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## MEMORANDUM

To: Highland Park Mayor's Equity Advisory Council

From: Lucille E. Davy, Esq.   
Office of the Borough Attorney

Date: January 12, 2021

Re: **Mayor's Equity Advisory Council Inquiries**

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In accordance with the request made for advice regarding the Mayor's Equity Council, this memorandum provides answers to the questions presented and updates regarding (1) recently released policies from the Attorney General on the use of force, (2) revisions to Attorney General directives governing police internal affairs, (3) status of the case involving the release of police disciplinary information, and (4) recent N.J. Supreme Court case involving civilian review boards.

### ***Questions Raised by the Mayor's Equity Advisory Council***

> What are the limitations to the Mayor's Equity Advisory Council in terms of access to HP Police Dept data?

The Equity Advisory Council can have access to any information that is publicly available. Records related to police use of force, tickets issued, or traffic stops would be public information (subject to redaction of personal identifying information of the individuals who received the tickets or were stopped by the police) and could be requested by the Equity Council.

> Can the Borough Council assign to the Mayor's Equity Advisory Council license to access sensitive or confidential information from the HP PD?

The Borough Council cannot assign access to confidential information regarding members of the Highland Park PD to the Equity Council. Generally, personnel records are confidential and not accessible.

> Can the Advisory Council receive information on specific incidents handled by the HP PD, with identifying information on people involved deleted?

Yes, as indicated above, the Advisory Council can obtain public records related to police use of force, tickets issued, or traffic stops, subject to redaction of personal identifying information.

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> Can the Advisory Council establish an additional avenue to receive citizen's concerns about the HP PD?

If authorized by ordinance of the Borough Council, the Advisory Council could establish a means by which citizens could submit complaints alleging police misconduct or other concerns. The Council's ability to act on those concerns would be limited to what is currently authorized by state law. (See discussion below of Newark case, recently decided by the New Jersey Supreme Court.)

## ***New Jersey Attorney General's Use of Force Policy – issued December 2020***

Based on seven core principles, the new Attorney General's Use of Force (UOF) policy is part of the Attorney General's "Excellence in Policing Initiative," a broader strategy to enhance police accountability, transparency, and professionalism to strengthen the trust between law enforcement officers and the communities they serve.

The new UOF policy sets standards that go beyond the minimum constitutional requirements previously set forth by the United States Supreme Court in *Graham v. Conner*, a 1989 case that interpreted the Fourth Amendment of the U.S. Constitution to require an officer's use of force be "objectively reasonable." Ensuring that officers "preserve the sanctity of life and the dignity, rights and liberties of the public at every turn," the new UOF policy requires officers, whenever feasible, to use "critical decision-making and de-escalation techniques to reduce the amount of force used or avoid it altogether." The policy further provides that "force is only authorized when necessary as a last resort and requires that the amount of force used always be reasonable and proportional to further a lawful law enforcement objective." It also established a duty for all officers "to intervene to prevent or stop improper uses of force" and to provide medical assistance after any use of force, where appropriate.

Recognizing that officers face dynamic, quickly evolving and potentially dangerous situations that require split-second decisions, officers who act in good faith consistent with the UOF policy will be "strongly supported in any subsequent review of their conduct regarding their use of force," while those who do not may face disciplinary action (including termination) and possible criminal consequences. To comply with the UOF policy, *every use of force must be reported on the AG's Use of Force portal within 24 hours*. The local police chief must annually review overall use of force by officers in the department to ensure compliance with the UOF policy.

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The Attorney General made clear that the policy is not intended “to create any substantive right that may be enforced by any third party.” It supersedes all prior UOF policies and is effective beginning December 31, 2021 to allow for training of all officers before that date. Two addenda were released simultaneously with the UOF policy: one addressing conducted energy devices and other authorized less-lethal devices and ammunition which are to be used only when other reasonable means to gain compliance are not effective; and the other focusing on vehicle pursuit that balances the protection of the lives and safety of the public and police officers, and law enforcement’s duty to enforce the law and apprehend violators.

## ***Status of Case requiring public release of police disciplinary information***

The Attorney General released Directive 2020-5 in June 2020, which requires law enforcement agencies to publish a synopsis of all complaints in which an officer received final disciplinary action of termination, demotion, or suspension of more than five days, beginning with the year 2020, and each year thereafter. Initial reports were due on December 31, 2020, but the Directive was challenged in court and although an appellate court upheld the AG’s authority to issue such an order, implementation was stayed to allow an appeal to the N.J. Supreme Court. The Supreme Court agreed to hear the appeal and, in the interim, the Attorney General has agreed that no reports or records will be published or released until the Supreme Court decides the case on its merits. Briefs were filed in mid-December, but a hearing date has been set yet.

## ***Revised Internal Affairs Policy Directive from the Attorney General – August 2019***

Municipal police departments are required to establish internal affairs policies pursuant to N.J.S.A. 40A:14-181. In 2019, the Attorney General released Directive 2019-5, which addresses new internal affairs requirements. On an annual basis, every law enforcement agency shall publish on the website a report summarizing the types of complaints received by the department and the disposition of those complaints. Most internal affairs investigations are kept confidential for various reasons, including impairing the integrity of the police department’s investigation unit, creating legal issues and potential liability for the municipality, and increasing the risk of litigation as a result of the investigation. Police departments are expected to share internal affairs investigations with other police departments when officers are seeking positions in another community but again, that information is required to be kept confidential.

The Highland Park Police Department has established internal affairs policies and procedures and those could be reviewed by the Equity Council, assuming they are not related to security or safety matters that would not be otherwise be made public.

***City of Newark Case involving creation of Civilian Review Board***

The option of a civilian review board is being used by some municipalities across the country to improve police and community relations and to allow for policy review and recommendations. In 2016, the City of Newark by ordinance created New Jersey's first civilian oversight board with authority to recommend discipline of officers, investigative powers including subpoena, and concurrent jurisdiction with the Newark P.D. to receive in investigate complaints against members of the department. Additionally, at the conclusion of police internal affairs investigations, the board was authorized to review the findings, conclusions and recommendations stemming from the internal investigation, and given authority to recommend procedures for investigating police conduct to city officials.

The Newark Police Union filed suit and the lower court held the ordinance was invalid but allowed the board to continue conducting general police oversight functions and to provide input on the development of a police discipline matrix. In 2019, the Appellate Division reversed in part and affirmed in part the lower court decision, which was then reviewed by the New Jersey Supreme Court in 2020. In Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, A-15-19 (August 2020), the Court ruled as follows:

- (1) State law “permits the creation by ordinance of civilian review board with its overall beneficial oversight purpose.”
- (2) The board can investigate citizen complaints alleging police misconduct which could result in recommendations to the Public Safety Director to pursue discipline of an officer.
- (3) Board can review “overall operations of the police force including the performance of its internal affairs function in its totality or its pattern of conduct” and require the department to provide periodic reports.
- (4) Board cannot exercise its investigatory authority when the internal affairs unit is conducting an investigation (the court noted that process is established in state law and is carefully regulated) because it could interfere with the police chief's statutory responsibility over the internal affairs investigation function.
- (5) Board cannot have subpoena power under existing law.

The Court concluded that the legislature would have to act in order to confer broader investigatory powers on the civilian review board. Not long after the decision was released, two identical bills authorizing the creation of local civilian review boards to review police operations and conduct, were filed in the N.J. State Legislature: S-2963 (on September 24, 2020), which was referred to the Senate Law and Public Safety Committee, and A-4656 (on September 17, 2020), which was referred to the Assembly Community Development and Affairs Committee. Neither bill has been heard in committee yet.

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Some municipalities, such as Maplewood, have taken a slightly different direction by establishing community review boards that are intended to be advisory in nature (hence within the parameters of existing law) and to improve police and the community. This option that could also be utilized by Highland Park.

Ed Schmierer and I will attend the zoom meeting on January 14, 2021 and can respond to additional questions you may have.

cc: Edwin Schmierer, Borough Attorney