the City and Guild to reach an agreement.

I recognize that the right and obligation to engage in labor negotiation for the City is the purview of the Executive, subject to ratification by the Legislative body. The role of OIG extends only to engaging in consultation as a subject matter expert at the request of, and with consent of, the parties. OIG was consulted regarding this TA in a limited capacity concerning several specific provisions related to OIG authority and operation. OIG was not involved in any direct negotiations between the parties. To the extent OIG might have an ability to remedy any of the areas of concern with the TA, if adopted, it is within OIG authority to audit the systems established by the terms of the TA, and to push course correction through audit, analysis, and recommendations.

As your memo states, OIG was created **"to help ensure the fairness and integrity of the police system as a whole in its delivery of law enforcement services by providing civilian auditing of the management, practices, and policies of SPD and OPA and oversee ongoing fidelity to organizational reforms implemented pursuant to the goals of the 2012 federal Consent Decree."** This language makes clear not only what the mandate is for OIG, but also the manner in which OIG has authority to operate. Accordingly, this memo details the impact of the proposed TA on the ability of OIG to effectively audit and review SPD and OPA, and to oversee ongoing fidelity to the reforms implemented by the consent decree.

The following is neither an endorsement nor criticism of the results of the bargaining efforts that have thus far resulted in a contract approved by SPOG, pending consideration by the Seattle City Council. It is, rather, an analysis of the impact of the proposed contract on OIG

operations, as well as the OIG mission to further the stated purposes and goals of the accountability ordinance. The TA legitimizes OIG authority within the labor structure, and solidifies the ability to function effectively, since the terms of the TA acknowledge OIG authority and unfettered access to SPD and OPA operations, as contemplated by the accountability ordinance.

Main areas of TA impact on OIG operation

1. **Access to information from SPD**

OIG is the singular civilian oversight entity charged with auditing the management, practices, and policies of the Seattle Police Department (SPD) and Office of Police Accountability (OPA). Implicit in the duty to oversee ongoing fidelity to the consent decree is the vital need for full and complete information access. OIG access to SPD and OPA information is critical for effective monitoring and meaningful contribution to ongoing reform efforts.

OIG responsibilities involve auditing SPD and OPA systems and reviewing SPD incident response, including authority for on-scene access by OIG. As part of these duties, OIG also reviews OPA classifications and certifies OPA investigations as thorough, timely, and objective (3.29.260).

The TA formally acknowledges and guarantees "full and unfettered access to the operations of the department." Insofar as "operations" is construed broadly, this particular provision fully realizes and acknowledges the authority of the Inspector General (IG) to daylight the operations of SPD, with an eye toward ensuring that the department remains on the path of innovative reform. Conversely, a narrower definition of "operations" has the potential to constrain access to information needed for meaningful audit or review.

There are two additional areas for discussion regarding information access. One notable concern is the TA's potential restriction on IG participation in Force Review Board (Firearms Review Board) meetings to that of an observer (App. G). A purely observational role that does not allow robust participation of the IG significantly limits the ability of OIG to effectively review serious incidents.

The other area of potential impact is the TA restriction on subpoena power (App. E.12). While generally, the restriction on subpoena power is more likely to affect OPA and OIG in the context of obtaining information related to a misconduct investigation (such as employee bank records), subpoena power as envisioned in the ordinance was intentionally broad. So long as SPD remains a willing partner, the absence of subpoena power may not be felt as an actual negative impact, but planning for the future and the possibility of a less willing law enforcement

partner is prudent. In the event SPD ceases to be collaborative and declines to provide information upon request by the IG, a subpoena might be the only alternative recourse to obtain critical information, or to achieve code or contractual compliance.

2. **Ability to perform misconduct investigations involving OPA personnel**

a. The 180-day calculation – The TA allows for the time limitation "clock" to start due to actions outside the control and knowledge of OPA. It is a question for OPA as to whether there are adequate mechanisms in place to allow OPA to receive timely notice when such outside actions trigger the clock. In the event OIG undertakes an OPA conflict investigation, the same potential issue with the time calculation would apply to OIG. In addition, OIG has authority to request or direct further investigation (3.29.260.D). In those cases, OPA must resubmit the case to OIG for certification before the OPA Director may issue proposed findings. Any impacts of the TA on the 180-day investigation time limit will affect OIG ability to respond to OPA, as well as the amount of time left for OPA to issue findings.

b. Civilian vs. sworn investigators – The TA allows for two civilian investigators in OPA (App. D & 7.10), but App. D states that any case that reasonably could lead to termination "will have a sworn investigator assigned to the case." This appears to relegate civilian investigators to only investigations of less serious allegations. This would potentially directly conflict with the obligation of OIG to investigate serious misconduct allegations in those situations where OPA is conflicted out.

3. **Burden of Proof**

The accountability ordinance provides that the same evidentiary standard be applied uniformly to all cases. It states, "Termination is the presumed discipline for a finding of material dishonesty based on the same evidentiary standard used for any other allegation of misconduct" (3.29.135.F).

The TA on its face reduces the burden of proof for a departmental finding of dishonesty, as it strikes the existing CBA requirement that the department prove dishonesty by clear and convincing evidence (3.1). It also calls for a standard of review and burden of proof that is consistent with established principles of labor arbitration, including "an elevated standard of review (i.e. - more than preponderance of the evidence) for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment." For purposes of this analysis, stigmatizing cases are presumed to include, but not be limited to, cases involving dishonesty.

The practical consequence of the TA language is that OIG, in conducting a misconduct investigation, would likely seek to apply a standard that is greater than a preponderance of the evidence in order to be consistent with the standard that would be applied upon review. It is unclear whether termination might be de facto stigmatizing and therefore require all cases to be held to a greater standard of review.

Whether the TA language will result in fewer sustained findings compared to current OPA practice is unknown, given the subjective nature of what constitutes a preponderance of the evidence versus "more than a preponderance." Further, when applying a "more than preponderance" standard, it is unclear how OPA, OIG, and arbitrators would each define this standard and how consistency across entities and between individual arbitrators could be achieved.

Other TA Impacts on OIG

1. **Retaliation claims** – The accountability ordinance authorizes OIG to open an investigation into matters involving retaliation against employees of OPA, OIG, CPC, or others who provide information to these entities, and to refer a complaint to the appropriate authority (3.29.480). The TA, however, places the obligation and authority on SPD to receive and handle Equal Employment Opportunity investigations (3.13). Of note, a February 2005 MOU requires that complaints be investigated by a sworn member of SPD.

2. **Changes in findings or discipline –** The accountability ordinance requires that the OIG be copied on changes in findings or discipline (3.29.125). The failure to include this provision will require OIG to proactively seek such information and will impede the timely receipt of information by OIG.

3. **MOUs incorporated by reference** – The TA Appendix F incorporates various other agreements by reference that have potential impacts on OIG operations. Should any of the MOUs become an impediment to "full and unfettered access to the operations of the department," OIG will keep track of such occurrences for purposes of

providing 2020 collective bargaining agenda input.[1]

4. **Unfair Labor Practice complaints** – The TA provides for dismissal of current unfair labor practice complaints (ULP) lodged against the City (App. G). Two areas that have the potential to be contentious are OIG presence at Force Review Board and at Force Investigation Team activities. Both activities have OIG duties established by the accountability ordinance (3.29.240.G), but as OIG authority has yet to be recognized in the labor scheme, each instance of such oversight activity creates the potential for a ULP complaint.

5. **Unsustained findings records retention** – The ability of OIG to retain unsustained records for analysis is helpful, but if the requirement that names not be kept is interpreted as prohibiting the retention of identifying information, then that limitation would hamper OIG ability to look at trends involving individual officer behavior over time.

Conclusion

On balance, the Inspector General is empowered to perform accountability duties under the terms of the TA, with potential limitations as highlighted above. OIG will have a role moving forward as the objective check on the system, to review, audit, and evaluate the systems as they play out under the TA and accountability ordinance. OIG can use that information to help the City's oversight partners advance recommendations that improve the system and serve as guidance for what is needed to sustain public confidence.

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[1] Examples of MOU areas that could benefit from clarification with respect to OIG include the following:

- August 2008 holding cell video MOU – does not contemplate uses besides performance review or investigations, which could affect OIG access
- August 2008 Automated Vehicle Locator system MOU – directs that data will be maintained and audited by the Communications and/or IT Section, which does not recognize the auditing function of OIG
- Oct. 2012 In Car Video settlement agreement – enumerates the only reasons for which department review of ICV will be conducted, which does not include audit or review purposes by OIG
- Jan. 2013 Monitor FRB attendance MOU – identifies conditions for Monitoring team FRB attendance, including a restriction on asking questions and who can attend. The TA includes OIG attendance.
- Feb. 2013 due process hearing MOU – restricts who can attend due process hearing

cc: Council President Bruce Harrell (District 2)
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Councilmember Kshama Sawant (District 3)
Councilmember Rob Johnson (District 4)
Councilmember Debora Juarez (District 5)
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