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## MEMORANDUM

TO: Mayor Satya Rhodes-Conway  
All Alders

FROM: Michael Haas, City Attorney

DATE: August 21, 2020

RE: Independent Police Monitor/Civilian Oversight Body Discussion Topics

### Background

At the request of several alders, I am providing this summary of legal, policy and administrative issues related to the proposed ordinances establishing an Independent Monitor and Civilian Oversight Board. The draft ordinances are significant in their scope and, in some instances, in their departure from current City practices and procedures. I hope that this memorandum will assist policymakers and the public in understanding the intent of the ordinances and the policy choices presented by them, including specifically the policy choices presented by provisions that may differ from traditional City practices and procedures. It is important that the Council and community have a shared set of expectations regarding the role, authority and operations of the Independent Monitor and Civilian Oversight Board as well as the possible limitations on that authority under applicable laws.

As you are aware, much of the substance of the proposed ordinances was recommended by the MPD Policy and Procedure Review Ad Hoc Committee. To the extent possible, the Alder Workgroup which created the draft ordinances committed to simply converting the Ad Hoc Committee's recommendations into draft ordinances for the Council's consideration. With regard to several items, however, the Ad Hoc Committee did not offer specific recommendations or did not address potential legal or administrative issues or complications. In addressing these issues, the Alder Workgroup obtained further feedback from some Ad Hoc Committee members who attended the Workgroup meetings and reviewed similar ordinances in other communities throughout the country, sometimes borrowing from those models and in other instances creating a different solution.

As a preliminary matter, there is much information available about citizen oversight of police departments and various models enacted in other communities on the website of the National Association for Civilian Oversight of Law Enforcement (NACOLE) at <https://www.nacole.org/>. Furthermore, the Workgroup benefitted from receiving information and input directly from Brian Carr, President of NACOLE, including information related to how other cities have arranged and organized police oversight systems. The information received from NACOLE is included in the Legistar file. A good overview of police oversight is provided in a 40-minute podcast interview with Mr. Carr at this link: <http://www.criminalinjusticepodcast.com/blog/2018/10/30/what-civilian-oversight-needs-to-succeed>. In the interview, Mr. Carr discusses various models of oversight and several key considerations in structuring oversight entities.

As further described below, the Workgroup created draft ordinances that propose establishing the Office of the Independent Police Monitor and the Police Civilian Oversight Board. The Monitor and Board would have the ability to both address individual complaints and to analyze broader trends and data and make policy recommendations to improve MPD practices and procedures. This type of oversight system is similar to oversight systems created for the same purpose in other cities.

Because our Office staffed the Alder Workgroup meeting and researched various similar ordinances nationwide, we have been asked to outline some of the key legal, policy and administrative issues and choices that are presented in the draft ordinances and which policymakers may wish to consider. In some cases the draft ordinances resolve these issues and in other cases the resolution is left to future implementation and actions of the Monitor and Oversight Board. This memorandum is intended to help inform discussion and consideration, not to suggest a specific policy direction or make a recommendation regarding adoption of the ordinances.

### Policy and Legal Considerations Regarding Key Provisions

1. Independence of Police Monitor: The draft ordinance creates an Office of Independent Police Monitor, led by a full-time Independent Monitor, which would be a full-time managerial City position subject to a 5-year contract, similar to other comparable positions in Compensation Group 21. The Office's proposed budget resolution includes authority for the Monitor to hire two additional staff, retain independent investigators and legal counsel, and appoint and pay for attorneys to represent complainants before the Police and Fire Commission (PFC), subject to specific limitations. The Monitor's authority includes a substantial amount of discretion related to initiating investigations, issuing subpoenas, making recommendations related to discipline and changes to MPD's policies and procedures, and determining areas of research and data analysis that are pursued.

The draft ordinance provides that the Monitor would be recruited and appointed by a Board consisting of 11 members and 2 alternates (the Board's appointment process is outlined below), with the assistance of the Human Resources Department and Council staff. The appointment of the Monitor would be subject to confirmation by the Common Council. In between Board meetings, a three-member Executive Subcommittee of the Oversight Board would be required to meet at least monthly in order to provide feedback and direction to the Monitor.

The Ad Hoc Committee stressed the importance of independence of the Monitor from the Police Department, which is also a key recommendation of NACOLE. The Ad Hoc Committee did not address supervision of the Monitor or make a recommendation regarding this issue. The Workgroup concluded that the intent of the Ad Hoc Committee to establish independence could be best implemented by providing for supervision by the Oversight Board as described in the preceding paragraph. To ensure this independence, the draft ordinance includes a provision stating 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 Office of Independent Monitor.

Having a city employee hired and supervised by a city board would be relatively unique arrangement within the City and, to a large degree, different from oversight models nationwide. Within the City, the majority of managerial employees are hired and supervised by the Mayor, with the notable exceptions of the Police Chief (PFC), Fire Chief (PFC), and Library Director (Library Board). In those cases the Mayor still has a reporting and accountability role in establishing consistent performance and service standards and Citywide initiatives. Nationwide, most of the other police oversight ordinances reviewed by the Workgroup place the Monitor under the supervision of the Mayor or the municipality's chief executive officer such as the City Manager. In placing the Monitor under the supervision of the Board, the Workgroup considered similar structures used in San Jose, Syracuse, and Eugene. The Council may want to consider whether additional detail about the relationship between the Monitor and the Board would be helpful.

2. Investigation Authority: The draft ordinances provide that the Monitor and the Oversight Board may conduct independent investigations of all Police Department personnel, including the Police Chief. Since conducting investigations requires a specific skill set, particularly if it involves the exercise of subpoena power and obtaining sworn statements, and those skills and experience are different from that required for data analysis, review of policies, community engagement, research and creating reports (duties also assigned to the Monitor), the proposed ordinances and budget appropriations include funds for the Monitor to retain investigators to assist with investigations. The proposed ordinances and accompanying proposed budget amendment would also create one Data Analyst position and one Office Administrator position to assist the Monitor with other duties, including duties related to investigations.

The draft ordinances provide that both the Independent Monitor and the Oversight Board would have subpoena authority. The Alder Workgroup had significant discussion regarding this provision. In his podcast interview, Mr. Carr of NACOLE stated that while subpoena authority is often a priority of community organizations and policymakers, it does not always accomplish what the public may expect. This is partly due to the fact that all public employees, including police officers, have certain rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution, which have been further recognized by decisions of the U.S Supreme Court. Due to the decisions which established them, these rights are known as *Garrity rights*, *Loudermill rights*, and *Weingarten rights*. Thus, it may be important to briefly consider these potential limitations so that policymakers and the public

understand the framework within which the Monitor and Board will be exercising subpoena authority.

Under *Garrity*, a public employee may be compelled to answer questions as part of a disciplinary investigation or face termination, but any such statements cannot be used as part of a subsequent criminal prosecution. The *Loudermill* decision requires due process before a public employee can be dismissed from their job, meaning that the employer must offer a pre-termination meeting with the affected employee at which the employer presents the grounds for termination and the employee is given the opportunity to respond. The *Weingarten* decision ensures that any unionized employee has the right to request union representation for any investigatory interview conducted by their employer when the employee has a reasonable belief that the discussion could lead to disciplinary action.

These employee rights exist under federal and state law whether or not they are specifically cited in the ordinances and certainly they are applied in other municipalities which exercise civilian oversight of police departments. These rights must be followed during any investigations that might be conducted by the Monitor or Oversight Board and those entities would need to be mindful of, and comply with, these employee rights. It may also be useful to note that, under Wis. Stat. § 175.47, all officer-involved shooting deaths are investigated in the first instance by an outside law enforcement agency rather than by MPD, and that the Monitor would not be entitled to participate in such investigations.

These rights are also relevant to the Workgroup's discussion regarding the subpoena authority of the Monitor and the Oversight Board. Subpoenas typically are not used in personnel investigations because employees are required to cooperate. Except for the general phrase "for the purpose of compelling testimony or receiving documents" necessary to fulfill their duties, the ordinance does not specify the specific instances for which a subpoena may be issued by Monitor or Board. Our Office advised the Workgroup that there is a potential that an officer could challenge the legality of a subpoena if the Monitor or Oversight Board is involved in a disciplinary investigation that is simultaneously being conducted by the Police Chief through Professional Standards and Internal Affairs, and that we could not guarantee that a court would uphold the validity of such a subpoena.

Because there have been no Wisconsin court decisions related to the actions of an Independent Police Monitor, the Alder Workgroup decided to simply authorize the Monitor and Oversight Board to issue subpoenas "to the extent permitted by law" for the purpose of compelling testimony or receiving documents necessary to fulfill their duties. This approach leaves the development of subpoena authority, and any potential challenges to it, to the judgment and experience of the Monitor and Oversight Board.

In a broader sense, the priority of our Office is to protect the validity of disciplinary actions of the Police Department and the PFC, as well as any potential criminal investigations, and it would be important for the Monitor and Oversight Board to conduct any investigations with that goal in mind. Under state law, officers cannot be suspended, reduced in rank or dismissed unless there is a finding of just cause by the Chief and in contested discipline matters the PFC. The just cause standards

include procedural requirements such as, before filing any charges, making a reasonable effort to discover whether the officer violated a fair and just rule or order, as well as discovering substantial evidence that the officer violated a rule or order. The Monitor and Oversight Board must take care to be cognizant of all of the “just cause” requirements under Wis. Stat. § 62.13(5)(em) to avoid inadvertently jeopardizing any subsequent disciplinary action or criminal investigation by inviting a procedural challenge.

Just this week the New Jersey Supreme Court held in Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark that the City of Newark’s oversight ordinance conflicted with state law to the extent it authorized the oversight board to conduct investigations of citizen complaints at the same time that the police department is conducting an internal affairs investigation. The Court also held that the oversight ordinance could not confer subpoena authority on the oversight board.

Regarding both issues, the Court’s rationale was based on very detailed interpretations of New Jersey state law and Newark’s oversight ordinance, which are different from Wisconsin law and the proposed ordinances. As a result, we cannot say that the results would be the same if a legal challenge is brought regarding investigations of the Monitor or Oversight Board as the issues and arguments would be different, and the legal findings in that decision would likely have limited applicability in such a case. We wanted to note this decision, however, simply to highlight that subpoena and investigative authority has been and may continue to be a topic of litigation as oversight entities become more widespread throughout the country.

3. Exclusion of Individuals with Police Ties: The Ad Hoc Committee recommended that the Monitor not be an individual formerly employed by MPD but did not otherwise disqualify individuals who had worked in law enforcement or were related to law enforcement officers, and it placed no restrictions on staff of the office, outside investigators or Oversight Board members. NACOLE has published core competencies for civilian oversight practitioners which include knowledge of policing and law enforcement policies and procedures (<https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/61/attachments/original/1454352545/Core-Competencies-for-Civilian-Oversight-Practitioners-20110114.pdf?1454352545>).

The Workgroup discussed disqualifying factors at length. The Workgroup sought to ensure that the Monitor’s Office and Oversight Board would not be subject to a bias in support of MPD or its personnel. The Workgroup recognized that individuals with law enforcement background may bring different expertise and perspective about policing, but determined that the risk of potential bias outweighed the potential expertise that such individuals might bring. The Workgroup was also aware that the restrictions limit the Monitor’s discretion in hiring supporting staff and outside investigators.

After discussing these factors, the Workgroup recommended prohibiting some individuals with past experience in policing or who are family members of law enforcement officers from serving as the Independent Monitor, an employee of the Monitor’s Office, an outside investigator, or a member of the Oversight Board. The

Monitor, staff, outside investigators and Board members shall have never been employed by the MPD, be an immediate family member of a current or former MPD employee, or have worked in law enforcement in Wisconsin in the ten years prior to appointment.

“Immediate family member” is defined as an individual’s spouse or designated family or registered partner, or an individual’s relative by marriage, lineal descent or adoption.” While other municipalities include some restrictions on the involvement of former law enforcement officers, the “immediate family” definition in the proposed ordinance is fairly broad and would exclude, for instance, the grandchild of a former MPD employee, or the niece or nephew of a former MPD employee who had been separated from the Department for many years.

4. Fee Shifting to Prosecute Complaints: The proposed ordinance provides that the Monitor may appoint legal counsel to provide representation to aggrieved individuals in presenting and litigating complaints against MPD personnel with the PFC, to the extent the Monitor concludes that those complaints have arguable merit. In doing so, the Monitor shall appoint an attorney selected by the individual from a list of attorneys approved by the Oversight Board. Attorneys’ fees paid pursuant to this directive shall not exceed \$15,000 per complaint.

The Ad Hoc Committee recommended that the Monitor have the authority to appoint legal counsel to represent complainants before the PFC but was silent as to payment of legal fees, although several members of the Ad Hoc Committee stated they believed that the Committee intended that the City should pay for such representation. It is important to note several restrictions on the payment of legal fees. First, it only applies to the prosecution of complaints before the PFC, not to representation related to a lawsuit against the MPD, its officers or the City. Second, the Monitor must determine that the complaint has “arguable merit” in order to authorize payment of attorney fees. Third, fees are limited to \$15,000 per complaint.

The proposed budget for the Office of Independent Monitor includes an initial estimate of \$50,000 annually to cover legal fees of complainants. As this is a completely new procedure and process the Workgroup acknowledged that it is difficult to predict whether or not \$50,000 will be an adequate estimation or will be a sufficient amount in future years to cover these fees.

Currently there is an ordinance which provides for a fee shifting mechanism for successful complaints filed by citizens and processed by the PFC. MGO § 5.15(2)(c) states:

Private Persons Bringing Charges. If a private person brings charges before the PFC and the complaint is successful, the City will reimburse the reasonable legal fees and costs incurred by the private individual. A complaint is successful if the charges are sustained or discipline is imposed. If the PFC found some violation of a legal standard (such as a code of conduct) by the City employee or official but does not sustain the charge or impose discipline, the Council may make a reasonable adjustment in the reimbursement for such findings. Similarly, if the complaint is successful on some claims and not on

others, the Council may make a reasonable adjustment in the fees and costs to be reimbursed.

There may be some legal, liability and ethical considerations related to a City employee such as the Monitor recommending specific attorneys to represent complainants before the PFC, who in turn may also pursue separate litigation against the City. For example, if the complainant subsequently alleges that the attorney provided inadequate or ineffective representation, they may attempt to place responsibility on the Monitor or even pursue a monetary claim against the City due to the complaint being unsuccessful. Also, there is certainly the possibility and even likelihood in more significant cases that an attorney appearing before the PFC may also file a lawsuit against the City, resulting in the City effectively paying an attorney in preparing to sue the City.

Part of the Ad Hoc Committee's intent appears to be to ensure that complainants can navigate the PFC process and have a fair opportunity to carry their burden of proof, given that the PFC does not independently investigate complaints. The concern appears to be that complainants, especially those of limited means, must often represent themselves against an attorney representing the officer.

It is difficult to predict what, if any, impact the ordinance would have on the frequency of complaints filed with the PFC. The current fee shifting provision has been in place for three years and has yet to be used. The Monitor's determination of "arguable merit" is intended to act as a filter against frivolous complaints. Also, currently minor complaints are typically resolved administratively and do not reach the PFC, and the PFC hearing process can be prolonged and time-consuming.

5. Police Records: The draft ordinance includes a provision allowing the Monitor "unfettered access" to MPD records, policies, data, computer databases, and all other information necessary to fulfill the Monitor's duties, and requiring the Monitor to keep such records confidential except to the extent necessary to fulfill their responsibilities. There may be issues that arise under the Public Records Law which governs access to or withholding of certain personnel records. Also, MPD uses several databases of outside federal and state agencies that may not be shared outside of law enforcement personnel.

Similar to the issue of subpoenas authority, the Workgroup decided to resolve this issue by modifying the Monitor's unfettered access to MPD records with the phrase "to the extent permitted by law."

6. Oversight Board Membership and Authority: The draft ordinance creates a Civilian Oversight Board consisting of 11 regular members and 2 alternates, serving four-year terms except for some of the initial members who would have two- or three-year terms in order to establish staggered terms. The Ad Hoc Committee recommended, and the draft ordinance requires, that membership include a diversity of membership, including racial and ethnic backgrounds, age, socioeconomic status, gender, geographic residence in the City, work experience, and lived experience with homelessness, mental health, substance abuse and/or arrest or conviction record.

The draft ordinance provides that at least one member be Black, Asian, Latinx, Native American, a member of the LGBTQ community, as well as that at least one member be affiliated with organizations in the field of mental health, youth advocacy, and AODA, and at least one member have an arrest or conviction record. The draft ordinance incorporates those membership requirements but the Workgroup has separately recommended in its Final Report that the Board consist of at least 50% members who are Black.

Our Office has received several inquiries as to whether there is a legal concern with the requirement that the Oversight Board include a minimum number of members from various racial backgrounds. Because the case law prohibiting racial quotas relates to educational and employment opportunities, we cannot conclude for certain that a court would extend similar analysis to such requirements for a Civilian Oversight Board. There are several potential distinctions that can be drawn between purpose and legality of the educational and employment affirmative action programs at issue in previous cases and the purpose of ensuring a diverse police oversight board, which is to enhance overall public safety by ensuring that the Board includes representation from historically disadvantaged communities and those who have experienced interactions with MPD. Also, similar provisions are included in ordinances of other communities.

To eliminate any legal concerns related to this issue, the Council could modify the language to state that the membership “should strive” to include the specified racial makeup. In any event, the Council should decide whether to incorporate the Workgroup’s recommendation to change the draft ordinance to require that at least 50% of the Board’s membership be individuals who are Black.

In its Final Report, the Ad Hoc Committee has also proposed a list of 9 designated organizations which would each be invited to submit names of three individuals to be nominated for membership on the Oversight Board. If the Council adopts the Final Report, these 9 organizations will submit nominations for the initial Oversight Board. However, other organizations can also submit nomination through the normal Board, Commission, and Committee membership process. Further, the ordinance requires the list to be reviewed and potentially revised every two years to account for organizations which may have either dissolved or created and actively working on relevant issues.

The Mayor and Common Council would appoint one individual nominated by each organization, and the Mayor and Council would each appoint an additional regular member and an alternate, with all appointees requiring Council confirmation. The involvement of the designated organizations in nominating most appointees to serve on the Board would be different from the normal appointment process for Boards, Commissions and Committees.

The draft ordinance provides that Board Members would receive a stipend and encourages the City to consider providing other forms of support for Board members, such as child care, to ensure that socioeconomic status is not a barrier to serving on the Board. Members would also receive training regarding police practices and procedures, use of force, mental health, AODA, problem-oriented policing, confidentiality requirements, ethics, public records and open meetings



requirements. Under the ordinance, the Board must meet at least quarterly and the Monitor would serve as the Board's Executive Secretary. Further an employee from MPD and the Office of City Attorney are required to attend all Board meetings.

The Board would have significant authority but ultimately, with the exception of its supervision of, directions to, and evaluation of the Monitor, the end result of its decisions would be recommendations rather than binding action. This includes recommending the individual to be hired as the Monitor to the Council, completing an annual review of the Police Chief, and making policy recommendations.

The Board would have the authority to issue subpoenas and conduct investigations on its own independent of the Monitor. The results of those processes would be recommendations and not final determinations. The Board is also charged with conducting community outreach and completing an annual public report to the Mayor and Council containing an assessment of the performance of the Monitor, the Board and MPD.

I hope this summary helps to inform the Council's consideration of the proposed ordinances related to civilian oversight. Our Office is available to discuss this memorandum if there are any questions.