

Recommendation XX. On selected force incidents, MPD should convene a panel to roundtable the incident, to identify training, policy, supervision, and equipment issues, and to develop an appropriate after-action plan. [OIR 82]

Discussion: OIR recommended, and the Committee agrees, that, in addition to undertaking a rigorous paper review of every use of force, some kinds of significant force incidents should be directed to a panel of command staff for review. While MPD is best positioned to determine the precise nature of this “review panel,” and the precise types of cases it should review, OIR recommended that the process should contain a few key components, including: 1. MPD should clearly define which categories of incidents will be reviewed; 2. “the review should be automatic and non-discretionary so that officers understand the scrutiny to be routine and not the result of any initial judgment that the force was problematic”; 3. the panel should review the reports prior to the meeting and the supervisor responsible for conducting the investigation should present the evidence for discussion by the panel; 4. “the panel should consider all aspects of the force incident to identify ways in which the tactics, supervision, and post-incident handling might be improved”; and 5. “the panel should critique and review the thoroughness and objectivity of the force investigation and, if need be, return the investigation for necessary follow up.” More specifics on these elements can be found in the OIR Report at pages 132-33.

MPD responded that it supports this recommendation in principle, but that implementing it in practice will be challenging. MPD indicated that it planned to explore this and other recommendations regarding review of critical incidents further internally and in conjunction with the City Attorney’s Office. As OIR notes in its reply concerning this recommendation and OIR recommendation 75, “anxiety about whether information developed during this process may be subject to litigants or the general public should not be used to defeat it or compromise its robustness and critical underpinnings. There are legal protections available when a law enforcement agency rigorously self-examines and uses that process to improve.^[1] And even if there were some public access and litigation concerns, those should of course take a back seat to any initiative that reduces the likelihood of further ... incidents and increases officer safety through critical self-scrutiny.” Moreover, as noted in the context of a discussion of criminal justice sentinel event reviews, “cost-benefit analysis might reveal that reductions in potential future liability more than compensate for the ‘risks’ of transparency.”²

MPD should proactively seek input from City stakeholders and the public before completion and implementation of any new policies or changes to its existing policies. MPD will do this through creation of a formalized, tiered process, ranging from working groups for major changes, to notice of interim implementation, with provision that minor or urgent rules can become effective during the notice period, pending final adoption.

[OIR 88]

Discussion: Police departments have been likened to a type of administrative agency, whose rule-making power constitutes a form of law-making. In a democracy, it is critical that that law-making process be open and subject to input from the community. For that reason, federal agencies, for example, are subject to public “notice and comment” requirements before they can adopt

¹ Jones, J. (2016) Behind the Shield? Law Enforcement Agencies and the Self-Critical Analysis Privilege, *Washington and Lee Law Review*. 60(4), 1609-1652..

² Doyle, J. M. (2014). Learning from error in the criminal justice system: Sentinel event reviews. *Mending Justice: Sentinel Event Reviews* (NCJ 247141), 3-19.

administrative rules. Because MPD policies have the effect of determining how the community will be policed—that is, prescribing the rules of conduct for police officers and the community members they encounter—it is equally important that the community have notice of, and an opportunity to provide input, when changes to those official policies are being contemplated.

This recommendation is consistent with recommendations of President Obama’s Task Force on 21st Century Policing (e.g., action item 1.5.1: “In order to achieve external legitimacy, law enforcement agencies should involve the community in the process of developing and evaluating policies and procedures”). As OIR notes, “Providing an opportunity for the Madison community to weigh in will help MPD build legitimacy, community support and acceptance of its practices, and will result in a more transparent process and a final product improved by virtue of the fact that it addresses the public’s concerns.”

The original recommendation submitted by OIR on this included only the first sentence of the recommendation set forth above, requiring proactive efforts to secure community input before making changes to any SOPs. The MPD responded that, while it is open to exploring options for expanding the opportunities for input into significant SOP changes, many SOPs undergo regular revision, and some of those revisions are minor or technical. Therefore, the MPD cautioned that “[r]equiring an extensive public comment and input process for each minor SOP change would be cumbersome and delay needed updates.” In light of this and other considerations, the Committee added the second sentence to this recommendation. Mechanisms should be implemented to utilize working groups for robust community input into any major SOP changes, and to have at least a period of notice and public comment for minor changes (providing an opportunity for the community to weigh in and offer any suggestions). This amended recommendation provides the flexibility MPD needs to make changes to SOPs without delays, and to make minor revisions in ways that are not unduly cumbersome, but still provide an opportunity for community notice and input at some point in the process. The Committee felt comfortable allowing this flexibility in part because the new Independent Monitor recommended by the Committee will be well positioned to monitor the MPD’s rule-making process to ensure that adequate opportunities for community notice and input are being provided, and that more streamlined processes (e.g., interim implementation during the notice period) are being utilized only where appropriate. Moreover, methods of communication other than the internet should be provided, to ensure inclusivity. In addition, as OIR notes, “[w]hen the Independent Police auditor position is created, MPD should provide him or her any potential policies early in the drafting process for input.”

On August 29, 2019, the Chief announced on his blog: “MPD’s Code of Conduct and SOPs are viewable on the MPD website: <https://www.cityofmadison.com/police/chief/standardoperatingprocedures.cfm>, and we have added a link for members of the public to provide input/feedback on existing SOPs. We also will begin posting drafts of SOP changes to this page, with a similar mechanism to provide input/feedback. Draft SOPs will be posted for review for about 10 days, and we will consider other mechanisms for getting public input (like public meetings, etc.) on a case-by-case basis (depending on the SOP being changed, public interest in the subject, etc.)” Elsewhere, MPD indicated that the expanded District Advisory Groups could provide another mechanism for obtaining such input. The Ad Hoc Committee commends MPD for proceeding with implementation of this recommendation.