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MEMORANDUM

TO: Police Civilian Oversight Board Members
Common Council Members

CC: Alder Govindarajan

FROM: City Attorney Michael Haas

DATE: March 25, 2026

RE: Proposed Amendments to MGO Sections 5.19 and 5.20

This memorandum summarizes the provisions of ordinance amendments proposed by Alder Govindarajan related to the Office of the Independent Monitor (OIM) and the Police Civilian Oversight Board (PCOB). The amendments are contained in Legistar File 92386 which is scheduled for introduction at the March 24th Council meeting, referral to the PCOB at its March 25th meeting, and consideration by the Council on April 21st. Alder Govindarajan has sponsored the main motion consisting of several provisions as well as two separate amendments for which he is requesting the PCOB's feedback.

Main Motion

Alder Govindarajan's main motion includes three language changes.

1. Add the following language as MGO 5.19(6)(c):

> Administrative Structural and Legal Compliance. While the OIM shall maintain independence in carrying out its duties, including investigations, findings, and recommendations, the OIM shall operate within the administrative structure of the City of Madison for purposes including, but not limited to, hiring of staff other than the Independent Monitor, contracting, budgeting, use of technology, and procurement. Nothing in this subsection shall be construed to alter the recruitment, appointment or

> confirmation process for the Independent Monitor as set forth in this section. The OIM shall comply with all applicable federal and state laws, city ordinances, and Administrative Procedure Memoranda (APMs).

This language reflects the original intent of the Common Council when it created the Office of the Independent Police Monitor. It only reinforces and does not change the role of the OIM and its relationship to the City and other agencies. A separate provision of MGO 5.19 requires that the OIM shall be independent from the Police Department so that it can effectively fulfill its duties. Another provision states that:

> No City employee or official shall attempt to use their political or administrative position to unduly influence or undermine the independence of the Monitor or any employee of the OIM in the performance of their duties and responsibilities as set forth in this Ordinance.

This latter provision in MGO 5.19(6)(b) is intended to prohibit City officials and staff from attempting to interfere with or influence the OIM "in the performance of their duties and responsibilities as set forth in this Ordinance." Those powers and duties are listed in MGO 5.19(7) and include monitoring MPD activities, conducting investigations, making recommendations to the Police Chief and referrals to the Police and Fire Commission (PFC), making policy recommendations to the Mayor and Common Council, appointing legal counsel for individuals who file complaints with the PFC, completing an annual review of the Police Chief, processing complaints, and conducting community engagement.

While the ordinance requires that the substance and conclusions of that work shall not be influenced by City employees or officials, the original ordinance establishing the OIM did not contemplate that the OIM would be exempt or disconnected from standard City policies and procedures in conducting its work. Put simply, the OIM is a City agency, created by the Common Council, and is subject to all Citywide administrative policies and procedures. It is not an entity separate from the City or one that is only funded by the City. The OIM has no independent authority to enter into contracts outside of City procedures, hire staff or make expenditures outside of budgetary authority, initiate litigation on its own, or sue another City agency. It is part of the City government and organizational structure.

It is important to note that the OIM and the PCOB were created solely by the Common Council in an attempt to implement and be responsive to various recommendations, including MPD's own stated goals and mission statement. Unlike other cities, these oversight entities were not created as a requirement of a federal court or federal consent decree with the U.S. Department of Justice. The OIM has no authority or duties ordered by a court that supersede City ordinances, rules or procedures.

It is also important to recognize that the City has developed numerous internal operational policies and procedures over decades that are designed to ensure consistency across agencies, compliance with state and federal laws, and security of City systems and data, among other goals. Such policies may be in the form of an Administrative Procedures Memorandum (a mayoral directive to all City staff); instructions from a City agency responsible for specific subject matter such as IT, personnel or finance compliance; or a legal opinion from the City Attorney's Office.

Therefore, the proposed language regarding the OIM operating within the administrative structure of the City and following applicable laws and City policies reflects what is already in place. This is true of all agencies even though ordinances that establish other agencies do not specifically mention it. In fact, the absence of such language related to other agencies illustrates that this is a basic and obvious expectation for all City agencies and is not required to be stated in ordinances. The OIM is meant to be independent from influences of MPD and City officials and staff but it is clearly still an agency of the City and is not separate from the City's organizational structure or procedures.

There are many practical, legal and administrative reasons that following City procedures is not only required of the OIM but serves its responsibilities and authority. For example, the City as an employer is subject to the Fair Labor Standards Act and other employment laws that govern the treatment of overtime worked by staff. The Human Resources Department has developed hiring processes designed to comply with laws that prohibit discriminatory hiring practices, and the City has robust work rules and processes to address complaints of discrimination or harassment in the workplace. These rules and policies govern and correct behavior of City staff and also help to protect the City from legal liability.

Another example relates to the use of technology and the security of technology systems and City data. The City has invested significant resources and staff effort in building an infrastructure to secure City systems and data, review and approve new technology, and process requests from agencies in an organized and systematic manner. The IT Department is authorized and directed under APM 3-20 to review requests for new technology and City agencies are required to complete that review before obtaining or using new technology systems. The IT Department needs to ensure that the new technology does not duplicate existing City resources, that it does not pose security risks, and that its staff can support the technology and its updates in the future.

Similarly, the IT Department must ensure that City employees are safeguarding both City devices and data by not downloading unauthorized software, using personal devices to work with confidential City data, altering the City logo contrary to APM 3-18, or using artificial intelligence contrary to the City's policy. There are numerous ways that the City as an organization may be targeted with IT breaches, including by attempting to gain access to a particular agency through the devices or software of another agency. Following IT protocols and

procedures protects not only confidential OIM and MPD data but the data and systems of all other agencies. The City simply cannot take the risk that, for instance, the Clerk's election systems and data might be compromised because of unsecure practices of another agency.

A third IT concern that arises is handling confidential MPD records accessed through the FBI's Criminal Justice Information System, which is a national storehouse for sensitive criminal justice information managed by the United States Department of Justice and is subject to strict security measures. The DOJ periodically conducts audits to ensure that its data is handled properly, and failure to do so could put the access of the Police Department and the City as an organization at risk.

Finally, the OIM has referenced plans to host its own website. If this is intended to mean a website that is not hosted and maintained by the City, it would also raise serious concerns. Those include the need to retain records, the requirement to follow new federal accessibility guidelines for websites, the lack of staff to support and sustain a separate website, and security risks.

These examples and concerns illustrate that following City policies and procedures is not merely red tape or something requested by the whims of City staff and officials. They have been developed over time and they serve the City's administrative, legal and transparency purposes. All City agencies, including the OIM, must comply with them.

2. Add the following language as MGO 5.19(6)(d):

> Legal Counsel. The Monitor may retain independent legal counsel to assist the OIM with investigations, oversight activities, and representation related to police oversight cases within the OIM's jurisdiction pursuant to sub (7)(l). The Monitor may also assign outside counsel to complainants as provided in sub. (7)(b)(4). For all other legal matters involving the operations of the OIM as a City agency, including but not limited to compliance with public records laws, open meetings laws, employment matters, and general administrative functions, the OIM shall utilize the Office of the City Attorney.

This is also language that reflects the intent of the original ordinance establishing the OIM and the PCOB. In MGO 5.20(5), the Common Council directed that "Staff from MPD and the Office of the City Attorney shall attend each Board meeting to answer any questions that may arise. Other City staff shall attend meetings when requested by the Board." The City Attorney's Office cannot be expected to answer questions from the Board if it does not also advise the OIM.

Furthermore, under Wisconsin Statute 62.09(12)(a), the City Attorney "shall conduct all the law business in which the city is interested." Under Wisconsin Statute 62.06(12)(g), the Common Council "may employ and compensate special counsel to assist in or take charge of any matter in which the city is interested."

And under MGO 3.07(1), the Council has directed that the City Attorney "shall be responsible for the duties contained therein and for the conduct of all legal services of the City and shall serve as legal advisor to the Council, the Mayor and all departments and offices of the City."

Currently, MGO 5.19(7)(l) states that the Independent Monitor may "retain independent legal counsel if necessary to fulfill the duties of the OIM." While this language may appear to allow broad authority to retain independent legal counsel, it is modified by "if necessary to fulfill the duties of the OIM." The City Attorney's Office assigns an attorney to assist and counsel every City agency including the OIM. Our office provides legal advice to agencies regarding all types of municipal law matters including contracts, personnel matters, the Ethics Code, Open Meetings Law, Public Records Law, and federal, state and local laws that apply to the agency. These are duties that the City Attorney's Office has completed during and since the creation of the OIM and PCOB, and there have been no issues with that representation under either Independent Monitor. We have answered questions from and advised both the OIM and the PCOB on the range of legal and administrative issues that exist.

Not only is it not necessary for the OIM to retain independent legal counsel to fulfill the routine operations of the agency, but that was not the Council's intent. City agencies need to have consistent advice on how they handle legal and compliance matters which is provided by our Office. An outside attorney would need to be both familiar with those aspects of municipal law and capable of providing the same substantive advice as the City Attorney's Office. The City cannot rely on an attorney to provide advice on compliance issues who is not responsible for representing or defending the City. If the OIM or the PCOB is sued, as the Board has been, legal representation is provided by the City or outside counsel, not by an attorney retained by the OIM.

The Common Council recognized that the OIM may wish to retain outside legal counsel to assist in work related to investigations and complaints. **The City Attorney's Office has not been involved in those matters, has not been asked to be involved, and is not seeking to be involved in them.** These are not matters related to the agency's compliance with City policies and procedures or state or federal law. The potential outcomes of such investigations are the OIM making recommendations to the Police Chief or the PFC, or providing assistance to complainants pursuing a complaint against an officer at the PFC.

It is reasonable that the OIM may wish to retain expertise related to investigations and the Council authorized that action and appropriated funds to do so. Memos issued by the Finance Department when the Council considered the OIM's original budget indicated that the purpose of those funds was to permit the OIM to retain investigative or legal assistance related to the OIM's investigations or providing advice regarding complaints. A July 22, 2020 memorandum from Finance Director David Schmiedicke estimated a budget amount of $30,000 based on a blended rate of $250 and 120 hours of work

annually by investigators or outside legal counsel. Anticipating 120 hours of work annually is consistent with utilizing independent legal counsel for investigation and complaint matters and is not sufficient for providing general counsel to a City agency on the types of issues that are common to other City agencies.

The Independent Monitor has also expressed a concern regarding the City Attorney's Office having a conflict of interest in advising the OIM due to our office's other roles in representing the City. While I respect the Monitor's opinion and concern, I believe some clarification is required to address this issue. First, as noted above, the OIM may retain outside counsel to assist with investigation and complaints which minimizes any potential conflict due to the City Attorney being involved in those matters.

In addition, concerns about potential conflicts overlook some significant aspects of our Office's representation of the City. The Independent Monitor has pointed to our role in defending the City and implied that responsibility would somehow compromise or improperly color the advice we would provide to the OIM. It is important to understand that the City Attorney represents the entire City as an organizational client. We do not represent any individual officer or employee of the City.

If an employee of any agency is accused of misconduct resulting in an internal investigation, we do not represent that employee. That applies to employees of Metro, the Fire Department or any other agency the same as it applies to police officers. Our attorneys represent those agencies as well as Human Resources or the Department of Civil Rights which might be involved in an investigation or processing a complaint. In addition, if the Police Chief brings disciplinary charges against an officer, or an officer appeals disciplinary action to the PFC, our Office represents the Police Chief in advocating for or defending the disciplinary decision, not the officer. If an officer is sued for their actions on the job, they are represented by an outside attorney who is different than the outside counsel that represents the City. In this way both the City and the officer each have their own attorney representing their legal interests which may or may not align, and the City Attorney is not litigating on behalf of either.

This scenario demonstrates my final point regarding how our Office handles conflict of interest issues. As licensed attorneys we have an obligation to comply with our Supreme Court Rules of Professional Conduct and to alert our client or related parties to a conflict of interest and allow them to determine whether to waive any such conflict and allow our Office to provide representation in a matter. Each of our attorneys takes this responsibility seriously and none of our attorneys have an incentive to or are inclined to risk their law license by violating our professional ethics rules.

Occasionally conflicts do arise related to our representation and we are responsible for ensuring that we address and resolve them in the normal course of our duties. If a conflict arises, we take steps to resolve the conflict by either

"walling off" two attorneys in our office who may be involved in different aspects of a matter, or by retaining outside counsel. This approach, along with the OIM relying on outside counsel to assist with investigations and complaint processing, should alleviate any concerns of the OIM or the Board related to the City Attorney's Office providing general legal counsel as we have done successfully for the past five and one-half years.

3. Reporting Requirements for the OIM and PCOB:

   The remaining language in Alder Govindarajan's main motion specifies information to be provided to the Common Council in quarterly reports from the OIM and in annual reports from the PCOB. These involve standard requests within the Council's jurisdiction and are similar to the process the Council uses for regular quarterly reports from the Police Chief. The Police Chief also typically attends meetings of the Common Council to summarize the quarterly reports and answer questions from the Council, and occasionally the Council requests new information to be summarized in subsequent reports. The ordinance language also clarifies that the Council will consider the reports at meetings and it may accept reports or seek additional information.

<u>Govindarajan Amendment 1</u>

The document labeled "Govindarajan Amendment 1" seeks to clarify existing language regarding the OIM's access to records of MPD. It addresses the terms "unfettered access to all MPD records," and "to the extent permitted by law" which appear in MGO 5.19(7)(i).

First, the ordinance proposes deleting "computer databases" from the list of MPD records which the OIM has a right to access. MPD has been providing records and data contained in its computer databases to the OIM but the databases themselves are secure and MPD cannot provide the OIM with the ability to search within the databases and risk information being altered or compromised. Again, this is a matter of the City securing sensitive and confidential law enforcement and personnel information.

Second, the proposed amendment directs the OIM, MPD and the City Attorney's Office to collaborate in executing a memorandum of understanding to specify records that the OIM may access, redactions that may be required, and records that may not be shared, at least during a pending MPD investigation. This reflects current practice as our Office worked with the previous Independent Monitor and the Police Department to reach a detailed agreement related to sharing records.

I will note that the OIM's access to MPD records was a topic of discussion when the Council originally created the OIM and PCOB. In a memo dated August 21, 2020, I advised the Common Council that the phrase "unfettered access" may lead to issues of interpretation and questions about the application of requirements under the Public Records Law. I also noted that MPD uses several databases of federal and state law enforcement agencies that may not be shared outside of law enforcement personnel. The Council decided to modify the OIM's unfettered access to MPD's records with the

phrase “to the extent provided by law.” It chose not to fully sort out the meaning of unfettered access to the extent provided by law, with the expectation that such access would be sorted out with additional experience and cooperation between the OIM and MPD.

Govindarajan Amendment 2

Govindarajan Amendment 2 proposes two changes to the main motion’s language related to the OIM’s compliance with City policies and procedures. First, the amendment proposes adding management of staff to the examples of City policies that the OIM must follow, in addition to following City hiring practices. Second, Amendment 2 proposes adding the following language to MGO 5.19(6)(c):

> The Common Council retains the authority to enforce City policies and procedures regarding operations of the OIM and the actions of the Independent Monitor consistent with City ordinances, rules and procedures.

This provision is intended to address the unique nature of the OIM and supervision of the Independent Monitor by a volunteer Board, which is also an issue I highlighted for the Common Council during its consideration of the original OIM and PCOB ordinances. As a creation of the Common Council, the OIM and PCOB are ultimately subject to the Council’s supervision and direction. The language is intended to allow the Council to intervene and take corrective action in the event that the OIM does not comply with City policies or procedures and the PCOB does not take sufficient action. The proposed language does not affect the provision in MGO 5.19(6)(b) prohibiting City officials and employees from attempting to interfere with the OIM’s work, conclusions or recommendations resulting from its investigations, processing of complaints or analysis of MPD policies and data.

I understand that this information is a lot to digest, particularly when it is offered on the same day as the PCOB meeting that the ordinance proposals will be considered. I will attend the meeting this evening to assist in talking through this memorandum and the proposed ordinance changes and to answer questions. Board members and alders also may feel free to contact me with any questions.