

Recommendation xx: MPD should clarify its SOP on officer-involved deaths and other critical incidents to ensure that investigators obtain a statement from involved and witness officers prior to providing the officers opportunity to review any recording of the incident. [OIR 69]

Discussion: Policing activities are increasingly being captured in recordings, including on dashcam video, cellphone recordings, surveillance cameras, etc. For critical incident investigations, it is now established best practice that involved and witness officers should not be permitted to view recordings prior to being interviewed. Cognitive science research has clearly shown that an individual's memory of what happened will be suggestively influenced and altered by viewing video footage. Once an officer views a video, what had been two independent lines of evidence – the officer's eyewitness memory and the recorded footage – are no longer two independent lines of evidence, since the eyewitness memory of the officer has been tainted by viewing the recording. Importantly, for a critical incident, the officer's perception of an incident goes to the fundamental "state of mind" question, which is crucial for determining whether officers' actions met the objective reasonableness standard. In key ways, the officer's perception of what occurred is as important as what actually occurred, since this perception is likely to have governed the officer's behavior. It is thus important to preserve the officer's perception of the event and not taint his memory by letting him or her view the recorded footage. In addition, as the ACLU has noted, "If an officer is inclined to lie or distort the truth to justify a shooting, showing an officer the video evidence before taking his or her statement allows the officer to lie more effectively, and in ways that the video evidence won't contradict.... [I]f the officer watches the video and discovers that certain elements that put them in a poor light happened not to have been captured—or that there's a moment when the subject wasn't in frame that the officer can say he reached for his waistband—then the officer will feel at liberty to shade and color their account of events, if not to lie outright."¹

As OIR discussed in its report, Wisconsin Department of Criminal Investigation (DCI) protocols for investigation of officer-involved deaths are consistent with recognized investigative best practices: "For critical incident investigations, the DCI protocol is for investigators to interview involved and witness officers prior to the officers viewing any type of video of the incident. DCI agents complete a formal detailed interview, and then give officers an opportunity to watch any video, after which officers may make any additional statements before the agents conclude the interview."²

In contrast, current MPD policy states:

If audio and/or visual records are available, and are relevant to the involved officer's point of reference of the incident, the involved officer(s) may be allowed to review the recordings prior to or during their formal statement.

- a. Generally, the formal statement should begin with the involved officer providing a statement based on his or her recollection of the incident. Relevant video/audio may then be reviewed (in the presence of a member of the OICI team) prior to the completion of the formal statement.
- b. Deviation from this guideline is at the discretion of the OICI commander.

As OIR noted, "The first sentence of MPD's current policy is unclear and potentially conflicts with the second sentence. If the first sentence is deleted from current policy and the second sentence is rephrased to be more definitive – by deleting 'Generally' and changing 'should' to 'shall' – MPD's policy would be consistent with the DCI

¹ Stanley, J. & Bibring, P. (2015) *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?* ACLU. Retrieved from <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports>

² Wisconsin Department of Criminal Investigation. (2017) *General Investigative Guidelines for Officer-Involved Death Investigations*. Retrieved from <https://www.policefoundation.org/wp-content/uploads/2017/05/Investigative-Guidelines-for-Officer-Involved-Death-Investigations.pdf>

protocol and in line with best investigative practices. Finally, the policy should not give the OICI commander authority to deviate from the policy.”

In its response, MPD stated that “MPD’s view is largely in alignment with that of OIR,” and that, “in 2017 MPD modified the department SOP on this topic, to what seems like the best approach: officers involved in an OICI will be asked to provide an initial statement without viewing video, have an opportunity to view video (if any exists) and then the interview will continue to allow for additional discussion (with the benefit of having viewed the video).” MPD’s response, however, did not acknowledge the ambiguity that OIR had pointed out in its SOP. Furthermore, it only referred to officers providing an “initial statement” prior to their review of video/audio recordings, rather than clearly indicating, consistent with best practices and DCI protocol, that a complete detailed formal interview should be conducted with officers before giving them access to recordings. Furthermore, MPD made it clear that it intended to retain the “OICI commander” exception, arguing that an involved officer might only be willing to provide a statement if first allowed to review recordings. Meanwhile, the City Attorney’s Office stated disagreement with this OIR recommendation, under the apparent misimpression that the recommendation was for MPD to seek to direct DCI on its protocol for OICI investigations (asserting, “under State law, MPD does not control the investigation and has no authority to direct DCI....”).

In reply, OIR pointed out: “In its response, MPD expresses support and advances the sound investigative and evidentiary rationale for a process we endorse whereby an officer provides a pure statement, has an opportunity to review any video, and then can supplement the statement based on recollection refreshed by viewing the video. However, MPD expresses intent on keeping the ‘OICI Commander’ exception that would allow an officer the opportunity to view the video upon the officer’s demand if he/she then agrees to provide a voluntary statement. Again, as with the officer waiting period, MPD values the importance of obtaining voluntary statements so highly that it is willing to discard sound investigative and evidentiary principles to entice an officer to provide them. MPD has struck the wrong calculus in this regard. We urge the Department to reconsider the recommendation. As for the City Attorney’s response, it misses the point of the recommendation. Our recommendation does not speak to directing or influencing DCI’s protocol for an officer- involved investigation. It is a recommendation designed to eliminate an exception to MPD’s current protocol that is apt to swallow the rule.”

Because DCI now conducts the criminal investigation in an MPD officer-involved death case, their protocols (prohibiting video access prior to interview) would govern the criminal investigation interview in such a case. Furthermore, MPD SOP language regarding investigation of officer-involved deaths does note: “Unless exigent circumstances related to an on-going threat require it, involved officers shall not watch video related to the incident until their formal interview with the outside agency lead investigator, or upon receiving approval from the lead outside agency investigator.” The change in policy recommended by OIR would thus appear to predominantly affect MPD investigations of critical incidents that were not officer-involved deaths (i.e., “other officer-involved critical incident” cases “where significant injury likely to cause death occurs or when an officer intentionally discharges his/her firearm at another person”), but also could affect some MPD internal officer-involved death investigations. For officer-involved deaths, MPD’s SOP would govern MPD internal investigation interviews, and the change in policy regarding access to recordings would make a substantive difference in a restricted set of circumstances where the involved officer had not yet viewed the recording – for example, if the officer being interviewed for the internal investigation had refused an initial voluntary interview with DCI, or if additional video footage became available after the initial DCI interview, but prior to the MPD internal investigation interview. It is worth noting that MPD can compel an interview for its internal investigation and is not reliant merely on voluntary statements in this context.

Having considered all the factors articulated above, the Ad Hoc Committee believes that the MPD SOP should be amended to align with best practices and to concord in full with OIR’s recommendations.