

Memorandum

To: Alder Sheri Carter
Michael P. May, City Attorney
From: Heather Allen, Legislative Analyst
Date: March 28, 2017
Re: Civilian Oversight of Police

Overview

You have requested a memorandum summarizing civilian oversight panels, which preside over policing in a number of cities across the United States. In general, civilian oversight panels are established to increase transparency and/or accountability of municipal police departments. Approximately 150 civilian review boards are in operation today and some cities host more than one review board or panel.¹

The first section of this paper will provide a summary of the various types of civilian oversight panels: investigative, review, appeal or independent audit. Case studies of Berkeley, Tucson and Portland are highlighted in this section. Table 1 of this memo provides details on panels on even more cities. The table² details the panels' activities, transparency, subpoena power and staff and budget details. The case studies demonstrate the wide variation among oversight panels. This section of the paper also provides an overview of research regarding civilian oversight panels and explores trends. Appendix I provides a comprehensive list of cities with oversight panels with hyperlinks to those panels' webpages.

¹ Walker, Samuel. *Police Accountability: The Role of Citizen Oversight* (Belmont: Wadsworth, 2001) and the National Association of Civilian Oversight of Law Enforcement.
http://www.nacole.org/police_oversight_by_jurisdiction_usa

² This table is modeled on a similar table from a 2001 National Institute of Justice Report, though it has been modified and updated to reflect current data.

A theme often repeated throughout these case studies and the literature is best summed up by Peter Finn, author of the National Institute of Justice Report: "There are serious limitations to what citizen review can accomplish. To be most effective, citizen oversight must complement other internal and external mechanisms for police accountability."³

The second section of this paper reviews the unique considerations for Wisconsin cities. The section includes a summary of the role of the Police and Fire Commission in Madison and its limited role in oversight, investigation and policy. The City Attorney has also addressed questions related to civilian oversight and independent investigation in a previous memo dated (Jan 14, 2003). The memo is available in Appendix VII (attached). Finally, this part finishes up with a review of the Milwaukee Fire and Police Commission (FPC), which has additional authorities as designated by State Statute.⁴ As a result of this authority the Milwaukee FPC has many of the elements of a robust civilian oversight system.

The final section of this memo offers conclusions and questions to consider. State law places some limitations on the City of Madison's ability to establish civilian oversight or to direct the Madison Police Department (Appendix V). The final section of this paper concludes with a series of questions and other considerations that may prove useful should the city choose to further explore civilian oversight of police. Those questions include:

1. Could an audit of Madison Police Department complaint investigations add transparency and build trust?
2. Could the City of Madison improve outcomes or public perception by hiring an external investigator to conduct investigations of police misconduct?

³ Peter Finn. Citizen Review of Police: Approaches and Implementation. U.S. Department of Justice. National Institute of Justice March 2001. NCJ 184430.

⁴ Wisconsin Statutes sections 62.50 and 62.13 establish police and fire commissions for first and second class cities respectively. As Wisconsin's only first class city, Milwaukee's Fire and Police Commission has the responsibility of conducting an annual policy review and prescribing policies and standards for the department, in addition to the personnel and complaint hearing responsibilities. Second class cities such as Madison are charged only with personnel matters and hearing complaints regarding the police and fire departments. Second class cities may expand their powers by passing a referendum to increase supervision and policy authority over the department. §62.13(6).

3. Would regular reports enhance the transparency and openness of the Police and Fire Commission?
4. Could additional staff support or training for the Madison Police and Fire Commission increase transparency, accessibility or accountability?
5. Could an Early Warning System, established to identify officers likely to generate a citizen complaint, buttress Madison's police oversight?

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Part I: Civilian Oversight Panels

Approximately 150 civilian oversight panels have been established in the United States to increase oversight and accountability for law enforcement agencies. Civilian oversight panels became part of the national conversation in the midst of the civil rights movement in the 1950s and 1960s.⁵ Since then the number and variety of civilian oversight panels have grown. The panels are often established to provide independent regulation to address concerns that “local politicians, courts and police departments generally do not do enough to punish and deter routine acts of police misconduct or to reform problematic police department policies.”⁶

Civilian oversight panels are a tool whose effectiveness is determined by the level of cooperation from law enforcement, the commitment of elected officials and the public, effective and well-resourced staff and leadership, the surrounding regulatory structure and the authority of the panel. Each panel is unique. When structured properly, civilian oversight panels can help to build transparency on police policies, procedures and specific incidents. They may also build trust between the community and police. On the other hand, if they are inadequately staffed or face other barriers, oversight panels may increase conflict between department critics and law enforcement, or come to be seen as providing political coverage for those critics or the department. The challenge in establishing an effective civilian oversight panel is determining the appropriate structure for the community it will serve, and endowing the panel with sufficient resources and authority to succeed.

Why do cities invest in civilian oversight?

To Prevent Costly Lawsuits and Settlements

Civilian oversight may be framed as a cost-benefit analysis. Civilian oversight is intended to reduce the direct costs of police misconduct. In some cases police misconduct can cost a

⁵ Peter Finn. Citizen Review of Police: Approaches and Implementation. U.S. Department of Justice. National Institute of Justice March 2001. NCJ 184430.

⁶ Clarke, Stephen, Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails. Columbia Journal Of Law and Social Problems. Fall, 2009.

city millions of dollars, whether in a settlement with a family regarding a lawsuit⁷ or implementing reforms after being compelled by the federal government. Oakland, California spent more than \$13.6 million⁸ in court monitors, audits and investigations plus millions more in body cameras and other technology to increase police oversight as a result of a settlement with the federal government. But the easily quantifiable dollar amounts do not fully capture the unseen benefits of reducing misconduct and improving trust with the community.

To Promote Trust Between the Police and Community

When the Oakland investment in oversight was criticized by the former Oakland Chief of Police, Samuel E. Walker, author of *Police Accountability* (2001, 2014) said, “It’s offensive to think of this just in terms of the dollar cost, because there’s a human and social cost when people are shot and beaten up by police.”⁹ Moreover, the National League of Cities emphasized that “trust between law enforcement agencies and the people they protect and serve is essential to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.”¹⁰ The costs of police misconduct are very high for city finances.

At the same time the value of trust between law enforcement and neighborhoods has incalculable benefits. Chief Yousry Zakhara President of the International Association of Chiefs of Police said “We know that in order to be truly effective, police agencies cannot

⁷ Treleven, Ed. City Agrees to Pay Paul Heenan’s family \$2.3 million for fatal 2012 shooting. *Wisconsin State Journal*. August 12, 2015. http://host.madison.com/wsj/news/local/crime-and-courts/city-agrees-to-pay-paul-heenan-s-family-million-for/article_cccdb0f8-e7b5-5985-afcb-3fca59d6689b.html

⁸ Swan, Rachel. Oakland Police Misconduct Cases Raise Questions on Oversight. *San Francisco Chronicle*. July 10, 2016 <http://www.sfchronicle.com/bayarea/article/Oakland-police-misconduct-cases-raise-doubts-on-8350857.php>

⁹ Swan, Rachel. Oakland Police Misconduct Cases Raise Questions on Oversight. *San Francisco Chronicle*. July 10, 2016 <http://www.sfchronicle.com/bayarea/article/Oakland-police-misconduct-cases-raise-doubts-on-8350857.php>

¹⁰ National League of Cities. *City Officials Guide to Policing in the 21st Century*. 2016. <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Governance-Civic/NLC%20Community%20Policing%20Guide.pdf>

operate alone; they must have the active support and assistance of citizens and communities...”¹¹

“More and more police officials are realizing that internal investigations are controversial and thankless. An oversight agency decreeing that a shooting or use of force was within acceptable policy guidelines has more credibility than an internal investigation making the same pronouncement.

A negative ruling bolstered by an independent investigation helps to take the sting out of a contentious disciplinary action. Oversight in its many forms provides accountability and transparency for police issues that are otherwise inaccessible to the larger community.”¹²

To Ensure Community Members, Especially African American Residents, Feel Safe Reporting Crimes

A recent study found that there is a chilling effect linking police misconduct and willingness to contact emergency personnel. In 2006, Milwaukee off duty police officers severely beat Frank Jude Jr., to the point where he was “within inches of his life.”¹³ After the incident became public, calls to 911 dropped by 20% over the next year, especially in African-American neighborhoods.¹⁴ According to the authors, “high-profile cases of police violence—disproportionately experienced by black men—may present a serious threat to public safety if they lower citizen crime reporting.” After controlling for crime, call patterns and neighborhood characteristics, they found that 22,000 less calls were placed to 911. During that same period the homicides in Milwaukee spiked. The authors conclude that the

¹¹ International Association of Chiefs of Police. IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Community Trust. January 2015.

http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf

¹² Attard, Barbara. Oversight of Law Enforcement is Beneficial and Needed—Both Inside and Out 30, Pace L. Rev. 1548 (2010) <http://digitalcommons.pace.edu/plr/vol30/iss5/12/>

¹³ Editorial. Jude Verdict: A wall of lies has fallen: Justice was elusive in the case of Frank Jude Jr. Justice was elusive in the case of Frank Jude Jr., but at last on Thursday the beating victim and his family — and the wider community — got some satisfaction. July 27, 2007 <http://archive.jsonline.com/news/opinion/29464804.html>

¹⁴ Deidrich, John, and Luthern, Ashley. 911 calls fell in black Milwaukee neighborhoods after Jude beating, study finds. Milwaukee Journal Sentinel. September 28, 2016. <http://www.jsonline.com/story/news/investigations/2016/09/29/911-calls-fell-black-milwaukee-neighborhoods-after-jude-beating-study-finds/90907882/>

frequent response of city and police officials to label a police misconduct incident as an *isolated incident* caused by a bad apple fails to address the ramification of “undermining public safety efforts by dampening crime reporting and inviting legal cynicism.”¹⁵

To Increase Transparency

According to the comprehensive review of civilian oversight panels authored by Peter Finn for the National Institute of Justice, civilian oversight has the potential to benefit a variety of groups.

"Complainants have reported feeling:

- 'Validated' when their allegations are sustained - or merely appreciated have an opportunity to be heard by an independent third party.
- Gratified they are able to address an officer directly.
- Satisfied the process appears to help hold police and sheriff's departments accountable.

Police administrators have said that oversight can:

- Improve their relationship and image with the community.
- Increase public understanding of the nature of police work.
- Promote the goals of community policing.
- Improve the quality of the department's internal investigations.
- Reassure a skeptical public that the department already investigates citizen complaints thoroughly and fairly.
- Help subject officers feel vindicated.
- Help discourage misconduct.
- Improve the department's policies and procedures.

Elected and appointed officials have indicated that oversight:

- Demonstrates their concern for police conduct to constituents.
- Can reduce the number, success rates, and award amounts of civil suits against the city or county.

Members of the community at large have suggested that oversight has helped to:

- Reassure the community that appropriate discipline is being handed out for misconduct.

¹⁵ Desmond, Matthew, Papachristos, Andrew, and Kirk, David S. Police Violence and Citizen Crime Reporting in the Black Community. *American Sociological Review* 1-20.
<https://www.documentcloud.org/documents/3114813-Jude-911-Call-Study.html>

- Discourage police misconduct.
- Increase their understanding of police behavior.”¹⁶

Lawrence Rosenthal affirms the value of truthfulness and transparency toward the public in his analysis of methods to address police violence. Rosenthal argues that police accountability depends on the ability to reach reliable conclusions about police misconduct. He finds that the code of silence is a natural consequence of harsh punishments for misconduct and a lack of incentives for candor. To address these concerns he encourages departments to consider instituting incentive systems to promote candor and thereby promote transparency. He concludes: “if public testimony and administrative findings disclose misconduct, even if guilty officers are suspended rather than fired, the public will be engaged and is likely to demand better training and supervision. As with the adoption of express policies governing aggressive patrol, greater transparency of this character promotes democratic accountability in policing.”¹⁷

How do you know if civilian oversight is effective?

Frank Harris sums up the problem of evaluating civilian oversight systems. He posits that civilian oversight systems are based on the “intuitively attractive claim that complaints against police are ‘better’ dealt with by a largely non-police group.” He goes on to argue that it is impossible to prove that civilians are, in fact, better at addressing complaints. “Whilst [the claim] might seem intuitively correct, any attempt at proving the point runs up against apparently insuperable barriers to quantitative research: how does one prove – in numerical terms – that a non-police group is more effective at dealing with complaints than a police group?”¹⁸

¹⁶ Peter Finn. Citizen Review of Police: Approaches and Implementation. U.S. Department of Justice. National Institute of Justice March 2001. NCJ 184430.

¹⁷ Rosenthal, Lawrence. Good and Bad Ways to Address Police Violence. The Urban Lawyer. Fall 2016. Volume 48, Number 4. Pp. 675-736.

¹⁸ Harris, Frank. Holding Police Accountability Theory to Account. Policing, 6 (3) pp. 240-249. March 2012.

The issue of variability between oversight systems further confounds researchers. There is no single structure for civilian external oversight. The conservative think tank, the CATO Institute finds “there does not seem to be any kind of perfect or ideal CRB [Civilian Review Board] in existence today. Part of the reason for this is that CRBs can be established for a number of different reasons. Some review boards are established because the police force has lost legitimacy or accountability in the eyes of the citizens. Others are established because excessive force lawsuits have become prohibitively expensive, and the local city government is looking for new policies that will reduce the number of such claims in the future.”¹⁹

As noted earlier there are four main types of civilian oversight and some cities will have structures that encompass two or more types of oversight. As a result, Samuel Walker, one of the foremost authorities on police oversight, finds,

“Not all citizen oversight agencies have authority to independently investigate citizen complaints. Many simply involve the review of completed investigations by IA units, with authority to recommend a different disposition or that the case be reinvestigated. No external citizen oversight agency has the power to impose discipline of officers against whom complaints are sustained.”²⁰

There are no studies evaluating the effectiveness of external citizen oversight agencies. As is the case with internal misconduct investigations (see above) [sic], there are *no studies attempting to assess whether a particular organizational structure or procedure is more effective than another. Nor are there any studies attempting to assess whether the investigation of officer misconduct by external oversight agencies is more effective than investigation by internal units.* [emphasis added]

And also as is the case with internal misconduct investigations, there is only very limited discussion of the multiple goals of external misconduct investigations (Brereton, 2000). As already noted with respect to internal complaint investigations, there is only very limited discussion of the multiple

¹⁹ The CATO Institute. National Police Misconduct Reporting Project (NPMRP). Civilian Review Boards. <http://www.policemisconduct.net/explainers/civilian-review-boards/>

²⁰ Note: The Wisconsin Police and Fire Commissions generally do have authority to discipline officers against whom complaints are sustained.

goals of external citizen oversight agencies: thorough and fair investigation of complaints, deterrence of officer misconduct, providing a satisfactory experience for both complainants and officers, recommending alternative department policies and procedures, improving police-community relations (Walker, 2001:56-60).”²¹

As noted in the previous excerpt and quote, it can be challenging to evaluate civilian oversight systems because of the variety of oversight objectives and structures. Therefore it is incumbent upon those considering an oversight system to carefully evaluate goals and local conditions. In particular, system design should intentionally seek to promote transparency. Appendix II contains a checklist for decision makers to help evaluate and plan for the various components of a civilian oversight system.

Types and Examples of Oversight Panels

There are generally four types of oversight panels: investigative, review, appeal, and independent audit. Oversight panels demonstrate a wide breadth of variability though they often fit into one of these categories. In a research paper commissioned for the National Institutes of Justice of the U.S. Department of Justice, Peter Finn defines the four types of oversight panels.

- I. *Investigative:* Citizens investigate allegations of police misconduct and recommend findings to the chief or sheriff.
- II. *Review:* Police officers investigate allegations and develop findings; citizens review and recommend that the chief or sheriff approve or reject the findings.
- III. *Appeal:* Complainants may appeal findings established by the police department to citizens, who review them and recommend their own findings to the chief or sheriff.
- IV. *Audit:* An auditor investigates the process by which the police or sheriff’s department accepts and investigates complaints and reports on the process’ thoroughness and fairness.²²

²¹ Walker, Samuel. Police Accountability: Current Issues and Research Needs. Doc. No. 218583. May 2007 Paper presented at the National Institute of Justice Policing Research Workshop: Planning for the Future, Washington, DC, November 28-29, 2006.

²² Ibid. Emphasis original.

The various types of panels have benefits and drawbacks and each city has to determine the most appropriate fit for their city.

In addition to the responsibilities described above, civilian oversight panels may also make recommendations for changes “in department policies and procedures and training, arrange for mediation” or develop or operate “an early warning system for identifying problem officers.”^{23,24}

Berkeley, CA

The Berkeley Police Review Commission (PRC) established by voters in 1973 is an example of the first type of panel. The PRC investigates citizen complaints against police officers and provides written findings to the complainant, subject officer, City Manager and Chief of Police. The PRC has the additional role of recommending policy changes to the Council. Finally, the PRC will accept policy complaints from citizens and determine if a policy review is warranted and potentially undertake a policy review and submit any recommendations to the City Manager and Chief of Police for consideration.

In December of 2014, Berkeley residents protested the officer involved deaths in Ferguson, MO and Staten Island, NY. The Berkeley Police response, “even by its own assessment, fell short of community expectations.”²⁵ A lawsuit alleged that “on that initial night of protests, demonstrators were allegedly pushed down Telegraph Avenue into Oakland by members of Berkeley Police Department who employed tear gas, rubber bullets and batons, among other weapons, in an attempt to control the protesters, according to the lawsuit.”²⁶ The

²³ Ibid.

²⁴ Note: In Wisconsin, certain training standards are mandated by State law and could not be directly modified by city officials.

²⁵ City of Berkeley Police Review Commission Report to the City Council Investigation Into the Police Department Response to Protests on December 6, 2014
http://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2016/SpecialRpt2014-12-06InvestigativeRptProtests.pdf

²⁶ Jenkins-Goetz, Maxwell. Federal lawsuit filed against city over December 2014 Black Lives Matter protest. The Daily Californian. Monday November 23, 2015. <http://www.dailycal.org/2015/11/23/federal-lawsuit-filed-against-city-over-december-2014-black-lives-matter-protest/>

PRC conducted an extensive review of the incidents and made recommendations to the City Council including the following:

“The PRC recognizes the need for the Department to make better-informed decisions in crowd control situations. Therefore, the department needs access to real time surveillance tools. Gathering such information will require some degree of surveillance, which raises concerns regarding civilians’ privacy. We recommend that the Council make a determination of what, if any, surveillance tools should be considered for use, and then refer the matter to the PRC to obtain community input and work with the BPD to establish the appropriate guidelines for such use.”

The quote demonstrates the multiplicity of roles that the PRC provides to review and recommend policy changes related to policing. In this case the PRC investigates the incident, reviews policy, recommends policy changes, asks the Council for action and commits to leading a community input process to establish guidelines related to the recommendation in partnership with the Berkeley Police Department. The Berkeley model shows how a civilian oversight panel can weave together the community, elected officials, and the police department while supporting regular evaluation and improvement.

Tucson, AZ

The City of Tucson, AZ established a position of Independent Police Auditor (IPA) in 1997, originally located in the Equal Opportunity Programs Division. The IPA is now independent from that Division. “The IPA was created for the purpose of auditing Internal Affairs investigations of citizen complaints alleging misconduct and/or improper service by the Tucson Police Department (TPD) and its employees. The goal of this type of civilian oversight is to instill confidence and transparency in the complaint process.”²⁷

The Tucson model is an example of the second oversight model. In this model police officers investigate allegations and develop findings and citizens review those findings. At

²⁷ Tristy Terwilliger, City of Tucson Independent Police Auditor Annual Report 2015. Issued 02/01/2016. https://www.tucsonaz.gov/files/oeop/IPA_2015_Annual_Report_0.pdf

the same time the Tucson model fits the fourth type of oversight panel, an auditor who investigates the process of civilian complaints to the police department.

The other critical elements of the Tucson oversight system are a Citizen Police Advisory Review Board (CPARB) and Boards of Inquiry. The CPARB is a citizen body, each member is appointed by a City Council Member. “The CPARB meets monthly and reviews a random selection of cases per month, whereas the IPA audits all closed internal investigations.”^{28,29} Boards of Inquiry are convened as needed by the Police Chief, to review the circumstances surrounding “any department operation, police response or actions of a department member. These are generally focused around officer involved shootings, death or serious injury in custody and incidents with significant media attention.”³⁰ These reviews include the following:

- “Review and evaluate all pertinent facts and information, including all reports, statements, documents, and evidence.
- If necessary request additional investigation
- Review all applicable procedures and directives.
- Consider all aspects of training.
- Review all patrol and investigative methods.
- Prepare a written report to the Chief of Police”³¹

The Boards of Inquiry may determine:

- whether the action was justified and within departmental policy, or justified and yet a policy violation,
- if it was justified yet there is an opportunity to improve training or tactics or.
- if it was not justified nor within departmental policy.

Tucson also charges the IPA with conducting community outreach (the IPA has developed flyers and attended community meetings to get the word out). The IPA is also doing outreach to the Tucson Police Department, by educating new recruits about the most

²⁸ Ibid.

²⁹ When the Tucson Police internal affairs completes it’s investigation, if the complainant is not satisfied with the outcome, they may request a review by the IPA. Source: Independent Police Auditor & Civilian Investigator: City of Tucson Website. <https://www.tucsonaz.gov/manager/independent-police-auditor-civilian-investigator>

³⁰ Ibid.

³¹ Ibid.

common complaints. Research has shown that by training officers on the review process the number of excessive force and civility complaints can be reduced.

Portland, OR

The Portland Police Internal Investigations Auditing Committee (PIIAC) was established in 1982 and represents both the third and fourth models; complainants can appeal findings following a police investigation and the PIIAC audits Internal Affairs investigations and provides recommendations to the Chief. PIIAC had largely been staffed by former law enforcement officials.

In 2001 Portland reorganized its oversight structure but maintained the same functions that remain in place today. At that time the Independent Police Review (IPR) was created as a division of the City Auditor's Office, "with a mission of improving police accountability and promoting higher standards in police services."³² Today the IPR has 14 full time staff including 5 investigators who have full access to police officers and records to conduct investigations of the Portland Police Bureau. IPR staff are all civilians, there are no former law enforcement officials. The IPR is overseen by the nine member Citizen Review Committee which is appointed by the City Council.

The Citizen Review Committee monitors and advises the IPR and "hear(s) appeals from civilians who are unhappy with how the Portland Police Bureau (PPB) handled their complaint against members of the bureau, and then vote on whether the bureau's findings could have been made by a "reasonable person," regardless of if they actually agree with what happened. If a majority sides with the bureau's findings, the complaint process is concluded. If they challenge the PPB's findings, they issue a report to the police chief, who can accept their recommendation or take it to city council."³³ In addition to these bodies,

³² Auditor, Mary Hull Caballero. Press Release. City Auditor Proposes Changes to Portland's Police Accountability System. August 19, 2016 <https://www.portlandoregon.gov/ipr/article/587475>

³³ Brown, Doug, Portland Police Oversight Updates: Cops used the Wrong Rules, Another Cancelled CRC Meeting and Outbursts at the COAB. The Portland Mercury. May 13, 2016.

<http://www.portlandmercury.com/blogtown/2016/05/13/18057517/portland-police-oversight-updates-cops-used-the-wrong-rules-another-cancelled-crc-meeting-and-outbursts-at-the-coab>

the City of Portland established a Police Review Board with the primary goals of investigating incidents and investigations related to officer involved shooting, a death in custody, an injury caused by an officer that results in hospitalization, and less lethal incidents which may have violated policy.³⁴

Portland is one of the most well funded, fully staffed and complex oversight systems. Nevertheless, in 2012, the U.S. Department of Justice filed a lawsuit against the City of Portland regarding excessive use of force. The Department of Justice lawsuit found “...reasonable cause to believe that PPB engages in a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness.”³⁵ The two parties reached a settlement agreement and another oversight body, the Community Oversight Advisory Board (COAB), was created at the time to ensure that the Portland Police Bureau is following the agreements of the settlement. The COAB is completely separate from the IPR and the CRC.

The Portland oversight system reveals some of the challenges facing civilian oversight of law enforcement. In August of 2016 Portland’s Auditor, Mary Caballero submitted proposed changes to the current oversight model which include efforts to speed up reviews by reducing the number of Citizen Review Committee members to hear citizen appeals on misconduct complaints. She has also proposed that all citizen complaints would be investigated; currently some are dismissed without investigation.

Caballero has called for another major change. She proposed that the office that investigates a complaint will issue findings; under the current system the officer’s supervisor issues the finding while another office may investigate the complaint. The Police Bureau would also have to notify the IPR of all suspected officer misconduct.³⁶ The auditor

³⁴ Portland Ordinance Section 3.20.140 (B) c. <https://www.portlandoregon.gov/ipr/article/312622>

³⁵ Findings from the Department of Justice. Office of the Assistant Attorney General Correspondence to the Mayor of the City of Portland. RE: Investigation of the Portland Police Bureau. September 12, 2012.,

³⁶ Bernstein, Maxine. Portland City Auditor Moves Forward with Police Accountability Reforms. The Oregonian/Oregon Live. August 20, 2016.

expressed regret that the Mayor had not taken up these recommendations that have resulted from community input and the 2012 DOJ Settlement agreement saying,

“I am disappointed at the lack of leadership given the requirements of the settlement agreement and the delicate time the city is in. My expectations were higher that this would be addressed at the policy level.”³⁷

The Portland oversight model is a continually evolving system with a high level of resident engagement and supervision. The Portland model demonstrates the need for constant evaluation and adaptation, the importance of transparency and civic engagement, that no one system for civilian oversight will be perfect. Each type of oversight system has specific benefits and drawbacks and yet “whatever their specific advantages, any type of citizen oversight needs to be part of a larger structure of internal and external police accountability; citizen oversight alone cannot ensure that police will act responsibly.”³⁸

Obstacles and New Strategies for Civilian Review

Samuel Walker explored some of the difficulties in establishing effective civilian review. “Civilian review agencies have often lacked the authority to accomplish their stated objectives: for example promising “independent” review of citizen complaints without the power to conduct any investigations. Others have had the power to conduct independent investigations but have lacked the necessary staff and budgetary resources. Some have suffered from poor management. Others have failed because of a lack of political support, disinterest by police management, or staunch opposition from the local police union.”³⁹

Walker goes on to explain that the traditional strategy of civilian review of complaints has given way to a modern strategy of focusing on police policies and procedures. The shift in theory is a result of the challenges noted above as well as the need to move away from

³⁷ Ibid.

³⁸ Peter Finn. Citizen Review of Police: Approaches and Implementation. U.S. Department of Justice. National Institute of Justice March 2001. NCJ 184430.

³⁹ Walker, Samuel. *The New World of Police Accountability*. Sage Publications. 2005.

focusing on single incidents/officers in order to establish systems that improve regular operations, organizational culture and prevent misconduct. Those new strategies may include regular policy review, police audits, and early warning systems to identify officers at risk of committing misconduct.

Part II. Police Oversight in Wisconsin

Police and Fire Commissions Oversee Public Safety Personnel in Wisconsin

Primary Activities: Personnel, Discipline and Hearings

Law enforcement and fire protection agencies are regulated by Wisconsin Statutes §62.50 and §62.13 that establish police and fire commissions for first and second class cities respectively. Police and fire commissions manage personnel issues including hiring, commendations, discipline and firing. The State of Wisconsin established the authority of police and fire commissions through an act published in 1899 in an effort to separate these agencies from political influence and control.⁴⁰ In 2014, the Madison Police and Fire Commission hired Police Chief Mike Koval to oversee the department.⁴¹

Police and Fire Commissions are unique bodies which have some elements of civilian oversight mechanisms. Police and fire commissions are independent from both police and fire departments. The commissioners are appointed by the Mayor for a term of 5 years. There are 5 commissioners on the board and each year a new commissioner is to be appointed. The commissioners are charged with: appointing the chief of either agency,

⁴⁰ According to the 2006 Report on the Milwaukee Police Department, prior to the establishment of the police and fire commission, “for the 30 years between 1855-1885, each time a new mayor was elected, he would fire the police chief and appoint a new chief. Police officers hired during a previous administration would resign; otherwise, they too would be fired. The new mayor would then hire new police officers.” Police Assessment Resource Center June 2006.

⁴¹ Mike Koval, hired as new Madison police chief, set a progressive tone as department’s recruiter. Isthmus April 12, 2014. <http://isthmus.com/archive/from-the-archives/mike-koval-hired-as-new-madison-police-chief-set-a-progressive-tone-as-departments-recruiter/>

confirming approval of subordinates appointed by the chief, and setting rules for qualifications and experience to serve within the departments.

The commissions are also responsible for overseeing disciplinary actions and conducting hearings for charges brought against a chief or subordinate. Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body or by any aggrieved person. After charges are filed a hearing is to be held by the board to determine whether there is just cause to sustain the allegations. Under the statute, the initial hearing is to be held 10 to 30 days after charges are filed, however, this timeframe may be waived by mutual agreements of the parties. The board manages the hearing and adjudicates the process. The board has subpoena power to require records and testimony for hearings. The board hears all evidence presented, the board does not investigate the charge, nor does the board review investigations conducted by internal affairs divisions.

After a thorough investigation, if the Chief of Police believes that an officer has violated policy or procedure, the Chief may impose discipline on an officer. If the officer does not agree to said discipline, the Chief may file charges against the officer at the Police and Fire Commission and request the Police and Fire Commission to impose said discipline.

If a Police Chief files a charge against a subordinate, the City Attorney is likely to represent the Chief while the subordinate may be represented by a labor union lawyer or a private attorney. If the board decides the charges are sustained, the subordinate can either be suspended or reduced in rank, or suspended and reduced in rank or removed from service. If the board does not sustain the charges, no discipline shall be imposed against the subordinate and the PFC would dismiss the charges and order reinstatement. It is also worthy to note that “no person shall be deprived of compensation while suspended pending disposition of charges.” The process for a charge against a chief is very similar.⁴² If an

⁴² Mayors may also submit charges against a chief which is a notable difference from the process to submit a charge against a subordinate.

officer wanted to appeal the decision of the PFC, the officer may file an appeal in Circuit Court.

If a member of the public files a complaint with the board, the individual would need to serve as their own representative in the hearing, or to hire a lawyer to serve in that capacity. Critics of the current Wisconsin system argue that the burden of hiring a lawyer or representing oneself in this process prevents many people from submitting charges to the police and fire commissions.⁴³ Scott Herrick, counselor to the Madison Police and Fire Commission Council estimates that the board has taken up approximately five such citizen initiated cases in the last ten years.^{44,}

Barbara Attard finds that “investigative authority greatly strengthens an oversight body. Investigative agencies —frame the investigation by determining the allegations, witnesses to be interviewed, and questions to be asked. Witnesses may be more forthcoming or even willing to be involved in an investigation if it is being conducted by an independent agency separate from the law enforcement agency.”⁴⁵ However, officers may be less willing to cooperate in such an investigation. Under the statute, the Madison Police and Fire Commission does not have the authority⁴⁶ to investigate a claim. This is a major difference between the Wisconsin oversight system and oversight systems in other states. Cities outside Wisconsin often with civilian oversight bodies frequently audit the investigation process by reviewing all cases, or a subset of cases handled by the department.⁴⁷

⁴³ Gelembiuk, Greg, Royko-Maurer, Amelia and Nathan Royko-Mauer. Can the Madison Common Council Hold a Police Chief Accountable? Progressive Dane. July 15, 2016.

http://www.prodane.org/can_the_council_hold_a_police_chief_accountable

⁴⁴ Personal Communication, Atty. Scott Herrick, 7/1/2016.

⁴⁵ Attard, Barbara. Oversight of Law Enforcement is Beneficial and Needed—Both Inside and Out 30, Pace L. Rev. 1548 (2010) <http://digitalcommons.pace.edu/plr/vol30/iss5/12/>

⁴⁶ All investigations of police misconduct are investigated by the police department. However cases of severe injury involving an officer or death involving an officer are investigated by the Wisconsin Department of Criminal Investigations (Appendix III).

⁴⁷ Peter Finn. Citizen Review of Police: Approaches and Implementation. U.S. Department of Justice. National Institute of Justice March 2001. NCJ 184430.

Additional Powers of the Milwaukee Police and Fire Commission

As a first class city, Milwaukee's police and fire commission has the responsibility of conducting an annual policy review and prescribing policies and standards for the department, in addition to the personnel and complaint hearing responsibilities.

A 2006 analysis of the Milwaukee Police and Fire Commission was generated in response to an officer involved shooting. Members of the public were calling for a new civilian oversight panel to govern the Milwaukee Police Department. The report determined that the Milwaukee Police and Fire Commission actually has statutory authority to improve the citizen complaint process, improve transparency and harness its power of policy review and recommendations. The table below compares the authority of the Milwaukee FPC, the Madison PFC and the Portland IPR.

Second class cities, such as Madison, are charged only with personnel matters and hearing complaints regarding the police and fire departments. Second class cities may expand their powers by passing a referendum to increase supervision and policy authority over the department §62.13(6).

Comparison of three police boards: Portland, Madison and Milwaukee

| | Portland Independent Police Review | Madison Police and Fire Commission | Milwaukee Police and Fire Commission |
|--|--|--|--|
| Does it conduct an investigation? | Yes | No | No |
| Does it hold a hearing to determine a result? | Yes | Yes | Yes |
| Does it have subpoena power? | Yes | Yes | Yes |
| Does it have the authority to review the internal affairs investigation? | Yes | No | No |
| Does it have the authority to implement discipline? | No | Yes | Yes |
| Does it conduct policy review and develop recommendations for the Chief and elected officials? | Yes | No | Yes |
| Does it issue annual reports or publish the results of hearings for the public? | Yes | No | Yes |

This table demonstrates that in many cases the Police and Fire Commissions in Wisconsin actually serve as civilian oversight today. They have robust disciplinary and personnel power which in some cases exceeds the authority of other civilian oversight bodies. In Wisconsin police and fire commissions generally do not conduct policy review nor do they investigate cases.

Part III. Considerations for expanded civilian oversight of police in Madison

Leveraging the Powers of the Madison Police and Fire Commission:

The previous table compares the Portland Independent Police Review Board with the Milwaukee and Madison police and fire commissions. In several key areas the Wisconsin Commissions have the necessary authority to provide civilian oversight including:

1) subpoena power, 2) ability to hold hearings, and 3) ability to implement discipline including termination. Madison has fewer powers granted by State Law than Milwaukee (such as policy recommendations) but has the opportunity to expand its role within the existing legal framework. Certain PFC powers may require a referendum of Madison residents, but others would be possible through new City of Madison legislation or funding and staff support.

There may be noteworthy opportunities to improve civilian oversight through careful analysis of the efficacy and accessibility of the PFC. Here are some initial considerations to explore:

1. Could an audit of MPD complaint investigations add transparency and build trust?

The MPD conducts investigations of police misconduct. The vast majority of investigations are handled internally under the leadership of Professional Standards/Internal Affairs. On occasion, special investigations may be conducted by other departments as ordered by the Chief.⁴⁸ All officer involved deaths are investigated by the State Department of Criminal Investigation. MPD compiles summary information

⁴⁸ Police Chief Koval requested an independent investigation of the June 2016 East Town Mall incident in which a 18 year old woman was arrested and was tased by Madison Police Officers. The video of the incident raised community concerns about an internal investigation. Chief Koval requested Dane County Sheriff Mahoney to conduct an independent investigation of the incident. Glaze, Jeff. *Outrage grows over forceful arrest of black woman: Madison police reviewing incident*. The Capital Times. June 23, 2016. http://host.madison.com/wsj/news/local/crime-and-courts/outrage-grows-over-forceful-arrest-of-black-woman-madison-police/article_08dfc5de-1fd6-543e-b8e5-020e35c487c4.html

regarding sustained complaints that resulted in discipline in a quarterly report (See Appendix IV). The reports include a final disposition of complaints. However other information, such as the number of complaints deemed ‘non-sustained’ is not readily available. The current system does not have a third party to review the data nor provide an independent analysis of the investigation process.

Public perception of police is influenced by the perceived accessibility and accountability of the complaint process. Lack of perceived accessibility and accountability in the complaint process is part of the driver for the creation of external accountability mechanisms, such as a civilian review board. And though more than 150 cities now have civilian review boards, “only a few have clearly demonstrated that they in fact do a better job of handling complaints than police departments.”⁴⁹ However police auditors, a new form of external oversight, have “shown considerable promise as an effective alternative to the traditional civilian review board.”⁵⁰

Cities such as Portland, Los Angeles and Tucson all utilize auditors outside of the police departments⁵¹ to provide reviews and reports of the investigation process by their police departments and to provide recommendations on a regular basis. Such a system provides the benefits of external accountability at a minimal cost. If the City of Madison were to provide an audit of the complaint process of the Madison Police Department, the auditor would regularly review the process for submitting complaints, investigating and

⁴⁹ Walker.

⁵⁰ Ibid.

⁵¹ The Portland Auditor is tasked with reviewing investigations of police conduct as well as managing reviews for other city agencies. The Portland Auditor Mary Caballero is elected to her position and has a background in auditing performance management. <https://www.portlandoregon.gov/auditor/27392>. This is not staffed by former law enforcement.

The Tucson Independent Police Auditor is managed by a long-time city employee who previously investigated equal opportunity claims and has an investigator on staff. This is not staffed by former law enforcement. <https://www.tucsonaz.gov/manager/independent-police-auditor-civilian-investigator>

The Los Angeles Audit Division was established in 2001 as a result of the Consent Decree and is now staffed by over 30 sworn officers and civilian professionals including CPAs, fraud examiners, an professional auditors. http://www.lapdonline.org/inside_the_lapd/content_basic_view/8772

disposing of complaints. Such an auditor can help provide the public and elected officials with an impartial analysis of the department's handling of complaints.

2. Could the City improve outcomes or public perception by hiring an external investigator to conduct investigations of police misconduct?

Investigations into police misconduct are traditionally handled internally, however as noted previously all officer-involved deaths are investigated independently by the State Department of Criminal Investigation. Accordingly, most Madison cases are handled internally in the City of Madison by the Madison Police Department, Division of Professional Standards/Internal Affairs. The City of Madison PSIA Office is staffed by officers who serve on two-year rotations before returning to other posts. This rotation may benefit MPD by exposing a variety of command staff to the PSIA work. However the rotation has potential drawbacks. In a variety of cities including the City of Madison, internal investigation has been documented to generate concerns related to conflicts of interest.⁵² Officers are keenly aware that they will return to work side by side with fellow officers and may be disinclined to vigorously investigate their future colleagues (and supervisors) for misconduct. An external investigator may improve accountability, given the internal PSIA structure.

Given the public interest surrounding policing and the public's frequent demand for independent investigations into misconduct, a policy which directs an external investigator to investigate certain complaints may enhance community trust. There is also a benefit to innocent officers when they are investigated externally. Officers

⁵² Ensuring unbiased investigations is a critical issue for police oversight and accountability. According to Samuel Walker investigation practices of police in Los Angeles and Philadelphia both resulted in concerns about conflict of interest. "The 1992 Kolts report on the Los Angeles Sheriff's Department found 'explicit and implicit biases against civilian complaints at every level of the complaint process.'" These problems included investigations being conducted by the supervisor of the officer under investigation, with resulting evidence of bias, ... The first report by the court-appointed monitor in Philadelphia found that investigators failed to follow leads and take obvious investigative steps and had an ingrained tendency "to view the case only from the officer's perspective"

Walker, Samuel. *Police Accountability: The Role of Citizen Oversight* (Belmont: Wadsworth, 2001) and the National Association of Civilian Oversight of Law Enforcement.

Potter, Steven. Police Questioning: Robinson Settlement Prompts Calls for a New Investigation, Settlement Reform. Isthmus. March 9, 2017

declared innocent of the complaint charge by an external body are more likely to be considered innocent by the public, rather than those officers declared innocent by their own departments. External investigations may “help reassure a skeptical public that the department already investigates citizen complaints thoroughly and fairly.”⁵³

For example, the City could determine to hire an investigator to investigate complaints submitted to the PFC so that an external report on the facts of a complaint case may be provided to the Police and Fire Commissioners for review.

3. Would regular reports enhance the transparency and openness of the PFC?

The City of Madison Police and Fire Commission is funded by the City of Madison and staffed by private attorney Scott Herrick. Mr. Herrick advises several commissions in the State of Wisconsin and is considered a leading expert on the governance of public safety personnel in the state. The City of Madison hosts information about the PFC on its website in two locations.⁵⁴ The public may access a subset of previous discipline decisions issued by the PFC as well as information about submitting a complaint and information about meeting times.

There are several differences between staffing and web presences of the Milwaukee FPC and the Madison PFC. The Milwaukee webpage boasts a full-time Executive Director, biographies of the Commissioners and a full calendar for the next year of meetings. Most notably the Milwaukee Fire and Police Commission provides a collection of public reports including: 1) regular annual reviews, 2) a review of the citizen complaint process, 3) reports on public safety, 4) discipline decisions, 5) informational memorandums, 6) public statements, 7) reports on Milwaukee PD practices and policies, especially use of force and 8) a 2006 external evaluation of the Commission. The breadth and depth of this information, some of it generated from external researchers provide Milwaukee

⁵³ Finn...

⁵⁴ <http://www.cityofmadison.com/cityhall/legislativeinformation/roster/104500.cfm>

<http://www.cityofmadison.com/city-hall/public-safety/police-and-fire-commission-pfc-decisions>

residents with a detailed picture of police oversight and provides a mechanism for tracking progress over time.⁵⁵

Similar to the Milwaukee Police and Fire Commission, the City of Portland Independent Police Review has a collection of detailed reports available on its website. For example, the reports from the Citizen Review Committee detail the Committee's work on mediation, crowd control, and the external assessment from the Police Assessment Resource Center.⁵⁶ The website also tracks the implementation of the Department of Justice Settlement Agreement and opportunities for resident engagement.

The City of Madison PFC does not produce an annual report detailing its activities, nor does it conduct an evaluation of its handling of civilian complaints, nor does the PFC provide an analysis of MPD policies and practices. These are all areas of analysis regularly conducted by the Milwaukee Fire and Police Commission and other civilian oversight agencies around the United States. These reports and analysis may help increase transparency and civilian engagement in the Madison Police and Fire Commission. This work would be an expansion from the existing workload of the PFC and its staff. It may be worth exploring the costs and benefits of such an expansion.

4. Could additional staff support or training for the Madison Police and Fire Commission increase transparency, accessibility or accountability?

Resources, training and staff support are often the keys to implementing any municipal policy. In the case of improving civilian oversight these tools are once again an important tactic to improve outcomes.

Access and transparency at the PFC could potentially be increased through greater staff support, outreach efforts, communications materials and enhanced assistance and

⁵⁵ City of Milwaukee Police and Fire Commission
http://city.milwaukee.gov/fpc/Reports#.WD3_tH3fvRQ

⁵⁶ City of Portland, Independent Police Review CRC Reports: <https://www.portlandoregon.gov/ipr/69491>

guidance for folks submitting a complaint through the PFC. These services are not provided now and in part explain the public complaints that the PFC processes are obscure and inaccessible. Staff support for some of these services may be accessible with small additions or shifts to the existing budget.

The Madison PFC is staffed by one legal office on a contract basis. The office provides all paid services for the PFC including legal advising and administrative support. The total costs for these services have ranged from just under \$10,000 to nearly \$29,000 annually for the past four years. The hourly fees for general staff support are \$95/hour and litigation counsel are \$150/hour.⁵⁷ Understanding these costs is essential in any consideration of increased staff support for the PFC. Additional activities would require increased budget support beyond \$29,000 annually.

The Commissioners themselves may be an untapped resource. The National Association of Civilian Oversight of Law Enforcement (NACOLE) is an organization that provides trainings and extensive resources on civilian oversight. NACOLE hosts several conferences each year as well as training opportunities. In addition the organization offers a certification program, the Certified Practitioner of Oversight (CPO) Credential. This program and others like it would provide Commissioners with regular training and information about best practices in the areas of civilian oversight. NACOLE has identified core competencies for civilian oversight (Appendix VI). Civilian oversight is an evolving area of study, therefore, there could be a great deal of value⁵⁸ in working with practitioners and experts from outside the City of Madison.

⁵⁷ Contract records for Madison PFC. Herrick and Kasdorf June 2016 bill.

⁵⁸ There are no costs associated with the program in 2017, though there will be fees for the certification beginning in 2018.

5. Early Warning Systems can track problems before they become serious issues; could any such system buttress Madison's police oversight? How will the recently implemented IA Pro Software employed by the Madison Police Department track problems?

Early Warning Systems, also called Early Intervention Systems, are tools to monitor officers who are frequently the subject of citizen complaints or demonstrate behavioral issues. Early Warning Systems are becoming increasingly popular, as of 1999 the most recent survey on early warning systems, 39% of all police forces serving communities of more than 50,000 have a system in place or are planning to implement one.⁵⁹

Each Early Warning System is implemented in accordance with the needs of the police force, and is therefore each system is unique. In general the systems have three basic phases: selection, intervention and post-intervention monitoring.⁶⁰ In a review of the limited number of studies examining the impact of early warning systems, consistent trends indicate a reduction in use of force, declines in complaints, and risk-related incidents.

“Only a few outcome evaluations have been conducted. Walker et al. (2000) conducted evaluations of the [Early Intervention] (EI) systems in three agencies: the Miami-Dade Police Department (MDPD); the Minneapolis Police Department (MPD); and the New Orleans Police Department (NOPD). Bobb et al. (2009) assessed the Personnel Performance Index of the Los Angeles Sheriff's Department (LASD). Macintyre et al. (2008) examined the operation of the Victoria, Australia Police EI system. Worden et al. (2013) evaluated the effects of the EI system of an anonymous agency in the north-eastern U.S.

All of those evaluations have reported changes of the expected nature in officers' performance: declines in complaints (Macintyre et al., 2008; Walker et al., 2000, Worden et al., 2013), use of force (Walker et al. 2000), secondary arrests (Worden et al., 2013), and “risk-related” incidents (Bobb et al., 2009).”⁶¹

⁵⁹ Shultz, Ashley. Early Warning Systems: What's New? What's Working. CNA Analysis & Solutions. December 2015. https://www.cna.org/cna_files/pdf/CRM-2015-U-012182.pdf

⁶⁰ Early Warning Systems: Responding to the Problem Police Officer. National Institute of Justice: Research in Brief. U.S. DOJ National Institute of Justice. July 2001. <https://www.ncjrs.gov/pdffiles1/nij/188565.pdf>

⁶¹ Burke, Ronald Ed. Stress in Policing: Sources, consequences and interventions. Routledge. July 1, 2016

Critiques of the above studies include concerns about scientific rigor, lack of control groups and a concern that problematic officers subject to an EI system may simply reduce arrests, thereby compromising public safety.

The limited research indicate there may be value in Madison implementing a long-discussed Early Warning System to track, monitor and seek to improve the behavior of at-risk officers. As several study authors highlight, an EI system is only as effective as a part of a comprehensive transparency and accountability structure. The EI tool would be part of a system-wide strategy to promote responsible policing, and would require diligent oversight and implementation to be successful.

The City of Madison Police Department has purchased police data tracking system called IA Pro which includes an Early Intervention Warning System. As the Department implements the early intervention program within IA Pro, it will be interesting to monitor its impact.

Conclusion

The City Attorney issued an opinion related to civilian oversight of the police in a memo to the Mayor dated January 14, 2013 (Appendix VII). He reaffirmed that under state law the PFC and the Chief of Police hold the authority to discipline or terminate officers, however there may be opportunities to increase the independence of investigations of police misconduct through one of the following strategies:

1. “establishing some sort of body or person to conduct an independent investigation or review of the specific incident;
2. establishing such a body on a permanent basis, looking at the range of other options used in other cities; or
3. asking the Police Chief to institute a policy listing the circumstances under which the Police Chief is instructed to use an outside investigator or review.”

The City Attorney's recommendations, coupled with the information gathered from other municipalities, both within and outside WI, point to a path forward to advance the goals of civilian oversight. Transparency and accountability are often primary goals of civilian oversight. The City should consider improving transparency and accountability through the previous discussed strategies and considerations.